BEUCITIZEN
BARRIERS TOWARDS EU CITIZENSHIP

Exploring obstacles in exercising core EU citizenship rights

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Document Identifier
D7.3 Report on the results of case study (i): Exploring obstacles in exercising core citizenship rights

Version
1.0

Date Due
31.05.2016

Submission date
09.06.2016

Work Package
7

Lead Beneficiary
UU

Dissemination Level
PU

Grant Agreement Number 320294
SSH.2012.1-1

Change log

version	Date	amended by	changes
1.0		Hanneke van Eijken and Pauline Phoa	Implemented review comments and prepared document for submission.

Partners involved

number	partner name	People involved
1	UU	Hanneke van Eijken, Pauline Phoa
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EXECUTIVE SUMMARY

Utrecht University researchers dr. Hanneke van Eijken LL.M and Pauline Phoa, LL.M have prepared a general report which provides a comparative and critical overview of the exercise of so-called core EU citizenship rights in selected Member States (Belgium, Denmark, France, Hungary, the Netherlands and Spain).[1] Core EU citizenship rights include access to and loss of nationality (and thereby also the acquisition and loss of the EU citizenship status), the right to reside in a host Member State and in the Member State of nationality, the right to family reunification in a Member State for EU citizens, the right to free movement of EU citizens and the derogations to those rights: expulsion measures and abuse situations.

Rules on nationality fall, in principle within the exclusive scope of competence of Member States. However, on the one hand the access to MS nationality opens up EU citizenship to TCN, or has consequences for migrated EU citizens and their children. On the other hand, the CJEU decision in the case of *Rottmann* (C-135/08) has made clear that the loss of Member State nationality may bring nationality laws within the scope of EU law, as it may also affect a person's status as EU citizen. "Under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality" (par. 10). Nowadays it is clear that Member States have to take into account the outer limits of EU law in their competence to regulate nationality laws. The description of the nationality laws in the reported Member States do not always reflect an awareness on the side of the national authorities of the consequences EU citizenship rights for their nationality law.

The EU citizenship right to freedom of movement and the right to reside in another Member State have been established in primary and secondary EU law for a while now, and the implementation of these rights into formal national law seem to be relatively unproblematic in most Member States. However, the answers to the questionnaire show that there is a significant gap between formal law and the actual operationalization of these rights in day-to-day (administrative and judicial) practice. Certain key concepts of EU citizenship rights, such as "sufficient resources", are subject to differing interpretations in the different Member States, which is undesirable from the perspective of coherence and uniformity of EU law.

Connected to the general EU citizenship right to free movement and residence, are the rights to family reunification, either with family members holding the nationality of another Member States, or with third country national family members. Such family members may have – under certain conditions – a right of free movement and/or residence that is derived from their EU citizen family member's core EU citizenship rights. In this area of law, the national reports again show that there are disparities between Member States in the judicial interpretation and/or administrative application of concepts such as "dependent family member", and "genuine relationship", which may form obstacles to a full use of the opportunities that EU law offers.

The EU Treaties and EU secondary legislation allow for certain derogations or limitations to the core EU citizenship rights of free movement and residence. Member States may take expulsion measures and measures preventing or punishing abuse of EU rights, under certain conditions. The national reports show that there are interpretive difficulties on these topics, and that there is a growing tendency to connect having insufficient resources with unlawful residence.

[1] The authors would like to thank the national rapporteurs for their input and comments on earlier versions of this report, and would like to thank Mónica Ferrin and Dorota Lepianka for reviewing the draft of this report and for providing their valuable feedback.

1. INTRODUCTION

The objective of bEUcitizen Work Package 7 is to study, from the perspective of EU citizenship, specific problems that EU citizens face in exercising civil rights and liberties in areas which fall within the scope of EU law, but also in areas beyond the scope of EU law. In the EU legal context, fundamental rights, including civil rights, have gained not only visibility but also, arguably, significance, now that the Lisbon Treaty has made the Charter of Fundamental Rights of the European Union (hereafter: the Charter) legally binding. In the first WP7 deliverable Report 7.1 the role of the Charter in national litigation and legislation had been assessed in a broad way.[2] From that report it can be deduced that the role of the Charter in granting civil rights is increasing, both in national and European context. The second deliverable, Report 7.2, focused on the barriers for EU citizens in specific fields of law, *inter alia* criminal law, the effect of mutual recognition and access to justice.[3]

This present case study will focus specifically on actual and potential barriers to core EU citizenship rights. These core EU citizenship rights entail, for the purpose of this deliverable, access to and loss of nationality (and thereby also the acquisition and loss of the EU citizenship status), the right to reside in a host Member State and in the Member State of nationality, the right to family reunification in a Member State for EU citizens, the right to free movement of EU citizens and the derogations to those rights: expulsion measures and abuse situations. The questionnaire, as included in the annex to this General Report, is structured around these themes.

This report first discusses the European context of core EU citizenship rights (Section 2), in order to have a clear understanding of what belongs to these core citizenship rights. Section 3 brings together the observations from the national reports. For the present case study, national reports have been prepared in six Member States (Belgium, Denmark, France, Hungary, the Netherlands and Spain).[4]

Although the conclusions drawn from these reports may not be entirely representative for the whole of the EU, they may give important information about legal and practical obstacles that may be more common throughout the Union. A further limitation is that the national rapporteurs are all legal academics, so the questionnaire, the ensuing national reports, and also the present General Report, only take a legal point of view, detailing legislation, national administrative decisions and national case law, and not, for instance, quantitative data.

The purpose of the report is to give insight in, and compare, obstacles at national level for EU citizens to exercise their core citizenship rights, to place these in the context of the developments at EU level that will be discussed in Section 2, and to make observations and recommendations that may set the agenda for future action on a national and/or EU level.

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[2] H. van Eijken et al., *The Legal Framework for Civil Rights Protection in National and International Context (Deliverable 7.1)*, (2015) available at: http://beucitizen.eu/wp-content/uploads/Deliverable-7.1_final.pdf

[3] M.-P. Granger et al., *Mechanisms Transposing and Enforcing Civil Rights Aiming at Identifying Barriers that EU Citizens and Third-Country Nationals Face (Deliverable 7.2)* (2016), available at: http://beucitizen.eu/wp-content/uploads/D7.2_Report_final.pdf

[4] The content of this report is heavily based on the national reports written by Henri de Waele, Maria Teresa Solis Santos Silvia Adamo, Marie-Pierre Granger, Orsolya Salát, Javier A. González Vega, Davide De Pietri, Raúl I. Rodríguez Magdaleno, and Hanneke van Eijken. The national reports provide for more detailed information on the exercise of core EU citizenship rights in the particular countries. For this report the information of the country reports is used to make a comparative analysis of important developments and state of affair in the countries. As described in the Description of Work the coordination team of WP 7 has made a selection of countries to report in this case study.

Preliminary remarks

The Union's legal order has often been referred to as 'shared'[5] or 'multi-layered',[6] and the status of EU citizenship as 'composite' in nature.[7] EU citizenship is a status that grants entitlements, rights, but also duties, to several layers of the European multi-layered legal order. In the context of a multi-layered EU constitutional legal order, EU law is not analysed isolated from its interaction with both international and national (and regional) law. In that specific context the EU citizen may be seen as a EU composite citizen: looking at the individual as a central point, not isolated from international and national law. EU citizens enjoy rights that may be granted on EU, national, or even regional level, the realization and operationalization of which are, in turn, dependent upon further legislation or other action (administrative or judicial) on either of those three levels of government. The structure of the present report, paying attention to, firstly, the EU level, and subsequently, through national reports, to the national (and local) level, seeks to do justice to the 'compositeness' of EU citizenship that is evident in law and in practice. This report reveals the interplay between the different core rights of EU citizens, taking the EU citizens and the core citizenship rights as central focal point.

2. THE EUROPEAN CONTEXT OF CORE CITIZENSHIP RIGHTS

2.1 INTRODUCTION: THE TENSIONS WITH REGARD TO THE CONNECTION BETWEEN CIVIL RIGHTS AND CORE EU CITIZENSHIP RIGHTS

This report focusses on the core citizenship rights of EU citizens. Two preliminary points should be raised here. First, core citizenship rights in a traditional sense are broader in material scope than the rights discussed in this paper as the core EU citizenship rights. Second, since this work package concerns civil rights in a broader sense, one should be aware that civil (human) rights are also broader in personal scope and in principle have a universal application, rather than being limited to on an exclusive circle of persons who enjoy EU citizenship status.

Citizenship in a traditional, national context may be best qualified as the status that grants individuals the status of equal members of the community. This equal membership is ensured by granting citizens fundamental rights – civil, political, and social rights - in order to enable them to participate fully in society. As noted in bEUcitizen report D7.1, individual freedoms, such as the freedom of expression, the right to a fair trial, and the freedom of association and assembly, tend to belong to the core civil rights recognised in the national legal system.[8]

In the European context, fundamental rights are protected in a layered system of national (i.e, national constitutions and legal traditions), EU (the EU Treaties, the Charter and general principles of EU law) and regional (ECHR) and international (for instance, the ICCPR) rights and instruments.[9] Furthermore, within the

[5] See for instance, T. van den Brink et al. (eds.), *Sovereignty in the Shared Legal Order of the EU – Core Values of Regulation and Enforcement*, Cambridge – Antwerp – Portland: Intersentia 2015.

[6] See for instance T. Baumé et al. (eds.), *Today's Multi-layered legal order : Current Issues and Perspectives*, Zutphen: Uitgeverij Paris 2011,

[7] H. van Eijken, *EU Citizenship & the Constitutionalisation of the European Union*, Groningen: Europa Law Publishing 2015.

[8] H. van Eijken et al., *The Legal Framework for Civil Rights Protection in National and International Context (Deliverable 7.1)*, (2015) available at: http://beucitizen.eu/wp-content/uploads/Deliverable-7.1_final.pdf, at p. 10.

[9] H. van Eijken et al., *The Legal Framework for Civil Rights Protection in National and International Context (Deliverable 7.1)*, (2015) available at: http://beucitizen.eu/wp-content/uploads/Deliverable-7.1_final.pdf, at p.7.

system of fundamental rights protection in EU law, the traditional distinction between civil and political rights on the one hand, and social and economic rights on the other has become blurred.[10]

EU citizenship is a form of supranational citizenship and it is firstly highly dependent on national citizenship, as is acknowledged by Article 20 TFEU. Secondly, the EU citizenship status needs to be "triggered", in order to be effective, i.e., Member State nationals need to use their EU rights before they can rely on the full scope of protection of EU law. Therefore it is important to stress that the core citizenship rights of EU citizenship are defined in the specific context of EU citizenship, focussing on the specific citizenship rights that are granted by the EU Treaties and the EU Charter to EU citizens.

By looking at the both the substance and the order of the provisions on EU citizenship in the TFEU and in the Charter, we learn that EU citizens have first and foremost, the right to move and reside freely in another Member State (Article 21 TFEU and 45 EU Charter). Once an EU citizen has used this right, most of their other EU citizenship rights are activated, such as the political right to vote and stand in local and EP elections in another Member State (Art. 22 TFEU and Art 39 Charter), and the right to diplomatic and consular protection in third countries (Art. 23 TFEU Art 46 EU Charter).

The free movement rights therefore are definitely part of the core EU citizenship rights. The present report therefore focuses on this core right and its "nucleus": access to and loss of nationality (and thereby also the acquisition and loss of the EU citizenship status), the right to move to and to reside in a host Member State and to move back to the Member State of nationality, the right to family reunification in a Member State for EU citizens, and limitations or derogations to those rights: expulsion measures and abuse situations.

Linking EU citizenship with fundamental rights – as has been happening in EU law during the past decades - creates a tension in the sense that it imposes the dilemma of insider versus outsider; inclusion versus exclusion.[11] Since citizenship is a status that includes those defined as citizens as equal members of the community, individuals who are not considered as citizens are consequently excluded from the scope of protection of the rights attached to this status. However, civil rights, the object of focus of bEUcitizen Work Package 7, in a broad sense of the word usually also include rights for non-citizens, and cover human rights not restricted to citizenship rights, such as the freedom of speech and the freedom of association.[12] For this specific case study, however, the focus lies on specific core EU citizenship rights, as other civil rights are assessed elsewhere (reports D7.1, D7.2 and D7.5 in this Work Package). Since core EU citizenship rights are limited to EU citizens, they are narrower than general civil rights. Therefore, it is important to keep in mind that core EU citizenship rights are essential to EU citizenship, but do not necessarily protect individuals in a broader context, and the position of third country nationals (hereafter abbreviated to "TCNs") is therefore in principle not the main focus of this report.

However, the status and rights of TCNs as family members of EU citizens are also examined here, illustrating how the protection of fundamental rights of EU citizens can strengthen the civil rights of TCNs. We can mention here, for example, the way in which EU citizens' rights to family life and reunification may provide TCNs with derived or ancillary rights based on Articles 21(1) and 20 TFEU can be mentioned. This is visible in the case

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[10] H. van Eijken et al., *The Legal Framework for Civil Rights Protection in National and International Context (Deliverable 7.1)*, (2015) available at: http://beucitizen.eu/wp-content/uploads/Deliverable-7.1_final.pdf, p. 9.

[11] See also S. Seubert and F. van Waarden, *Introduction of crosscutting themes (Deliverable 2.1)* (2014), p. 13, available at: http://beucitizen.eu/publications/introduction-of-cross-cutting-themes-further-conceptual-elaboration-of-the-original-research-design/

[12] See for instance H. van Eijken et al.,,The Legal Framework for Civil Rights Protection in National and International Context (Deliverable 7.1), (2015) available at: http://beucitizen.eu/wp-content/uploads/Deliverable-7.1_final.pdf p. 10.

studies on the effects on the CJEU's judgment in *Ruiz Zambrano* on national law and the right to family life of EU citizens, discussed in paragraphs 2.3 and 3.2.3 hereafter.

2.2 THE EUROPEAN CONTEXT: CORE EU CITIZENSHIP RIGHTS

2.2.1 THE ESTABLISHMENT OF CORE CITIZENSHIP RIGHTS IN THE EU

The core EU citizenship rights as studied in the present report are the right to reside and the right to free movement in the EU (and derived rights for family members), and these rights are, foremost, provided in the Treaties and the Charter.

The Treaty of Maastricht formally established EU citizenship and its accompanying, specific rights for EU citizens. However, even before the Treaty of Maastricht, EU citizenship and the rights attached to it were present in a more informal manner in EU legislation, policy documents and case law of the Court of Justice of the European Union (CJEU).[13] At the Intergovernmental Conferences of 1990-1991, the Spanish delegation submitted a proposal on the inclusion of European citizenship rights into the EU Treaty. In that proposal, entitled 'The road to European citizenship', the delegation emphasised the need for citizenship in the European Union "with special rights and duties that are specific to the nature of the Union and are exercised and safeguarded specifically within its boundaries".[14] Thus, before EU citizenship was formally established in 1993, different rights were already granted to the nationals of the Member States in the context of the internal market. Nationals of Member States that were economically active, and also jobseekers, and tourists (as service recipients), enjoyed a right of free movement.[15] Moreover in 1990, the Council adopted various Directives on free movement for other categories of persons, such as students, pensioners and those with sufficient means and comprehensive healthcare insurance.[16] These directives are nowadays repealed and replaced by Directive 2004/38.[17]

The establishment of the European Union at Maastricht marked "a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen." The same phrase is also included in the Lisbon Treaty, in its preamble, proclaiming that the process of creating an ever-closer union among the peoples of Europe should be continued.

The old Articles 17 to 21 of the Treaty Establishing the European Community (EC Treaty) are nowadays incorporated in Articles 20 to 25 of the Treaty on the Functioning of the European Union (TFEU). These EU citizenship rights include the right to move and reside freely (Article 21 TFEU) in the Member States. Articles 22, 23 and 25 TFEU grant, moreover, political and electoral rights to EU citizens.[18] Title V of the Charter provides specific rights for Union citizens. The rights listed in the Charter correspond to the rights included in

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[13] See for a detailed overview S. O'Leary, The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship (The Hague: Kluwer, 1997).

[14] Intergovernmental Conference on Political Union, European Citizenship, 21 February 1991, Spanish Memorandum "The Road to Citizenship", p. 329.

[15] Case C-281/89, Angonese ECLI:EU:C:2000:296 , and case 186/87 Cowan ECLI:EU:C:1989:47

[16] Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students, Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity, Council Directive 90/364/EEC of 28 June 1990 on the right of residence.

[17] 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, OJ 2004 L 158/77

[18] These rights will be left outside the scope of this report, since this field of analysis belongs to Work Package 8 on Political Rights for EU citizens.

the Treaty as specific citizenship rights. The electoral rights with regard to European and municipal elections,[19] the right to submit complaints to the European Ombudsman[20] and the right to petition to the European Parliament,[21] the right to move and reside freely in the EU,[22] as well as the right to equal diplomatic and consular protection in third countries[23] are rights that are included in the Charter, similar to the Treaty. Additionally, the Charter includes two other citizenship rights in Title V. One is the right to good administration, which is provided for in Article 41 of the Charter. The second additional right is the right to access to documents of the European Parliament, Council and Commission in Article 42 of the Charter. Both rights, however, are not exclusively granted to European citizens, and have a broad personal scope.[24] Since the entry into force of the Lisbon Treaty, the Charter has acquired the same legal status as the Treaties.[25]

As observed in the introduction, the focus of this report will lie on access to and loss of Member State nationality, the freedom of movement and the right to reside in another Member State (including the right to family life/family reunification) and limitations to those rights. Hereafter these rights will be elaborated on in more detail.

2.2.2 NATIONALITY AS AN ESSENTIAL CITIZENSHIP RIGHT

One of the most important Treaty Articles for the core citizenship rights is Article 20 TFEU, which provides that European citizenship is built upon the nationality of the nationals of the Member States: Union citizenship does not replace national citizenship, but is additional to it. Hence, the status of EU citizenship is dependent on having the nationality of an EU Member State of the European Union. Only in that case an individual qualifies as EU citizen and enjoys the specific EU citizenship rights. For that reason the access to the nationality of an EU Member State is a key element of EU citizenship. In terms of barriers for core EU citizenship rights, the access to Member State nationality, and, even more importantly, the possibilities for Member States to withdraw nationality, are essential. The competence to regulate nationality laws has remained in the hands of the Member States, which is also explicitly expressed in Declaration 2, annexed to the Treaty of Maastricht. This declaration emphasises that whenever the Treaty makes reference 'to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned'. The domain of nationality is, consequently, the domain of Member States. However, the case of *Rottmann* showed that discretion of the Member States might be curtailed by EU law and by EU citizenship in particular.[26]

The case of *Rottmann* in 2009[27] concerned the discretion of Member States to revoke the nationality of their citizens. Mr Rottmann acquired the German nationality due to naturalisation by the German authorities. When

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[19] Articles 39 and 40 of the Charter.
[20] Article 43 of the Charter.
[21] Article 44 of the Charter.
[22] Article 45 of the Charter.
[23] Article 46 of the Charter.
[24] Article 41 of the Charter grants the right to good administration to every person". The right to access to documents provided for in Article 42 of the Charter is granted to European citizens, but also to any natural or legal person residing or having its registered office in a Member State. See also Article 15(3) TFEU and Regulation (EC) No. 1049/2001 granting access to documents to EU citizens as well as persons residing or having a registered office in one of the Member States. Article 15(3) TFEU is broadly formulated as access to documents of Union institutions, Regulation 1049/2001 grants access to documents of the Commission, the European Parliament and the Council.
[25] Article 6(1) TEU.
[26] In an earlier case the CJEU already ruled that nationality had to be regulated with due respect for EU law, but did not connect that to EU citizenship. See Case C-369/90 Mario Vicente Micheletti ECLI:EU:C:1992:295.
[27] C-135/08, *Rottmann* ECLI:EU:C:2010:104

he acquired the German nationality he also lost his Austrian nationality. When the German authorities discovered that Rottmann had hidden information (that he was subject to criminal investigation) during his application for German nationality, they withdrew his newly acquired German nationality. The question referred by the German court to the CJEU was whether the revocation of Rottmann's German nationality would be precluded by the provisions on EU citizenship. The CJEU emphasised that the Member States are competent to regulate nationality rules, but that it is clear that '*the situation of a citizen of the Union who […] is faced with a decision withdrawing his naturalization, adopted by the authorities of one Member State, and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by Article 17 EC [Article 20 TFEU] and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law*'.[28] Consequently, the CJEU held that the Member States needed to observe the principle of proportionality when revoking the nationality of their nationals. Member States should take into account several personal circumstances in the proportionality test, such as the gravity of the crime and the consequences for the national.

Since the CJEU has made clear that the acquisition and loss of nationality may fall within the scope of EU law if it affects EU citizenship rights, the present case study starts (in paragraph 3.1) with an exploration of the circumstances under which nationality is acquired, and of the limitations or barriers that are present in the national legislation and case law regarding the granting as well as the withdrawing of nationality.

2.2.3 The right to move and reside freely on the territory of the Member States

As stated above, the right to move and reside freely in and across EU Member States are among the most important rights for EU citizens, and are laid down in Article 20 and 21 TFEU. These rights give EU citizens not only access to the territory of the Member State of the EU, but it also affords the mobile EU citizen's certain opportunities to participate in a host Member State on equal conditions, for instance, in municipal elections, and (subject to certain conditions and limitations) in social welfare.

The right to reside in a host Member State as provided by Articles 20 and 21 TFEU and as clarified in the CJEU's case law, has been codified in Directive 2004/38. The Directive contains a gradual system: Article 4 and 5 of Directive 2004/38 regulates the general free movement right, or better said, the right of exit of and entry in their territory for EU citizens and their TCN family members. Furthermore, Art. 6 of Directive 2004/38 states that EU citizens and their family members shall have a right of residence for an initial period of three months without any conditions except for holding a valid identity card or passport.[29] After the period of three months, an EU citizen may reside in the host Member State as a worker, a jobseeker, a student, or, if economically inactive, when he/she has sufficient means and a comprehensive healthcare insurance (Article 7 of Directive 2004/38). How these conditions from Directive 2004/38 are transposed into national law is explicitly part of the questions of this case study. The CJEU held in its case law that the conditions mentioned in Article 7 of the Directive should be applied proportionately. It held, for instance, that the fact that an EU citizen had a healthcare insurance without covering emergency care should not block the right to reside of that EU citizen in a host Member State.[30]

Lastly, if the EU citizen maintains his or her lawful residence for more than five years in the host Member State, a permanent residence status is granted (Article 16(1) of Directive 2004/38). Article 16 also makes clear that the right of permanent residence is no longer subject to the conditions of Article 7, i.e., the conditions relating

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[28] *Rottmann*, par. 42.

[29] See also C-378/97, *Wijsenbeek*, ECLI:EU:C:1999:439.

[30] C-413/99, Baumbast ECLI:EU:C:2002:493

to occupation and/or resources. Furthermore, EU citizens with a right to permanent residence enjoy a greater protection against expulsion under Article 28(2) of the Directive.

Equal treatment and access to social benefits

The right to equal treatment and access to social rights is extensively dealt with in bEUcitizen Work Package 6, and does, consequently, not form part of research focus for the present case study. However, it must be emphasized that social rights and the core EU citizenship rights cannot be strictly or neatly separated, since it has become clear that the right of residence is, under certain circumstances, dependent upon the EU citizen having sufficient resources. Such resources may, or (as we shall see in the following paragraphs) may not, be drawn from a reliance on social benefits or assistance in the host Member State. In this respect, it is interesting to note the recent line of case law of the CJEU. Over the last few years, as politicians in Western Europe make a big deal of so-called benefit tourism, the CJEU seems to have adopted a stricter approach towards access to social benefits for EU citizens in the last two years, than in previous cases. A report on core EU citizenship rights cannot ignore these developments, as ultimately social rights may affect the residence rights of mobile EU citizens.

Based on the earlier case law of the CJEU since the case of *Martinéz Sala*, EU citizens have the right not to be discriminated against compared to nationals of a host Member State, or in the Member State of nationality after returning from a period of residency in another Member State. Moreover, every obstacle to their free movement, including non-discriminatory obstacles, were deemed precluded by Article 21 TFEU.[31]

Mrs Martinez Sala was a Spanish national who had lived in Germany since 1968 and has had various jobs between 1976 and 1986 and in 1989. Since becoming unemployed in 1989 she had received social assistance from the City of Nuremberg under the Bundessozialhilfegesetz. Until 1984 she had a residence permit, but after that year, she obtained only documents certifying that an extension had been applied for. However, in 1993, a year in which she did not possess a valid residence permit, she applied to Freistaat Bayern for child-raising allowance for her child born earlier that year. Her application was rejected on the grounds that she did not have the German nationality, a formal residence permit, or an official residence entitlement. In 1994 she obtained a residence permit for a year, which was extended with another year.

The CJEU concluded that Mrs Martinez Sala was and had been lawfully resident in Germany although she did not possess a valid residence permit. It therefore deemed it unnecessary to construe a right of residence on the basis of the Treaty provisions on citizenship. According to the CJEU, as Mrs Martinez Sala was lawfully resident in the host Member State, she could rely on the prohibition of discrimination attached to Union citizenship (Article 18 TFEU). The CJEU consequently concluded that the requirement to produce a formal residence permit constituted unjustified unequal treatment.

The CJEU's ground-breaking decision in *Martinez Sala* and subsequent cases gave the concept of EU citizenship an important shape and direction, moving beyond the notion of "market-citizenship" towards a more inclusive status based on solidarity between Member States. Nowadays, the principle of equal treatment is incorporated in Article 24(1) of Directive 2004/38. Article 24(1) of the Directive provides that every EU citizen has the right to be treated equally in a host Member State within the scope of the Treaty. Paragraph 2 of that Article formulates an important limitation to that right. It holds that Member States shall not be obliged to provide social assistance '*during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to*

[31] C-138/02, Collins ECLI:EU:C:2004:172, C-224/02, Pusa ECLI:EU:C:2004:273, C-11/06 and C-12/06 Morgan and Bucher ECLI:EU:C:2007:626.

persons other than workers, self-employed persons, persons who retain such status and members of their families'.

Recently, in the cases of *Dano*, *Alimanovici,* and *Garcia Nieto*, the CJEU restricted the ability of EU citizens to claim for social benefits in a host Member State.

The CJEU still took the more traditional approach in its judgment in *Brey.*[32] Mr Brey and his wife were both German nationals. The couple has no other income or assets other than a low sum of pension and benefit payments received in Germany. They moved to Austria in March 2011, and Mr Brey applied for a compensatory supplement. However, the Austrian authorities refused this because the aforementioned low amounts of pension payments from Germany supposedly did not constitute sufficient resources to establish his lawful residence in Austria. The Austrian administrative authorities did, however, give Mr Brey and his wife an EEA citizen registration certificate on 22 March 2011.

The CJEU explained that Directive 2004/38 allows Member States to make the granting of social security benefits to EU citizens who are not economically active conditional upon those citizens meeting the necessary requirements for obtaining a legal right of residence in the host Member State, such as possessing sufficient resources. However, these requirements must be compatible with EU law and proportionate. The CJEU emphasized in its judgment in *Brey* that the national authorities, before drawing the conclusion that a persons has insufficient resources and thus presents an undue burden on the national social assistance system, must carry out an overall assessment of the specific burden which granting that benefit to this particular individual would place on the national social assistance system as a whole, by reference to his or her personal circumstances. Reliance on social benefits may not, according to the CJEU in *Brey*, automatically lead to the conclusion that the EU citizen has insufficient resources, and therefore no lawful residence.[33]

The subsequent *Dano*[34] case concerned a young Romanian national and her son, who entered Germany in 2010, and lived with her sister in the city of Leipzig. In Leipzig she received a residence certificate of unlimited duration. Ms Dano had no diplomas, nor professional training or work experience and her command of German was very limited. She received a child benefit payment and an advance on maintenance payments, but she also applied for the grant of social benefits under the German Social Code. These benefits were refused because they were not intended for foreign nationals who are not workers or self-employed and who do not enjoy a right of residence under the German law on the free movement of Union citizens, for the first three months of their residence in Germany.

In its judgment, the CJEU repeated its *Grzelczyk* statement that EU citizenship "*is destined to be the fundamental status of nationals of the Member States…"* at the beginning of its answer to the preliminary questions, but subsequently answered the questions by reference to Directives 2004/38 and Regulation 883/2004,[35] as "more specific expressions" of the prohibition of discrimination on grounds of nationality of Article 18 TFEU. The Court concluded that the applicant and her son did not have sufficient resources and thus could not claim a right of residence under Directive 2004/38. In such circumstances, the Court ruled that EU law allows Member States to exclude them from entitlement to certain benefits, without, however, referring to the principle of proportionality as it did in *Brey* and other previous cases. Furthermore, controversially, the Court decided that the applicant and her son could not rely on the Charter of Fundamental Rights, since

[32] C-140/12, Brey ECLI:EU:C:2013:565

[33] Case C-140/12, *Brey*, ECLI:EU:C:2013:565.

[34] Case C-333/13 *Dano* ECLI:EU:C:2014:2358.

[35] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ 2004 L 166/1.

Member States were not implementing EU law when determining the conditions for the right to such benefits.[36]

In the subsequent case of *Alimanovic*[37], it is important to note that the CJEU, contrary to its standard line of reasoning, did not refer to EU citizenship as "*destined to be the fundamental status of nationals of the Member States*", nor did the CJEU refer to primary law provisions on EU citizenship such as Art. 18-21 TFEU. In this case, Ms Alimanovic and her family, who were Swedish nationals residing in Germany, applied for social assistance benefits. Ms Alimanovic and her eldest daughter had been employed, but not for sufficiently long to retain a right of residence, and the corresponding right to equal treatment under Art. 7(3) of Dir. 2004/38. In fact, they had worked for a period shorter than one year, and had been unemployed (but looking for jobs) for more than six months. The CJEU concluded that Member States may refuse social assistance to Union citizens who only have a right to reside as jobseekers under Art. 14(4)(b) of Dir. 2004/38. Moreover, instead of stressing that national authorities must take into account the EU citizen's individual, personal circumstances, the CJEU concluded that such an individual assessment was not necessary in the case of Ms Alimanovic.

In the very recent case of *Garcia Nieto*, also upon a German request for a preliminary ruling, the CJEU confirmed the restrictive line it has chosen with its decisions in *Dano* and *Alimanovic*. The unmarried Spanish couple García-Nieto and Peña Cuevas, had lived together in Spain for multiple years and had a common child. The father also had a son from an earlier relationship. Mother García-Nieto and their common child moved to Germany in April 2012, where she moved in with her mother, registered as a job seeker and started working in June 2012. She received a monthly net salary of 600 euros and had the compulsory insurance under the German social security law. The father and his other son joined the family in Germany in June 2012. Until November 2012, the family's living expenses were met from the mother Garcia-Nieto's income while they resided with their grandmother. From November 2012, the father also started to work in short-term jobs. The case concerned the request for social assistance benefits that the father made for himself and his son in July 2012. The German authorities denied them these benefits for August and September as they resided shorter than three months in Germany and were during that period neither working nor self-employed.

The CJEU confirmed that during the first three months of their stay, Member States may refuse EU citizens access to social benefits, without performing an individual assessment of their case, nor a proportionality review.[38]

Interestingly, the CJEU has a different approach regarding a different type of social benefits, namely when it concerns student allowances. In the recent case of Martens, the CJEU held that a Member State cannot restrict student allowances for its own nationals who had moved to another Member State, in the same sense as it is allowed to restrict the claims for social allowances for EU citizens of other Member States.[39] Ms Martens was a Netherlands national (born in 1987), who had moved with her parents to Belgium in 1993, where her father was employed. Between 2006 and 2008, he worked on a part-time basis in The Netherlands as a frontier worker, and began working fulltime in Belgium again in 2008. Ms Martens attended primary and secondary schools in Belgium and her family still resided there at the time of the procedure. In 2006, Ms Martens enrolled

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[36] For a fuller discussion of the Dano case, see for instance D. Thym, "The Elusive limits of solidarity: Residence rights of and social benefits for economically inactive Union citizens," 52 *Common Market Law Review* (2015) p. 17-5 and H. Verschueren, "Preventing "Benefit Tourism" in the EU: A Narrow or Broad Interpretation of the Possibilities offered by the ECJ in Dano?" 52 *Common Market Law Review* (2015), p. 363-364, and, very critically of the CJEU's new approach: N. Nic Shuibne, "Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship", 52 *Common Market Law Review* (2015) p. 889-937.

[37] C-67/14 *Alimanovic* ECLI:EU:C:2015:597

[38] C-299/14, Garcia Nieto ECLI:EU:C:2016:114.

[39] C-359/13 Martens ECLI:EU:C:2015:118.

at the University of the Netherlands Antilles in Willemstad (Curaçao) to study for a full-time degree. In 2008, Ms Martens applied for a Dutch student allowance. During the application procedure, she falsely stated that she had resided lawfully in the Netherlands for at least three of the six years preceding the beginning of her studies in Curaçao (which was a requirement in order to be eligible for the Dutch student allowance). The Dutch authorities discovered the fraud, and requested repayment of the unduly paid sums. This raised questions as to compatibility with both the rights of (family members of) frontier worker and with Ms Martens autonomous right as an EU citizen. The CJEU held that *'(t)he legislation at issue in the main proceedings, inasmuch as it constitutes a restriction on the freedom of movement and residence of a citizen of the Union, such as the appellant in the main proceedings, is also too exclusive because it does not make it possible to take account of other factors which may connect such a student to the Member State providing the benefit, such as the nationality of the student, his schooling, family, employment, language skills or the existence of other social and economic factors*.' [40] The CJEU consequently required Member States to perform an extensive proportionality test, rather than applying a period of residence criterion if it concerns its own nationals.[41]

As the cases summarized above show, the CJEU's case law is not crystal-clear, but it recently seems to take a more strict approach to EU citizenship social benefits than before.[42] By contrast, the CJEU seems to continue its protective approach towards student mobility, whereas it seems less inclined to support the mobility of poorer, less educated EU citizens.

Ruiz Zambrano: the right to reside in the EU

The CJEU held in the case *Ruiz Zambrano* in March 2011 that a TCN may have a right to residence in a Member State, if a EU citizen is dependent on that TCN and that a refusal of the right to reside (and to a work permit) for the TCN family member would endanger 'the genuine enjoyment of the substance of the rights'[43] of the EU citizen at stake. Mr and Mrs Ruiz Zambrano were Colombian nationals who had applied for asylum in Belgium in 1999 and 2000 respectively, but their applications were denied. They applied subsequently for residence permits, but these procedures took a considerable amount of time. They had two children in 2003 and 2005, who were granted Belgian nationality in order to avoid that they would otherwise become stateless, since Colombian law does not automatically grant Columbian nationality of children born to Columbian nationals outside of Colombian territory parents. Eventually, the Belgian authorities rejected Mr and Mrs Ruiz Zambrano's applications for residence permits. Furthermore, they rejected Mr Zambrano's application for unemployment benefits because he had been employed illegally. Mr Zambrano challenged these decisions by relying on EU law. One of the main issues after *Ruiz Zambrano* was what actually constituted the 'substance of the rights' conferred to EU citizens. Did the CJEU mean the specific citizenship rights of the Treaty (Article 20 – 24 TFEU) or would it also include Charter rights, such as the right to family life?[44]

The case *Ruiz Zambrano* is groundbreaking in the sense that the CJEU for the first time explicitly used Article 20 TFEU to grant certain rights to EU citizens. That is significant because until *Ruiz Zambrano* it was believed that only EU citizens that had moved to another Member State could rely on their rights as EU citizens, and that static EU citizens could not. Ruiz Zambrano concerned basically Belgian children who were living in Belgium, without another connection to EU law than the fact that they were EU citizens, based on the Belgian

[40] Martens, par. 41.

[41] H. van Eijken, case note Martens, De zaak Martens: studiefinanciering en het vrije verkeer van EU-burgers, SEW Tijdschrift voor Europees en Economisch Recht (2015), pp. 483-486

[42] N. Nic Shuibne, "Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship", 52 *Common Market Law Review* (2015) p. 889-937.

[43] C-34/09, Ruiz Zambrano, ECLI:EU:C:2011:124, par. 42.

[44] H. van Eijken and S.A. de Vries, A New Route into the Promised Land? Being a European Citizen after Zambrano*, European Law Review* (2011), p. 704-721.

nationality. The CJEU therefore narrowed the concept of a 'wholly internal situation' and applied EU law in a situation in which the effectiveness of the status of EU citizenship was at stake. What is, moreover, noteworthy is that Article 20 TFEU does not grant the EU legislator competences to legislate or to lay down conditions to the rights that are derived from Article 20 TFEU. That means that the right derived from Article 20 TFEU only can be invoked in very specific situations, on the one hand, but on the other hand seems to be unconditional, since no limiations or conditions to Article 20 TFEU are set in secondary legislation. Although the CJEU's approach in *Ruiz Zambrano* has been classified in the CJEU's own subsequent case law as a very extraordinary case, the differences with its approach of, for instance, Article 21 TFEU and Directive 2004/38, are remarkable.

In case law following the *Ruiz Zambrano* judgment, it became clear that the CJEU had only very particular situations in mind. The applicants in the *Dereci* case were all TCNs who wished to live with their family members, who were Union citizens resident in (and national of) Austria. These Union citizens had never exercised their right to free movement and were not maintained by their TCN family members, so that they and their family members did not fall within the scope of application of Directive 2004/38. The CJEU held in *Dereci* that the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of Union citizenship refers to situations in which the Union citizen has, in fact, to leave, not only the territory of the Member State of which he is a national, but also the territory of the Union as a whole.'[45] The right conferred by Article 20 TFEU has therefore also been described not as the right to reside in the European Union, but as the right not to be forced to live outside the European Union.[46]

As many national courts had, and still have, difficulties applying *Ruiz Zambrano* and Article 20(1) TFEU, new preliminary questions have been referred to the CJEU. At the moment of writing the present report, a Dutch and a Spanish reference are pending.[47] It is a difficult task for national courts and authorities to assess whether an EU citizen may actually be forced to live outside the European Union in the sense of Article 20 TFEU. In case of families composed of a TCN parent and an EU citizens, how can be determined whether and under which circumstances a child can or should stay with the EU citizen parent, especially when that parent is present only occasionally or when there is no contact with that parent? Given the importance of the *Ruiz Zambrano* interpretation of Article 20 TFEU for the development of a derived right of residence for TCN family members of EU citizens, the national reception and application of this case law was given a special emphasis in the questionnaire, and will be elaborated on under Theme II, in Section 3 of this report.

Family reunification

The right to family life – and consequently, to family reunification – is considered by the CJEU, and subsequently by the EU legislator in Directive 2004/38, to be a precondition for a real and effective right to free movement of EU citizens.[48] EU citizens would be seriously discouraged from using their free movement rights if they were not able to enjoy a normal family life, as recognised by the CJEU in, for instance the *Metock* case.[49]

Article 2(2) of Directive 2004/38/EC defines 'family member' as follows:

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[45] C-256/11, Dereci, ECLI:EU:C:2011:734 par. 66.

[46] N. Nic Shuibhne, 'Case C-434/09, Shirley McCarthy v. Secretary of State for the Home Department, Judgment of the Court of Justice (Third Chamber) of 5 May 2011; Case C-256/11, Dereci and others v. Bundesministerium für Inneres, Judgment of the Court of Justice (Grand Chamber) of 15 November 2011' , *Common Market Law Review* (2012) Issue 1, pp. 349–380

[47] C-133/15, *H.C. Chavez-Vilchez* and C-165/14, *Rendón Marín.*

[48] See also H. van Eijken, *European Citizenship and the Constitutionalisation of the European Union*, Groningen: Europa law publishing 2015, para. 4.3.2.3. pp. 122-125.

[49] C-127/08, Metock, ECLI:EU:C:2008:449 par. 29. See also C-200/02 Chen, ECLI:EU:C:2004:639, par. 45.

2) "Family member" means:
(a) the spouse;
(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);
(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

Article 3(1) of Directive 2004/38/EC states that the Directive "shall apply 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 point 2 of Article 2 who accompany or join them." In other words, the persons falling within the scope of Article 2(2) enjoy a right of free movement and of residence that is derived from the free movement and residence rights of a mobile EU citizen under the Directive.

Furthermore, art. 3(2) provides:

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
(b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.

Persons who fall within the more narrow definition of family members provided in Art. 2(2) of the Directive enjoy a straightforward right of free movement and residence. The broader circle of family members and partners as designated by Art. 3(2) enjoy not strictly speaking a right, but a kind of preferential treatment in the review of their entry or residence application: Member States are required to 'facilitate' their entry and residence and to perform an "extensive examination" of their personal circumstances. However, Member States do enjoy a wide discretion as to the factors to be taken into account during this examination.[50]

2.2.4 LIMITATIONS TO CORE CITIZENSHIP RIGHTS

The right to reside is limited by the grounds for expulsion listed in Article 27 and 28 of Directive 2004/38. EU citizens and their family members may be expelled on grounds of public policy, public security or public health, if the decision is based on their personal conduct and if that conduct represents 'a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society' (Article 27). Article 28 of Directive 2004/38 provides a gradual system, based on the period the EU citizen has resided in his or her host

[50] C-83/11 Rahman, ECLI:EU:C:2012:519.

Member State. For EU citizens with a permanent resident status, who are thus residing for a continuous period of at least five years in their host Member State, expulsion measures are only possible on *serious grounds of public policy or public security*. For EU citizens who have resided in another Member State for more than ten years an expulsion measure may only be taken on *imperative grounds of public security.* Basically, the longer an EU citizen resides in a Member State the more weight is given to his/her interest above the interests of the host Member State's society in expelling this person from its territory.

Apart from these expulsion grounds, the Member States may adopt measures to prevent fraud or other forms of abuse of rights, which might actually hinder the free movement rights of EU citizens. Article 35 of Directive 2004/38 provides in respect of the measures that the Member States may adopt to challenge abuse of rights or fraud: '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 Articles 30 and 31.' The CJEU held, moreover, in the case *McCarthy* that measures to prevent abuse and fraud should be proportionate and be based on an individual assessment.[51] A general visa rule for family members is too general and exclusive to meet that requirement. The CJEU added that '(*i)n the absence of an express provision in Directive 2004/38, the fact that a Member State is faced (…) with a high number of cases of abuse of rights or fraud committed by third-country nationals resorting to sham marriages or using falsified residence cards cannot justify the adoption of a measure, such as that at issue in the main proceedings, founded on considerations of general prevention, to the exclusion of any specific assessment of the conduct of the person concerned himself*.'[52] Visa requirements, for example, may lead to obstacles for EU citizens, in the sense that it is more difficult for them to have a family life with a third country national. These obstacles and how they are dealt with on national level will be elaborated on in the legal analysis of the national context, and will be discussed in Theme III in Section 3 of this report.

3. THE NATIONAL DIMENSION OF CORE CITIZENSHIP RIGHTS: OBSTACLES, GOOD PRACTICES, CHALLENGES?

3.1 THEME I: ACCESS TO AND LOSS OF MEMBER STATE NATIONALITY AND EU CITIZENSHIP STATUS

3.1.1 INTRODUCTION ON NATIONALITY AND EU CITIZENSHIP

Nationality is the legal bond that connects a person to a state. In a state, the quality of 'national' is opposite to that of 'foreigner'. It belongs to the state, then, to determine under its own laws who are its nationals and who are not.[53] Many publications use 'nationality' and 'citizenship' interchangeably,[54] and although the authors of the present report acknowledge that there can be situations that such usage is not entirely accurate, we will

[51] C-202/13, *McCarthy*, ECLI:EU:C:2014:2450, par. 52.

[52] C-202/13, *McCarthy*, ECLI:EU:C:2014:2450, par. 55.

[53] A-C. van Gysel (ed.), *Les Personnes. Incapables, Droit judiciaire familial, Questions de droit International Privé (Volume I)*, Bruxelles: Bruylant 2015, p. 261.

[54] See for instance R. Baubock and V. Paskalev, "Citizenship Deprivation – A normative analysis", CEPS Working Paper No. 82, March 2015, available at: https://www.ceps.eu/system/files/LSE82_CitizenshipDeprivation.pdf ; BEUcitizen researcher B. Anderson, I. Shutes and S. Walker in WP 10 preferred the word "citizenship" in Report D10.1 "Report on the rights and obligations of citizens and non-citizens in selected countries", http://beucitizen.eu/wp-content/uploads/D10.1-Report-on-the-rights-and-obligations-of-citizens-and-non-citizens-in-selected-countries.pdf

hereafter refer to 'nationality' as meaning the legal affiliation of an individual to a state, where he or she will have a passport etc., in distinction to the additional legal status of EU citizenship.[55]

Art. 2(1)a of Directive 2004/38 defines Union citizens as "any person having the nationality of a Member State". Union citizenship is thus tied to, and dependent on, Member State nationality. For the purposes of the present report it is thus fruitful to look at this first "trigger" for EU citizenship rights. The questionnaire enquired into the conditions for acquiring nationality, with special attention to the position of persons who risk becoming stateless, as Member States are under an obligation, arising from international law, to prevent statelessness.[56] Furthermore, the national rapporteurs were asked to pay special attention to any influence that the *Ruiz Zambrano* case of the CJEU may have had in their respective Member States, i.e., situations in which a child or another dependent family member of a TCN has acquired the nationality of a Member State, and thereby EU citizenship, which may result in a derived right of residence for the TCN parent or carer.

3.1.2 Acquiring nationality

In the EU member states under review, the first way of acquiring nationality is generally based either on *ius soli* (Latin: the law of the soil, i.e., a child born within a country's territorial jurisdiction acquires that country's nationality) or *ius sanguinis* (Latin: the law of the blood: a child acquires the nationality of his or her parents), or on a combination of the two.[57] The second way of acquiring nationality is usually a form of optional acquisition, i.e., the individual concerned may opt for acquiring the new nationality in a (usually) rather simple procedure, and lastly, nationality can be acquired through naturalisation, which is usually a special procedure by royal decree or special executive order, for which the person in question has to fulfil numerous conditions in order to be eligible.[58] As the authors of Report D10.1 noted, "the ways in which individuals become citizens, and who is able to become a citizen, reveal ideals of citizenship, membership and statehood in specific states, and how the nation/state community is imagined."[59]

Automatic acquisition (*de iure*)

The country reports reveal that in all six Member States the basic way of automatic acquisition of nationality is by birth: a child automatically acquires the nationality of its parent or one of its parents, even when the child is born outside of the territory of that country (ius sanguinis). In **France, Spain and the Netherlands,** the national reports show that their respective colonial history and strong traditions of migration have resulted in more broad possibilities of acquiring nationality by birth: in France and Spain, second-generation migrants (persons born in the country to non-national parents who were also born in that country) acquire French or Spanish nationality by birth, and in the Netherlands the same holds true for third generation migrants who are born in the Netherlands. These possibilities for second or third generation migrants to acquire nationality may be relevant for EU citizens and their TCN family members who have moved to these Member States and have

[55] L. Pilgram, "International Law and European Nationality Laws", EUDO-Citizenship Working Paper March 2011, available at: http://eudo-citizenship.eu/docs/Pilgram.pdf

[56] See the Convention on the Reduction of Stateless Persons [1961] U.N.T.S. 989, and Article 15 of the Universal Declaration of Human Rights.

[57] See B. Anderson, I. Shutes and S. Walker, bEUcitizen report D10.1 "Report on the rights and obligations of citizens and non-citizens in selected countries", http://beucitizen.eu/wp-content/uploads/D10.1-Report-on-the-rights-and-obligations-of-citizens-and-non-citizens-in-selected-countries.pdf, p. 9.

[58] See for a detailed explanation of optional acquisition and naturalization the entries "Option – Acquisition of nationality by option" and "Naturalisation" in the EUDO Glossary on Citizenship and Nationality: http://eudo-citizenship.eu/databases/citizenship-glossary/glossary#Nation

[59] See B. Anderson, I. Shutes and S. Walker, bEUcitizen report D10.1 "Report on the rights and obligations of citizens and non-citizens in selected countries", http://beucitizen.eu/wp-content/uploads/D1.1-Report-on-the-rights-and-obligations-of-citizens-and-non-citizens-in-selected-countries.pdf, p. 8.

continued to reside (and start a family) there. Furthermore, in **France** there is a possibility that a child born in France to non-French parents may automatically become French at the age of eighteen if he or she still resides in France, has been residing there for at least five years since the age of eleven, and has not objected to this automatic acquisition. This may be anticipated by a court declaration at the age of sixteen.

By contrast, **Belgium, Hungary and Denmark,** despite having their own histories of migration and colonies, have more restricted automatic acquisition rules, basically limiting the possibility of acquiring nationality at birth to situation in which at least one parent hold the nationality of that country, or to the rare situation in which the child who is born on Belgian, Hungarian or, respectively, Danish territory would become stateless.

Concerning **Belgium**, special note must be taken of the impact of the *Ruiz Zambrano* judgment as explained in paragraph 2.2.3 above. Belgian nationality laws have been amended in order to avoid similar situations to the one that gave rise to the *Ruiz Zambrano* case. In order to acquire Belgian nationality at birth, a child (whose parents are not Belgian) must now not only risk becoming stateless, it must also be impossible to acquire another nationality by any action (usually a type of declaration of nationality) of its legal representatives at the diplomatic or consular authorities of the country of nationality of the child's parent(s) or legal representative(s). However, although this legislative amendment may limit the number of countries of origin from which such children may acquire Belgian nationality (and EU citizenship status), not all countries allow for acquisition of nationality by way of a declaration. In some cases therefore, children born in Belgium to parents of certain third countries will continue to automatically acquire Belgian nationality at birth, and, consequently, Union citizenship, entailing a possible right of residence for their parents, as was the case in *Ruiz Zambrano*.

Attribution by option

Optional acquisition of the **Belgian** nationality is possible for a rather large category of persons if they meet certain residence and socio-economic requirements, such as having a right of permanent residence and sufficient knowledge of at least one of the three official languages and the Belgian culture. This may be highly relevant for EU citizens who have migrated to Belgium and have continued to reside there for an extensive period of time. Similarly, **The Netherlands'** optional acquisition possibilities concern a large group of persons who were born on the territory of the Netherlands (including its overseas territories), who are over 18 and have continued to reside there. This option is therefore open to the children of migrated EU citizens (and, possibly, their TCN family members) who have continued to reside in The Netherlands. Furthermore, optional acquisition is possible for persons who are born on Dutch territory, have resided there for at least three years, and who has been stateless since birth, and for several other, very specific categories of persons. It is in the area of optional acquisition of nationality that the influence of the *Ruiz Zambrano* judgment has been discussed in Dutch parliament, but it was deemed unproblematic by the Dutch Minister for Immigration and Asylum at the time. An important difference between the Belgian system of acquisition of nationality for TCN children who risk becoming stateless, and the Dutch system, is that the Dutch legislation poses the additional requirement of a residency period of at least three years, since the acquisition of Dutch nationality is not automatic for these children. From practice, it has become clear, however, that most cases in the Netherlands in which litigants have tried to rely on a derived right of residence such as the one afforded to the parents in the *Ruiz Zambrano* case, occur in a situation of a 'mixed' family of a TCN and a Dutch parent. In that sense, the Dutch national rapporteur for this case study notes that the *Ruiz Zambrano* judgement had, and still has, a significant impact in the Netherlands. However, the criterion of *Ruiz Zambrano* ('being deprived of the genuine enjoyment of the essence of the rights as a EU citizen') is applied in a quite strict manner by Dutch courts. That domestic case law will be elaborated on in detail below in paragraph 3.2.3.

Denmark has a quite similar optional acquisition possibility for long-term residents (7-10 years of residence), which originally aimed to prevent statelessness. However, recently the amendment of this procedure has been debated. The proposed amendments would limit optional acquisition of Danish nationality to nationals of

the other countries of the Nordic region (Finnish, Icelandic, Norwegian and Swedish), and it aims to reflect a particular close bond between these countries and Denmark.

France offers an optional procedure for spouses of French nationals, and non-French parents of a child born in France and living in France since the age of eight can apply for French nationality on her behalf and with her consent from the age of thirteen.

Spain has a procedure for optional acquisition that seems to be residual to its automatic acquisition possibilities, i.e., for adults who have been adopted by Spanish nationals, and for persons whose Spanish parentage was only discovered after reaching the age of 18. **Hungary** reports no optional acquisition.

Naturalisation

In **Belgium**, which as mentioned above has a wide category of persons who can apply for optional acquisition of Belgian nationality, naturalisation is a special favour by the Belgian House of Representatives that is considered a last option if no other procedures for acquiring Belgian nationality are available. **Hungary**, by contrast, which has no optional acquisition, has an elaborate system of rules and requirements for naturalisation, creating various categories of persons that may apply for naturalisation under different requirements. The Hungarian national rapporteur noted the recent possibilities for ethnic Hungarians who live outside of Hungary to apply for naturalisation under very lenient conditions, which is subject to debate as to the political motives for this possibility. In **France and in The Netherlands**, naturalisation is possible if a person is lawfully resident for five years, and meets certain socio-economic requirements (language proficiency, socio-economic integration). As pointed out by Report D10.1, Dutch laws on naturalisation are largely shaped by its colonial history, and its history of being more a country of emigration, rather than of immigration.[60] Thus, we note that the Netherlands has rather strict rules on who can apply for naturalisation.

However, in **Denmark**, the requirements for naturalisation have become even stricter in recent years. It is only possible to acquire Danish nationality by naturalisation after a period of – in principle – nine years and after 4,5 years of self-support (i.e., not relying on social benefits) in the five years before applying for naturalisation. It was discussed whether the *Ruiz Zambrano* judgment of the CJEU would affect Danish naturalisation law, but it was regarded as having only minor application, since children in Denmark only acquire Danish nationality at birth if one of their parents is Danish. Similarly, **Spain** also has a general requirement for a long period (ten years) of lawful residence before applying for naturalisation. However, certain groups of (descendants of) Latin-American migrants, and Sephardic Jews, enjoy more lenient conditions for naturalisation, again reflecting Spain's colonial and migration past. Furthermore, naturalisation has been made possible for persons linked to certain special events of historical importance for Spain, such as the survivors of the 2004 Madrid terrorist attacks, the members of the International Brigades that fought the fascists and military rebels during the Civil War.

3.1.3 LOSS OF NATIONALITY

Paragraph 2.2.2 above summarized the CJEU's *Rottman* case, which illustrated how the loss of Member State nationality may affect an individual's right as an EU citizen, thereby bringing (aspect of) Member State nationality laws into the scope of application of EU law. In our questionnaire, we have asked the national rapporteurs to explain the conditions for loss of nationality, and whether there is a difference in the conditions as regards own nationals, persons with a double EU nationality and persons with a double nationality of a third country.

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[60] See B. Anderson, I. Shutes and S. Walker, bEUcitizen report D10.1 "Report on the rights and obligations of citizens and non-citizens in selected countries", http://beucitizen.eu/wp-content/uploads/D10.1-Report-on-the-rights-and-obligations-of-citizens-and-non-citizens-in-selected-countries.pdf, p. 25.

Generally, the loss of Member State nationality can happen in three main ways: voluntary declaration, automatic loss and withdrawal.

The national rapporteurs have reported no peculiarities when it comes to voluntary loss of nationality, this being possible in most countries upon the acquisition of another nationality. In this respect, it may also be noted that the Member States are generally careful to avoid statelessness. The automatic loss of nationality does not seem to exist in **France** or in **Hungary**. In **Belgium** and **Denmark**, it is possible to lose the respective Belgian or Danish nationality if a person is born abroad and has no subsequent residence in Belgium or Denmark before the age of 22. In the **Netherlands**, a similar possibility of automatic loss exists for a person who holds a dual nationality and has lived outside of Dutch territory for more than 10 years. This may be problematic, because these Member States do not issue a warning of any kind to the national in question before he or she loses his/her nationality, and therefore, the national may be unaware that this is a consequence of living abroad. It is only at the moment that a person requests the renewal of his or her Dutch passport, that he or she is informed. Based on the Dutch Passport Act (Paspoortwet) only persons with the Dutch nationality are entitled to request a passport. It is during that procedure that a former Dutch national discovers that his/her nationality is withdrawn as an automatic consequence of living elsewhere. Furthermore, in **the Netherlands and Spain**, joining a foreign military service or armed combat against the home state or allies of the home state, automatically leads to loss of citizenship. Lastly, in **Spain** there is a debate on the effects on nationality in case Catalonia ever secedes from Spain: will Catalans automatically lose Spanish nationality, and thereby their EU citizenship status?[61]

The withdrawal of nationality by decree is, reportedly, rare in **Hungary**. It can be ordered by reason of breach of law, such as fraud. This reflects a general practice common to the Member States that was noted in all reports submitted for this case study: the main reasons for an active withdrawal of nationality are either fraudulent behaviour during the acquisition of nationality, or the commitment of serious crimes, such as terrorism. This latter issue (and the relaxation of the conditions for withdrawing nationality in case of terrorism) is subject to heated debate and various legislative proposals in **Belgium**, **France** and **The Netherlands**, and may have significant impact on migrated EU citizens and their children, since it may entail the loss of EU citizenship status. In **Spain**, the involvement of the Spanish secret service in withdrawal procedures has been subject of judicial proceedings, in which the Spanish court decided in favour of the defendant's right to a fair trial. Lastly, it is noteworthy that in **The Netherlands**, the withdrawal of nationality for reasons of fraud has retroactive effect. This may be problematic, since the person's Dutch nationality and thus, possibly, his or her EU citizenship (and the derived nationality and EU citizenship of his/her children), is deemed never to have existed at all, even when the consequence is statelessness. In some cases courts have considered therefore that *Rottmann* did not apply, since these persons, who also had a nationality of a third country, actually never acquired the status of being an EU citizen, in case of retroactive withdrawal of the Dutch nationality. In more recent case law the Dutch courts are, however, seem to apply the *Rottmann* test in more situations.

Lastly, it may be observed that in all reported Member States, the rules for the loss of nationality apply equally to EU citizens and TCNs.

3.2 THEME II: FREE MOVEMENT RIGHTS OF EU CITIZENS

3.2.1 INTRODUCTION

[61] See for more information the blogpost of Raul Ignacio Rodriguez Magdaleno of 18 January 2016 on the beucitizen.eu website: http://beucitizen.eu/no-an-eventual-independent-catalonia-cannot-decide-who-is-spanish-nor-who-is-eu-citizen/ and the blogpost of Clara Isabel Velasco Rico of 12 March 2015: http://beucitizen.eu/a-reflection-on-european-citizenship-from-a-catalan-perspective/

Free movement rights of EU citizens are divided in this report (and the questionnaire) into the free movement rights (Article 21 TFEU) and the right to reside (Article 20 TFEU), both of which have been given more specific expression and clarification in Directive 2004/38.

Directive 2004/38 is applicable to those EU citizens that exercise their free movement rights. The Directive explicitly states that it shall apply to all Union citizens who move to or reside in a Member State other than that of which they are nationals, and to their family members (Article 3(1)). Moreover, the CJEU in the case *McCarthy* (2011) explicitly stated that the Directive is not applicable to (purely internal) non-free movement situations.[62] The CJEU held that when the 'Union citizen concerned has never exercised his right of free movement and has always resided in a Member State of which he is a national, that citizen is not covered by the concept of 'beneficiary' for the purposes of Article 3(1) of Directive 2004/38, so that that directive is not applicable to him.'[63]

If an EU citizen does not fall within the scope of application of the Directive and Article 21 TFEU, Article 20 TFEU may still be applicable to his/her situation. As observed above in paragraph 2.2.3, the CJEU held in 2011 in the case *Ruiz Zambrano* that Member States may not limit the (derived) right to reside for TCNs if such refusal would deprive the EU citizen (who is dependent on his/her TCN family member) of his/her essential rights as a EU citizen, i.e., the right to reside in the EU at all. The decision in *Ruiz Zambrano* triggered litigation in many Member States; in various cases TCNs invoked Article 20 TFEU as an ancillary right, derived from the right of an EU citizen (usually their child). The manner national authorities and courts deal with this right to reside for EU citizens with a TCN is discussed and elaborated on in this section. In 3.2.2 an analysis of the relevant measures and case law from the national context with regard to free movement rights will be made. In paragraph 3.2.3, the national obstacles, developments and challenges with regard to Article 20(1) TFEU will be elaborated on.

3.2.2 Free movement rights

Introduction

General framework free movement rights

As explained above in paragraph 2.2.3, the conditions laid down by Directive 2004/38 for lawful residence in a host Member State for a period longer than three months (Art. 7 Directive 2004/38) can be roughly divided into two alternative ways of having a right to reside: either being engaged in an economic activity (as worker or self-employed), or having "sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State", as well as having "comprehensive sickness insurance". Lastly, Article 16 of Directive 2004/38 provides a rather simple rule for the acquisition of a right of permanent residence, namely the lawful residence in the host state during a continuous period of five years.

The right of residence in the first two cases (shorter or longer than three months) is, however, subject to the general condition imposed by Art. 14(1) of Directive 2004/38: the EU citizen and his/her family members shall not become an unreasonable burden on the social assistance system of their host Member State. Although, as a general principle, EU free movement law may not be restricted on purely economic grounds, the preamble of Directive 2004/38 is more nuanced:

"*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. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence,*

[62] C-434/09, *McCarthy*, ECLI:EU:C:2011:277, Paras. 30-39.
[63] C-434/09, *McCarthy,* ECLI:EU:C:2011:277, Para. 39

the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion. In no case should an expulsion measure be adopted against workers, self-employed persons or job-seekers as defined by the Court of Justice save on grounds of public policy or public security." The application of the principle of proportionality is also affirmed by Article 14(3) of the Directive, which provides that '[a]n expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State'. As explained above in paragraph 2.2.3, the CJEU confirmed this approach in the case *Brey*,[64] but the cases *Dano*, *Alimanovic* and *Garcia Nieto* show that the CJEU gives increasing leeway to Member States to have more restrictive policies when it concerns access to social benefits. The conclusion of the 2014 FIDE General Report that the condition of 'sufficient resources' imposed by Art. 7 of Directive 2004/38 is one of the most "controversial features of citizenship law", thus still holds true in 2016.[65]Also, bEUcitizen Report D6.1 notes that although there is a 'nascent' level of transnational solidarity in the EU, it is in most countries fragile. Furthermore, the access of EU citizens to social benefits in their host Member States, promoted by EU law to a certain extent, does not have full political support and legitimacy on the national level.[66] From a legal point of view, the authors of the present general report have noted that there seems to be an increasing discussion in national media and politics, but also before national courts, about the access to social benefits and the requirement of having "sufficient resources" in relation to the right of migrated EU citizens.

The right to reside for periods shorter than three months, and permanent residence rights

The national reports show no widespread problems with the implementation and operationalization of the right to reside for a maximum of three months, nor for the right of permanent residence. All six reported Member States seem to have correctly implemented Art. 6 and 16 of Directive 2004/38/EC into their national legislation.[67]

Following the judgment of the CJEU in *Garcia Nieto*, it may, however, be expected that national authorities become more strict in enforcing the requirement of not becoming an unreasonable burden for the social assistance system during the first three months of stay, leaving economically inactive EU citizens in a kind of 'legal limbo'.[68] For instance in **Belgium**, there is already an administrative practice according to which an application for social benefits or other social assistance during the first three months of stay, (automatically) results in the loss of the right of residence. In **France**, although it is formally impossible to apply for social assistance before the three month period is over, including for French nationals who return to France after residing abroad, a (recurrent) reliance on social assistance is considered as proof that a person is an undue burden on the social assistance system. Furthermore, in France a specific practical problem exists when it comes to proving continuous residence in order to apply for social benefits after the first three months of residence or for permanent residence: it is formally not required to register the residence at a local (municipal) authority, but the application for social benefits or permanent residence places the burden (and a high

[64] Case C-140/12 Brey, ECLI:EU:C:2013:565, para. 69.

[65] Niamh Nic Shuibhne and Jo Shaw*, FIDE 2014 General Report on EU Citizenship*, in:Ulla Neergaard et. al. (eds.) Union Citizenship: Development, Impact, and Challenges, The XXVI FIDE Congress in Copenhagen 2014, Congress Publications Vol. 2, Copenhagen: DJOF Publishing 2014p. 89.

[66] Martin Seeleib-Kaiser and Elaine Chase, bEUcitizen Report 6.1 "Social Rights of EU Migrant Citizens: A Comparative Perspective", available at: http://beucitizen.eu/wp-content/uploads/Deliverable-6.1_final1.pdf , p. 29.

[67] In the light of the relative straightforwardness of these provisions, we have chosen to discuss them together.

[68] See for instance the blogpost of Catherine Jacqueson of 26 January 2015 on the beucitizen.eu website: http://beucitizen.eu/when-benefit-tourism-enters-the-court-room-the-consequences-of-the-dano-case/, and more recently the comment on the Garcia Nieto case of Frans Pennings: http://beucitizen.eu/eu-citizens-and-the-right-to-social-assistance/

standard) of proof on the EU citizen when it comes to the duration of the residence. In order to obtain a right to permanent residence, the EU citizen needs to provide proof of each year he or she has resided in France.

The **Hungarian** reporter noted that a significant practical problem exists for all EU citizens who have migrated to Hungary, because many real estate owners in Hungary do not allow their tenants to register their residence at the actual address, probably for tax avoidance. This causes problems for EU citizens (and any TCN family members) if they want to prove a period of residence.

The right to reside for periods longer than three months

Regarding the right to reside for a period longer than three months, it may also, and more concretely, be noted that that the requirement imposed on inactive EU citizens of having sufficient resources is being more and more strictly enforced, especially after the CJEU's judgments in *Dano*, *Alimanovic* and *Garcia Nieto*. Furthermore, in the various Member States that have reported for this case study, different standards are applied to determine what constitutes "sufficient resources".

In **Belgium and The Netherlands**, sufficient resources constitute an amount equivalent to the minimum wage. In **Denmark**, it is an amount equal to the sum of benefits that Danish citizens would be able to obtain under the Active Social Policy Act. In **France** it is, like Belgium, an amount equal to the minimum wage. However, the French rapporteur also drew attention to a problematic administrative practice, according to which sometimes workers who earn a very low income, or work part-time, are registered as "inactive", which is problematic as this is in violation of EU law,[69] and it constitutes a problem for any person who would have a derived right of residence. In **Hungary**, an inactive EU citizen is deemed to have sufficient resources when he or she disposed of a sum exceeding the monthly national pension per head of the family. In **Spain**, there is not a fixed threshold amount, and authorities must assess the EU citizen's individual circumstances. In any event, the amount may not exceed the threshold amount for the right of Spanish nationals to receive social benefits or assistance.

National measures preventing or discouraging use of free movement rights

Apart from enquiring into the way in which Member States have implemented the right to reside for periods shorter and longer than three months, the questionnaire also enquired into national measures that may prevent or discourage nationals from using their free movement rights. Such measures may have, at first sight, no link to national migration laws, but may form obstacles to free movement in practice.

As expected, in most Member States, including **Spain and Denmark,** criminal proceedings form the main source of prohibitions to leave the country. In t**he Netherlands**, the automatic loss of Dutch nationality after residing abroad for a period of 10 years or more, without prior warning, is a considerable negative consequence for persons using their free movement rights. In **France** and the **Netherlands**, the rapporteurs have also pointed at measures preventing minor children from leaving the country without their parents' consent. Although such rules are mainly in place to prevent child abduction (whether or not in the context of divorce proceedings), after the recent terrorist attacks and the growing number of persons (including minors) who leave the country to join the armed forces of ISIS or other jihadist groups, such rules may be amended in the near future, in order to fit those recent, specific purposes. Furthermore, in **The Netherlands**, a number of legislative proposals are currently discussed which aim to facilitate the withdrawal of passports of persons suspected of terrorist acts or of wanting to join foreign combat in Iraq and/or Syria. In **France,** such legislation has already been passed in November 2014. Moreover, under the French Emergency State laws there are wide possibilities of placing persons under a type of administrative house-arrest. It is noteworthy that, according to the French State, the ECHR does not apply to Emergency State measures.

[69] See for instance the cases C-139/85 Kempf ECLI:EU:C:1986:223; C-444/93 Megner ECLI:EU:C:1995:442; and C-14/09 Genc ECLI:EU:C:2010:57.

In **Belgium**, an obstacle to using free movement rights is formed by the fact that Belgian nationals may lose their right to certain social benefits in Belgium if they reside outside of Belgium for a period exceeding three years.

Lastly, in **Hungary** there is the curious practice of requiring non-paying students in higher education to sign a contract, which obliges them to stay in Hungary for a period twice as long as their studies, or else they have to repay the costs of their studies. Supposedly, this is a measure to combat so-called 'brain-drain', but it is debated whether this is actually effective.

3.2.3. The right to reside in the EU under Article 20 TFEU: impact of the Ruiz Zambrano judgment

At the time of writing three preliminary references are pending at the CJEU regarding *Ruiz Zambrano* and the interpretation of Article 20 TFEU. A Spanish reference[70], a British reference[71] and a Dutch reference.[72]

As noted in paragraph 3.1.2, in **Denmark**, the impact of the *Ruiz Zambrano* judgment was only limited. The Ministry of Refugees, Immigration and Integration issued a Briefing Note on the interpretation of the judgment, and the application to Denmark. The interpretation suggested by the Ministry was criticized for being too narrow, limiting the reach of the judgment only to cases in which a Danish child would be obliged to leave to country, and leaving out other links of dependence or types of family members. The national rapporteur found only one case that came before a Danish court in which the *Ruiz Zambrano* criteria were applied. However, the Danish court confirmed the deportation of the TCN mother. The **Hungarian** national rapporteur even found no national case law that refers to *Ruiz Zambrano*.

The *Ruiz Zambrano* judgment and the right to reside as provided for in Article 20 TFEU has had a significant impact in several of the Member States under study, as it caused legislative amendments. Especially in **Belgium**, from which the preliminary reference *Ruiz Zambrano* originated, the impact was remarkable. The law that enabled the children of Colombian parents to acquire the Belgian nationality at birth was not only amended in the way described in paragraph 3.1.2 (additional requirement of the impossibility to acquire the parents' nationality by declaration), but the amendment also limited the personal scope of application to 'the ascendants of a Belgian citizen when the latter is a minor, accompanied by the parents in Belgium.' The amendment marked a restriction in the sense that who is a dependant family member is quite strict and only refers to parents, not to other types of family members.

The **French** national rapporteur cites numerous cases in which applicants tried to rely on the *Ruiz Zambrano* (and subsequent *Dereci*) case law in order to challenge expulsion measures. However, a lot of these cases concerned non-French EU citizens who are covered by Directive 2004/38. In the few cases concerning French children, the domestic court scrutinised whether the TCN parent was the one caring for the child and whether the child's habitual residence was in France. However, the French rapporteur added that relying on the CJEU's *Ruiz Zambrano* judgment makes little sense as French law is at least as favourable as the CJEU's interpretation of Article 20 TFEU in *Ruiz Zambrano*, as it grants residence right to parent of French children who 'contribute' to the child's care and education since her birth or at least two years.

In **the Netherlands** a similar restrictive interpretation of 'dependant' family member to the aforementioned Belgian interpretation was codified into policy rules. These rules state that under three conditions a derived residency right can be granted: (1) the alien has a minor child, who has the Dutch nationality, (2) the child lives with the alien who has the care of the child and (3) the child shall have to follow the alien to reside outside the

[70] C-165/14, Alfredo Rendón Marín.
[71] C-115/15, *NA* and C-304/14*, CS*.
[72] C-133/15, *H.C. Chavez-Vilchez.*

European Union, when the alien has to leave the Netherlands. The debate before Dutch courts focussed on the question whether one or both parents with the nationality of a third country should have a right to reside in the Netherlands in order to operationalize the EU citizenship right not to be forced to leave the EU. Furthermore, there has been a debate in literature and issues raised before national courts, whether and under which circumstances a Dutch parent should be regarded suitable to take care of the dependent EU citizen. The Dutch Appeals Tribunal (*Centrale Raad voor Beroep*) referred questions in eight different joined cases to the CJEU, as referred to above. In these cases the question was raised whether the Dutch father who did not have the daily care for the child and was more or less present in the life of the child (some fathers only very occasionally, others had a weekly visiting arrangement), should be regarded as a fair alternative for the child to stay in the Netherlands if his/her mother with the nationality of a third country would have to leave the European Union. The Dutch Appeals Tribunal referred the following questions to the CJEU:

"Must Article 20 of the TFEU be interpreted as precluding a Member State from depriving a third-country national who is responsible for the day to day and primary care of his/her minor child, who is a national of that Member State, of the right of residence in that Member State?

In answering that question, is it relevant that the legal, financial and/or emotional burden does not rest entirely with that parent and, furthermore, that it cannot be excluded that the other parent, who is a national of the Member State, might in fact be able to care for the child? In that case, should the parent/third-country national have to make a plausible case that the other parent is not able to assume responsibility for the care of the child, so that the child would be obliged to leave the territory of the European Union if the parent/third-country national is denied a right of residence?"[73]

The case is still pending before the CJEU at the moment.[74] On 10 May 2016 the hearing in the case at the CJEU took place. One of the main points of discussion was whether the TCN mother (in all these cases) as a primary carer should have a derived right to reside in the EU, and whether it is important that she is the only (possible) carer of the Dutch child. In all the cases pending the mother is the primary carer for the child, whereas the father has a very small or no role. According to the Dutch authorities the fact that the Dutch father is present and might potentially become the primary carer for the child is reason not to grant the right to reside to the TCN mother. According to the applicants in these cases, the Dutch father is unfit/incapable to have the primary care for the child. Another point that has been raised is the burden of proof in these cases. According to the Dutch system and policy the TCN mother has to prove that the Dutch father cannot take care of the child. It is however very difficult for a parent to prove the incapability of the other parent based on objective facts. The Dutch immigration service requires for instance a judgement of a family court to prove that the Dutch father cannot provide the primary care for the child. In order to get such a verdict, the mother basically has to request the judge to grant the Dutch father with the authority over the child, so that the judge can refuse to do so because the father is incapable to provide the appropriate care and authority over the child, which is a rather undesirable and burdensome route.

In the context of the Netherlands, attention must also be drawn to a decision of the European Court of Human Rights (ECtHR) which decided in October 2014 that the Netherlands had to take into account the right to family life as a collective right for the whole family and could not refuse a Surinam national to stay in the Netherlands with her three children.[75]

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[73] See the Dutch reference to the CJEU http://www.minbuza.nl/binaries/content/assets/ecer/ecer/import/hof_van_justitie/nieuwe_hofzaken_inclusief_verwijzingsuitspraak/2015/c-zakennummers/c-133-15-verwijzingsbeschikking-crb.pdf (last accessed on 13 May 2016).

[74] C-133/15, H.C. Chavez-Vilchez,

[75] Case of Jeunesse v. The Netherlands, ECtHR 3 October 2014.

In **Spain,** the *Ruiz Zambrano* case law has also been litigated before domestic courts. A case before the Spanish Supreme Court gave rise to preliminary reference C-165/14, Rendon Marin. According to the appellant, Article 20 TFEU guarantees the right of EU citizens to free movement and residence in the territory of the Member States, and prevents the denial of residence permit to a national of a third country who is the parent of a citizen of the Union, when it implies that the dependent child will be deprived of its right to reside in a Member State of the Union as an inevitable consequence of the fact that he would be forced to leave the territory of the Union following the father to whom the residence is denied in that territory. According to such line of reasoning, the refusal of a residence permit in Spain would compel the appellant to leave Spanish territory and, therefore, it would also entail that his two sons, one of whom is a Spanish national, would have to leave the territory of the European Union.

However, in this case - which differs from *Ruiz Zambrano* - there is a peculiar circumstance under Spanish law: the strict prohibition to grant such a right of residence to a TCN where the applicant has a criminal record in Spain, which has led the Spanish Supreme Court ultimately to question the compatibility of this national regulation with the Art. 20 TFEU and the aforementioned CJEU case law. Furthermore, according to Spanish law, in case of renewal of the residence permit, the relevance of criminal records is significantly less, because in such cases it is only one of the circumstances to be taken into account. Consequently, the Spanish Supreme Court referred the following question to the CJEU:

"*Is it compatible with Article 20 of the TFEU, read in the light of the judgments of 19 October 2004 (Case C-200/02) and 8 March 2011 (Case C-34/09), national law which excludes the possibility of granting residence permits to a parent of a citizen of the European Union, minor and dependent one, for having criminal records in the country where the request is made, although this will lead to a forced departure of the child from the territory of the Union, having to follow his father?*".

The Spanish case of *Rendon Marin* has been joined by the CJEU with a preliminary reference from the UK, case C-304/14, *CS*. Advocate General Spuznar has rendered his conclusion in these cases on 4 February 2016. He concluded that a minor EU citizen's right to reside under Directive 2004/38 and Article 20 TFEU must be interpreted as precluding national legislation which requires the automatic refusal of a residence permit for a third-country national who is the parent of the minor EU citizen (the latter must be dependent on that parent and live with that parent in the host Member State), when that parent has a criminal record, when the consequence of such a refusal is that the child will have to leave the territory of the European Union. However, he also added that in exceptional circumstances, a Member State may refuse the residence permit of such a TCN who is the sole carer for a dependent, minor EU citizen, provided that the principle of proportionality is observed and that the refusal is based on the personal conduct of the foreign national, which must constitute a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, and is based on an imperative reason relating to public security.

3.2.4 FAMILY LIFE

Introduction

The next part of the questionnaire enquired into the implementation and application of the rules regarding family life/family reunification for EU citizens. Logically, the point of departure of the research questions concerned the scope of application of the rules at issue: who are defined as family members of EU citizens in the Member States that submitted reports, how have these Member States implemented Art. 2(2) and 3(2) of Directive 2004/38? Subsequently, the national rapporteurs were asked to describe the conditions under which TCN family members have a (derived) residence right either as a family member of a migrated EU citizen, or as a family member of one of the Member State's own, static nationals. The rapporteurs were also asked to identify obstacles to family reunification.

National scope of application, conditions and obstacles

The Fide 2014 General report on EU citizenship noted differences throughout the EU in the way in which different forms of partnerships, and especially same-sex marriages or partnerships, were recognized and/or treated equally. According to Art. 2(2)b, the recognition of registered partners is dependent on the legislation of the host State, but the recognition of same-sex marriage (i.e., meant by the use of the word "spouse" in Art. 2(2)a of Directive 2004/38) is still unclear. Not all Member States allow same-sex marriages to be concluded, or recognise such marriages that were concluded elsewhere, sometimes even expressly designating marriage as being between a man and a woman only.[76] At the time of drafting of the present report, although not a specific focus of the questionnaire, the recognition of same-sex marriages and same-sex registered partnership is still a point of concern, and may raise significant obstacles for the exercise of free movement and residence rights, which is hard to reconcile with the prohibition of discrimination on grounds of sexual orientation as laid down in Art. 21 of the Charter.[77]

Some Member States have chosen to extend the rules set out in the Directive to the family members of their own, static nationals such as **Spain** and **Hungary,** limiting occurrences of reverse discriminations of nationals who do not use their free movement rights.[78]

Some Member States have (partially) extended the scope of the Directive's rights of entry and residence to the broader circle of family members and partners of Art. 3(2) of the Directive, such as **Denmark**, and, to a lesser extent, **Hungary**.[79] These findings were confirmed by the answers provided by the national rapporteurs for the present report.

In **Belgium**, family reunification with a TCN is more difficult for Belgian nationals, than for EU citizens who have used their free movement rights to move to Belgium. The same holds true for **Denmark**, in which TCN family reunification is much more complicated for 'static' Danes than for EU citizens. **The Netherlands** and **Belgium** both restrict TCN family reunification for their own nationals to spouses, or the co-parent of their minor child.

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[76] Niamh Nic Shuibhne and Jo Shaw, *FIDE 2014 General Report on EU Citizenship*, op. cit. p. 69-76 and 83-85.

[77] See also bEUcitizen Deliverable 9.4, Mara Yerkes et. al., *Attitudes of national populations towards social and civil rights for family members and the role of the EU in converging these rights*, available at: http://beucitizen.eu/publications/attitudes-of-national-populations-towards-social-and-civil-rights-for-family-members-and-the-role-of-the-eu-in-converging-these-rights/

[78] FIDE General Report p. 74-75. Spain was criticized in the FIDE 2014 General Report for not having correctly implemented art. 3(2) of Directive 2004/38, but the answers to the present questionnaire have shown that this shortcoming has been remedied, Fide p. 78.

[79] See also FIDE General Report p. 75.

The **French** report shows that immigration law is not too restrictive with regard to the right of residence of family members of French citizens. It however requires proof of continuity of communal life since the marriage, and sustained and stable family life for registered and non-registered partners. In the case of EU citizens, including returning French, there are no specific requirements in relation to TCN spouses, but in relation to registered partners there is a requirement to proof one year of communal life, and five years in case of non-registered partner.

A further problem noted in the 2014 FIDE General Report, and confirmed by the present case study, is that throughout the Member States interpretation of a "durable relation, duly attested" as laid down in Art. 3(2) of Directive 2004/38 varies considerably. The administrative practice in Member States differs on the requirements to, and accepted proof of, for instance, the period of living together, the fact of having a mutual household, having mutual children, and the standard of having sufficient shared legal/financial obligations, such as a shared bank account or a mortgage.[80] These practical, evidentiary problems were equally reported in the answers to the present questionnaire (for instance in **Belgium** and **Hungary**), and shall be discussed hereafter, and more elaborately in the Final Observations under Section 4 hereafter.

In **Belgium**, it has been reported that the threshold for "sufficient resources" in case of TCN family reunification lays at 120% of the minimum income, which is a higher threshold than the one for "sufficient resources" in case of the right of residence of inactive EU citizens for a period exceeding three months. In **Hungary**, obstacles to TCN family reunification are formed by the very rigid interpretation in practice of the definition of family member. Couples need to have been registered at a common address and they need to have a common bank account before the authorities recognize their family status. Furthermore, certain administrative requirements, such as documentation, constitute considerable practical burdens, for instance the requirement of providing an official document containing the applicant and the TCN's mother's maiden name. The national rapporteur also notes that the Hungarian authorities structurally hold biases against certain third countries, such as China and Russia, but that there is a remarkable number of persons (often from these same third countries) who are so-called "investor-residents", i.e., persons who buy government bonds in order to have more lenient conditions for the acquisition residence rights.

The **Dutch** report identifies the recent restrictive case law and policy regarding TCN and family life of mixed families as problematic, see paragraph 3.2.3. Similarly, the **French** report noted inconsistencies in French domestic case law as to the application of EU law in *Ruiz Zambrano* type of cases in the sense that French domestic courts approach *Zambrano-type* cases through the lens of French law. They deny residency rights where the TCN parent is not essential to the maintenance of the child on the French territory (dependence criteria) and where the child is not 'habitually resident' in France. The **Dutch** report notes that the so-called "Belgium-route" is popular: Dutch nationals move temporarily to Belgium or another Member State in order to trigger their free movement rights as EU citizens, and apply there for family reunification (Metock-regime), or claim family reunification in the Netherlands after a period of residence in another Member State with their TCN family member. That route has become popular in the light of the rules for TCN family reunification for static Dutch nationals that are stricter than the rules for mobile EU citizens. Such a practice may constitute an artificial use, or even abuse of, free movement rights. In that context the Dutch Council of States referred questions to the CJEU in the joined cases *O. and B.*[81] and *S. and G.*[82] The CJEU was rather critical of this use of free movement rights, requiring a 'sufficiently genuine' period of residence in the host Member State before the TCN family member can acquire a derived right of residence.

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[80] FIDE General Report, p. 80-81.
[81] C-456/12 - O. en B.
[82] C-457/12 - S. en G.

The **Spanish** report notes no substantive obstacles to family reunification, but draws attention to the fact that in some cases the duration of the administrative procedure in the application for family reunification can be problematic, namely taking up to two years.

3.3. THEME III: LIMITATIONS TO CORE CITIZENSHIP RIGHTS

3.3.1 INTRODUCTION ON LIMITATIONS TO CORE CITIZENSHIP RIGHTS: EXPULSION AND ABUSE

Although the national rapporteurs for this case study had already been asked to pay attention to potential obstacles to the core EU citizenship rights in the context of the nationality laws and the implementation of the right to free movement and residence, Theme III concerns the limitations on the right to free movement and residence that Directive 2004/38 explicitly provide, namely the grounds for expulsion of EU citizens as set out in Articles 27 and 28 of the Directive, and the prohibition of abuse of rights as described in Article 35.

With regard to the provisions of Directive 2004/38 relating to expulsion, the national rapporteurs were asked, firstly, to described the way in which their respective Member States have implemented the relevant Articles, secondly, whether there is evidence in national administrative practice or case law that not fulfilling the conditions of Art. 7(1)b of Directive 2004/38 (the requirement to have sufficient resources and a comprehensive health insurance) leads to expulsion, and lastly, if there is evidence of a differing – national – notion of public order than what is prescribed by the Directive and by the case law of the CJEU.

Furthermore, the questionnaire enquired after the way in which abuse of EU free movement rights is interpreted and applied in the six Member States that form part of this case study.

3.3.2 EXPULSION

National implementation of Art. 27 and 28 of Directive 2004/38

Dutch and Belgian courts reportedly perform a rather strict scrutiny of expulsion decisions. Like Belgium and The Netherlands, the **Spanish** courts seem to perform an adequately strict scrutiny of expulsion decisions. However, the Spanish rapporteur noted a recent increase of expulsion decisions of Romanian and Bulgarian national for repeat offenses. By contrast, **Danish** courts have been criticized as being very formalistic in their approach, by checking the requirements of the Danish Aliens Act and the Directive separately, instead of in an integrated way. The **Hungarian** implementation of Art. 27 and 28 of Directive 2004/38 seems largely unproblematic, apart from the fact that the ground of expulsion for public health is broadly interpreted, also applying to persons who have been infected with HIV, which seems incompatible with EU and international standards. **France** seems to have the most active, and problematic, expulsion practice. There is a traditional, so-called 'common law' expulsion procedure, with due procedural safeguards. However, the majority of expulsion cases is handled by way of the so-called OQTF expulsion order, a more flexible instrument that offers less procedural safeguards, but of which the French rapporteur observes that its compatibility with EU law is questionable. The position of EU citizens, and most notably of Romanian and Bulgarian (Roma) nationals, and more recently, with a view to the terrorist attacks and the war in Syria, EU citizens of Middle-Eastern or North-African descent, is precarious with regard to this expulsion procedure.

Insufficient resources or no comprehensive health insurance as a ground for expulsion

Indeed, in **Belgium**, a lack of sufficient means seems to form a reason for expulsion of EU citizens, and increasingly often. In 2013/2014, Belgium withdrew residence permits of 2700 EU citizens for lack of sufficient resources. By legislative amendment of 15 December 2015, the Belgian law has become even stricter. The Belgium rapporteur links this to the fact that immigration and social benefits/unemployment registration were in the same task set of a certain Minister, and to the setting up of a data exchange between immigration services and the social assistance registration. Furthermore, there is an additional requirement for EU citizens who apply for family reunification with a TCN to earn at least 120% of the minimum wage that qualifies for

social assistance (approx. 1300 euro/month). The Belgian rapporteur notes however, that not all cases of EU citizens with insufficient resources lead to proper expulsion, but that the withdrawal of residence permits *de facto* leads to a sort of "administrative death".

Until 2011, there had been a practice in **Denmark** to expel persons who did not possess more than 350 kroner (approx. 46 euro, the costs of a night's stay at a hostel), but this was abandoned after protests from NGO working with homeless persons. **In France**, an OQTF expulsion order may be issued for 'illegal residence', i.e., when the residence requirements (such as resource requirements) are not fulfilled. In France this seems to be frequently the case concerning the expulsion of Roma,. Generally, since France has no system of obligatory registration of residence as noted in paragraph 3.2.2, it is sometimes hard to prove the period of residence and the respective level of protection granted by EU citizenship rules. By contrast, the **Hungarian** rapporteur notes no practice of insufficient resources leading to proper expulsion decisions.

In **Netherlands**, the Dutch Board of Appeals Tribunal (Centrale Raad van Beroep) decided in 2013 that the non-compliance with art. 7(1)(b) may not be held against an EU citizen so as to lead to a refusal of the right to reside, and asking for social assistance may not lead to automatic expulsion. However, similar to Belgium, in the Netherlands there has been a recent linking of the various governmental data registration services. As a result, a person without a right of residence may not have a right to social security, or vice versa: the reliance on social benefits may have repercussions for his or her residence rights. Although this point was discussed in the national proceedings leading up to the preliminary reference by the Dutch Board of Appeals Tribunal in Chavez-Vilchez and others (discussed above in para. 3.2.3), the Board of Appeals Tribunal did not refer a preliminary question on this specific issue.

Recent case law shows that **Spanish** judges are increasingly critical of the concept of not becoming a burden on the social assistance system, arguing that it causes legal uncertainty. Under Spanish (case) law, a fixed level minimum income may not be set, but in any case it the benchmark may not exceed the amount below which one can apply for social assistance. On a central level, there have been health care reforms, which would restrict access of immigrations to the Spanish national healthcare scheme. However, it appears that in recent years, certain Spanish regions have autonomously decided to regulate the health insurance of immigrants, and certain have even refused to implement the aforementioned reforms (such as the Basque region, Navarra and Galicia), therefore allowing a more generous access to health insurance for immigrants.

Public order

In **Belgium**, the national rapporteur notes that legislation and policy guidelines seem to set a lower (national) standard of public policy for expulsion decisions, but the Belgian judiciary apparently performs a rather strict scrutiny, and brings the national practice in line with EU standards and case law.

The **French** rapporteur identifies the use of the OQTF expulsion orders as a lowering of standards and as problematic with regard to EU law requirements. The highlights a different degree of judicial scrutiny: quite thorough on the normal expulsion order, less demanding on the (more widely used) OQTF. The French rapporteur also emphasizes the fact that this practice is not duly corrected by French courts, which have a fairly inconsistent line of reasoning, which is also apparently the case in **Denmark**. Moreover, the French rapporteur notes that only a minority of expulsion cases are challenged before national courts, making it unlikely that this practice will be corrected by a preliminary ruling of the CJEU any time soon.

The **Hungarian** national rapporteur concludes that in practice there is probably a too broad interpretation of the expulsion grounds. Although the Hungarian courts are balancing this broad interpretation by a more strict interpretation, it is noteworthy that the majority of expulsion decisions are not contested before a court, similar to what has been reported in the case of France.

In the **Netherlands**, it seems from administrative practice that there is a lower, national standard of public order in the specific cases of TCNs who have a derived right of residence (cf. *Ruiz Zambrano*). However, the Dutch rapporteur notes that national courts seem to apply the higher (EU) standard, so that – if litigated – these cases are usually corrected.

Lastly, the **Spanish** national rapporteur has not identified a standard of public order that is different from the EU law standard.

3.3.3. ABUSE

With regard to the issue of abuse of EU free movement rights as meant by Article 35 of Directive 2004/38, in **Belgium** such abuse frequently concerns the absence of real cohabitation or a common household by persons who claim to be in a stable relationship. Furthermore, there have been cases concerning fraud, i.e., submitting false or misleading information during the application process. The Belgian national rapporteur notes, however, that under the Belgian interpretation, fraudulent intent is not necessary (contrary to the CJEU's ruling in *O and B* and *G and S*, discussed above under para. 3.2.3 and below in the context of The Netherlands).

In case of a suspicion of abuse of rights, notably in case of family reunification (marriages of convenience etc.), **Danish** applicants may be required to provide additional documentation concerning, for instance, proof of residence (address), and proof of registration of children in Danish schools. **Hungarian** administrative practice and national courts appear to perform a strict review of the family ties and proof of living in the same household, so as to avoid abuse of family reunification, by, for instance, claiming paternity rights. Similarly, most cases of abuse of rights reported in **Spain** concern allegations of marriages (or civil unions) of convenience.

In 2011, abuse of rights was introduced in **France** as a separate ground for expulsion under the so-called OQTF expulsion procedure. It appears that such a ground was specifically introduced to give a legal basis for the mass expulsion of Romanian and Bulgarian (Roma) citizens in the summer of 2010. The French legislator has defined abuse as either the renewal of a short stay permit while the conditions for a longer stay than three months are not fulfilled, and/or staying in France for the purpose of benefiting from the social insurance system. OQTFs for abuse of rights are not frequently issued, and even less frequently challenged in court. When they are subject to judicial proceedings, French courts appear to have contradictory approaches. However, most courts do require that the authorities substantiate the allegations and provide evidence of the actual amount of social assistance the accused received.

In the **Netherlands,** the aforementioned 'Belgium-route' has been used by Dutch nationals in order to circumvent Dutch immigration rules for TCN family reunification, which are much stricter for static Dutch nationals than for mobile EU citizens. Administrative authorities are increasingly critical of such family reunifications. In the context of two such cases, the Dutch Council of State referred preliminary questions to the CJEU about the minimum duration of a Dutch national's stay in another Member State or the frequency of his or her visits. Indirectly, this case concerned the possibly abusive use of the free movement rules.[83] The CJEU ruled that it is for the national court at issue to assess whether there has been an abuse of EU law (a combination of objective circumstances, and a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating conditions for obtaining such right). Furthermore, the CJEU held that a derived right of residence only exists if the (duration of the) residence of the EU citizen in the host Member State has been sufficiently genuine so as to enable that citizen to create or strengthen family life in that Member State.

[83] C-456/12 O and B, ECLI:EU:C:2014:135 and C-457/12 S and G, ECLI:EU:C:2014:136.

4. FINAL OBSERVATIONS

4.1 INTRODUCTION

As stated at the beginning of the present report, the objective of WP7 is to study, from the perspective of EU citizenship, specific problems EU citizens face in exercising civil rights and liberties in areas which fall within the scope of EU law. It is important to identify not only such potential or actual obstacles in law, but also practical or systemic obstacles. Theme IV therefore enquires into specific barriers to the use of core EU citizenship rights from an empirical and systemic point of view, as well as any good practices.

As the findings on practical issues partially overlap with the findings summarized above from a more formal, legal point of view, we have chosen to integrate the practical barriers and good practices into our general conclusions. Wherever possible, we try to make concrete suggestions for (EU or national) action, or for further research.

4.2 THE EU CITIZEN AT THE CROSS-ROAD OF EU AND NATIONAL LAW - TOP-DOWN/BOTTOM UP

EU citizenship in itself and the effectiveness of its accompanying rights are dependent upon both national and EU law. It is therefore appropriate to speak of EU citizenship as 'composite' citizenship: citizenship composed of, and operationalized by, rights and entitlements (and duties) in both national and EU law. The EU citizens have a status that consists of different qualifications, each of which are activated by specific levels or layers of the EU legal order: EU and national (and – in a residual sense – the ECHR). These different layers and their actors, all have their own responsibilities towards the citizen, and the citizen enjoys different (substantive) rights and has different duties under the rules on each level of the system. It is clear that the rights that EU citizens enjoy may be characterized as constitutional rights, even if not fully fledged.[84]

This is specifically clear when it comes to nationality laws, since the status of EU citizen is dependent on Member State nationality. However, as shown by the CJEU's ruling *Rottmann*, Member State discretion in nationality cases may also be limited by EU citizenship concerns. Furthermore, the migration that is stimulated by the existence of EU citizenship rights to free movement and residence, have brought EU citizens within the scope of persons who (or whose children) may acquire their host Member State's nationality. Moreover, through the interplay of the EU right to family reunification and the Member States' own nationality laws, TCNs may have access to EU citizenship status. This is the case in for instance **Belgium**, where a person with a right to permanent residence, who has resided in Belgium for over five years, and who is sufficiently integrated, may opt for Belgian nationality. Another example are the possibilities for second and third generation migrants to acquire **French** or **Dutch** nationality upon birth. In that respect, it is also highly interesting to note the development in for instance Hungary, according to which the right of residence is more easily available to TCNs who are able to buy a large amount of government bonds.

Nationality law remains, in principle, within the exclusive competence of the Member States, and it only indirectly and potentially affects EU citizenship. There are therefore only limited ways in which the EU institutions may be pro-actively involved in shaping this field of law and policy. Although a continuous dialogue with Member States and frequent monitoring may be useful in order to make the Member States aware of the influence of their nationality laws on EU citizenship, we probably need to wait and see how these topical problems unfold in national legislation and case law, before they reach the CJEU in preliminary references.

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[84] H. van Eijken, *EU Citizenship & the Constitutionalisation of the European Union*, Groningen: Europa Law Publishing 2015, pp. 274-268.

The right to reside, sufficient resources and national social benefits

The economically inactive EU citizen and his/her family member(s) may also find themselves at the cross-roads of EU and national law with regard to the (EU) right to reside, which is conditional upon having sufficient resources and a comprehensive health insurance (as described in paragraphs 2.3 and 3.2.2), and the national social assistance system.[85] On the one hand, the CJEU has held that not having equal access to social benefits may form a barrier to the effective use of the core EU citizenship rights of residence and free movement, and on the other hand, it has (more recently) held that a right to equal treatment regarding social benefits may only be triggered if the residence of the EU citizen is lawful in the light of the conditions imposed by Directive 2004/38. However, economic reasons do not form a legitimate ground for expulsion of migrated EU citizens.

This leaves economically inactive EU citizens in a 'legal limbo': a reliance on social benefits may be taken as proof of a lack of sufficient resources, rendering their residence unlawful, but EU law may equally prevent their actual expulsion. As the EU concepts in Directive 2004/38 and the CJEU's case law remain open for national interpretations, we have seen in Section 3 that national administrative and judicial practices heavily influence the operationalization of core EU citizenship rights in concrete cases. An example from **Spain** illustrates the 'compositeness' of EU citizenship: as observed in paragraph 3.3.2, certain regions in Spain grant access to national health insurance schemes to migrants, even though law reforms on the national level seek to restrict such access.

4.3 Formal legislation and litigation, and the daily reality of administrative practice: 'mind the gap!'

On a more substantive level, although most Member States seem to have correctly implemented the provisions of Directive 2004/38 into their formal laws, there may be a significant gap between formal law, and administrative practice, which may affect the operationalization of core EU citizenship rights.

In almost all six Member State reports, the national rapporteurs note problems with the proof that national (administrative) authorities require in order to prove a genuine relationship (in case of family reunification), and of sufficient resources. The authorities of **Belgium, Denmark, Hungary and the Netherlands** require a large number of vastly different documents. Furthermore, the report on **Spain** notes a lack of standardized forms for the application procedure and a lack of formal, common elements for presenting the required documentation. In **France**, as already noted in paragraph 3.2.2, a specific practical problem exists regarding the lack of a formal requirement to register the residence at a local (municipal) authority, but at the same time a high burden (and standard) of proof when it comes to the duration of the residence in order to have access to social benefits or a permanent right of residence. On the same issue of registering residence, a practical problem exists in **Hungary** because many real estate owners do not allow their tenants to register their residence at the actual address (probably in order to avoid paying taxes over the rent), which also causes evidentiary problems for EU citizens (and their TCN family members). Perhaps more guidance from the EU, by way of guidelines or other types of informative documents to administrative authorities or standardized lists of accepted documents, may be helpful.

Apart from the more formal issue of proof, it may be concluded from the national reports that national authorities give their own interpretation of the substance of concepts such as "genuine, stable relationship", "sufficient resources", or "dependent family member" (in the sense of the Ruiz Zambrano case law), which may not always be in conformity with (formal) EU law, and may hamper the uniform application of EU citizenship rights throughout the EU. An example is the **Belgian** requirement of having at least 120% of the minimum income for EU citizens who apply for TCN family reunification, while other countries, such as Spain, set the

[85] See also M. Seeleib-Kaiser et al., Report 6.2. "EU Citizenship and Social Rights, a Comparative Report": http://beucitizen.eu/publications/social-rights-of-eu-migrant-citizens-a-comparative-perspective/

threshold at just 100% of the minimum income and also perform an individual assessment. As a further example, we can mention the **Belgian** and **Dutch** limitation of the *Ruiz Zambrano* type of derived right of residence for TCNs to only parents and children, not other dependent family members.

In terms of barriers to core EU citizenship rights, the right to reside in the European Union as a whole is heavily dependent on the assessment of national courts. Under which circumstances is a EU citizen sufficiently dependent in order to invoke Article 20(1) TFEU to have his mother/father with the nationality of a third country to stay with him/her? Under what circumstances should a child of a mixed family live with his EU citizen parent, and should the parent with the third country nationality be threatened with expulsion from the EU before being able to rely on Article 20 TFEU as interpreted in the *Ruiz Zambrano* case law? These questions seem to be answered mostly by administrative authorities and domestic courts, and the outcome of these cases is therefore dependent on both national interpretations, and the evaluation of the specific circumstances of each case. In that sense one could argue that the ambiguity the CJEU brought about with *Ruiz Zambrano* and subsequent case law in itself may be qualified as a barrier to citizenship rights, in terms of legal certainly and coherence of case law. As to the (derived) rights of TCN family members, we may confirm the conclusion of our colleagues who drafted bEUcitizen Report D10.1: "*Broadly speaking there are four categories of non-EU citizens who enjoy preferential access to EU state territory: asylum seekers, the diaspora, the wealthy, and the highly skilled. Those who are not within these categories, face greater barriers to mobility*."[86] It is only within the narrow boundaries set by the Treaties and by Directive 2004/38 that TCN family members enjoy rights derived from EU citizenship.

Another issue on which there is a further need of clarification on EU level, is the notion of "public order" in the context of expulsion decisions, especially with a view to, for instance, the precarious position of Romanian and Bulgarian (Roma) nationals in **France**. Perhaps more guidance from the EU, by way of instructions to administrative authorities, may be helpful, instead of awaiting more topical case law of the CJEU.[87]

Furthermore, it may be observed from the answers given to the questionnaire in this case study that perhaps only a minority of cases concerning the use and/or limitation of free movement and residence rights (including family reunification) is challenged, and reaches the stage of judicial review by national courts. Such lack of litigation is reported in for instance **Hungary**, and the **French** rapporteur has noted that because of the complexity of the French migration laws, it is hard for individuals to know their rights. Moreover, French immigration lawyers even seem to discourage their clients from challenging decisions in court, and legal (financial) aid appears problematic. Furthermore, the **Dutch** Immigration and Naturalisation Service reportedly withdraws its decision on a formal objection just a couple of days before a court session, and therefore court proceedings are cancelled entirely for lack of cause. It happens subsequently that the Immigration and Naturalisation Service adopts a new decision, requiring a new formal objection and the instigation of new court proceedings, thereby slowing the whole proceedings down.

On a different note, the **Spanish** report emphasizes the practical problem of the long duration of national (administrative) proceedings, for lack of staff and material resources at the Civil Register. By contrast, the **Danish** report cites the comprehensive and clear (online) provision of information on Danish migration laws and procedures as a good practice.

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[86] See B. Anderson, I. Shutes and S. Walker, bEUcitizen report D10.1 "Report on the rights and obligations of citizens and non-citizens in selected countries", http://beucitizen.eu/wp-content/uploads/D10.1-Report-on-the-rights-and-obligations-of-citizens-and-non-citizens-in-selected-countries.pdf, p. 9.

[87] See also M. Dawson and E. Muir, 'Individual, institutional and collective vigilance in protecting fundamental rights in the EU: Lessons from the Roma', *Common Market Law Review* (2011) Issue 3, pp. 751–775

These observations from the national reports make clear that a risk lies in relying on CJEU case law to get clarification of EU law concepts and to ensure a uniform application of EU law throughout the Member States, since apparently only a minority of cases reach national courts. As the national reports show, a lot can be gained on the national administrative level. Although it is for the Member States to ensure that their staff is adequately trained in EU law, the Commission may support additional training projects for administrative staff and migration lawyers, information campaigns to inform citizens of their (procedural) rights, and it may be helpful to publish interpretative guidelines on certain concepts.

4.4 Recent political developments affecting migration and citizenship in the European Union

Refugee crisis

The enduring violence and war in the Middle East and Northern-Africa, most notably the civil war in Syria and the atrocities of IS in Iraq and Syria, have caused the displacement of a large number of persons in that region. Particularly since 2014, the influx of refugees and economic migrants has risen to considerable numbers. With the growing numbers of refugees crossing, or attempting to cross, the EU's external borders, political unrest has also grown in the Member States. A fierce debate has started about the tenability of the Schengen regime, resulting in Member States starting to individually perform border controls,[88] and also, convened in the Council of ministers on migration, formally asking the European Commission to extend the period of suspension of the Schengen zone from six months to two years.[89]Further restrictive measures concern the intensified control of the external borders of the EU[90], more restrictive visa requirements and procedures, and amendments to the so-called Dublin-system of asylum.

Although these measures do not usually directly affect EU citizens, but only TCNs, the refugee crisis and the ensuing measures may create a climate that is hostile towards migrants – irrespective of their country of origin. Furthermore, the fact that most refugees come from the Islamic world may have a negative impact on the way Muslims – also EU citizens - are generally seen as (not) forming part of European society, thereby potentially hampering their (EU) citizenship and civil rights in the long term.[91] These topics fall largely within the shared legal competence of both the EU and the Member States, and it is needless to say that they require continuous attention.

Terrorism

There have been terrorist attacks linked to Islamic extremism in several Member States, most recently in Paris and in Brussels. As noted in various paragraphs in Section 3 (national reports), these violent attacks and the increasing and continuous radicalization of Muslim youth who are recruited to leave their home Member

[88] European Commission 23 October 2015, on the necessity and proportionality of the controls at internal borders reintroduced by Germany and Austria pursuant to Article 24 (4) of Regulation No562/2006 (Schengen Borders Code). See: http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/borders-andvisas/general/docs/commission_opinion_necessity_proportionality_controls_internal_borders_germany_austria_en.pdf

[89] http://www.euractiv.com/section/social-europe-jobs/news/commission-schengen-suspension-could-be-extended-60-of-migrants-should-be-sent-back/

[90] Such as the Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, COM/2015/0671 final, and Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation No 562/2006 (EC) as regards the reinforcement of checks against relevant databases at external borders, COM/2015/0670 final, both proposed by the Commission on 15 December 2015.

[91] See also the blogpost by Vassilis Hatzopoulos of 3 November 2015, "Refugee flows or refugees floating? Few things the EU should be aware of." Available at: http://beucitizen.eu/refugee-flows-or-refugees-floating-few-things-the-eu-should-be-aware-of/

States and join armed combat for IS in Syria and Iraq, have caused Member States, for instance France[92] and The Netherlands (described in paragraphs 3.1.3 and 3.3.2), to take preventive and/or repressive measures that may restrict EU citizenship rights. The restrictive measures may be effective from a security point of view (which remains to be seen), but they may contribute in the long run to the sense of alienation or isolation that Muslim citizens may already experience (also since ethnic profiling by the police seems to be increasingly accepted), and generally to the polarization in European societies between Muslims and non-Muslims, "original population" and persons from a migration background. These developments may become concrete barriers to EU citizens' (and their TCN family members') rights.

Both developments, the refugee influx and the terrorist attacks in Europe, affect EU citizenship in a broader context: the notion of citizenship as equal membership, but certainly also the core citizenship rights, such as free movement rights but also nationality as a core right of EU citizens. With regard to nationality laws, attention must be drawn to the recent debates about the (widening of the) possibilities of withdrawing nationality in case of terrorism. Another issue in this respect is the discussion about the withdrawal travel documents of EU citizens who are suspected to have connections with terroristic organizations or are believed to be involved in terroristic activities.[93]

In general, these recent developments affect how citizens perceive their fellow EU citizens. The idea that citizenship constitutes a status of equal membership to a society might be at risk. The fact that Member States close their borders on their own motion (as was the case in Austria for instance) has a negative impact on the concept of the Area of Freedom, Security and Justice and the rights to free movement of EU citizens. At the same time, Member States have a dilemma: as a state they need to obey and invest in the free movement rules, as laid down in Schengen, and the free movement rights for EU citizens. On the other hand, Member States also need to protect the society at large: the 'static' EU citizens, who have not used their free movement rights. There is still a gap between those EU citizens who actually exercise their free movement rights, and those who stay in their Member State of origin. Moreover, the concept of EU citizenship erodes if the concept it itself and its accompanying aspirations 'an ever closer union' in the future, are not supported by the society at large, i.e., by EU citizens themselves. The terrorist attacks in Paris and Brussels caused fear and skepticism towards the idea of an area of free movement and Schengen. The European Commission responded, *inter alia*, by publishing a roadmap 'Back to Schengen[94]' and it proposed to revise the current European asylum system, specifically the Dublin regulation, which appoints the responsible Member State for asylum requests.[95] Both initiatives are important in the sense that they may help to reinforce or rebuilt trust in the European free movement rules and rights, by showing the adaptiveness of the system to the recent developments.

4.5 Conclusion

As observed above, the EU citizen can be defined as composite in nature, as a subject of law at the crossroads of the national and EU legal spheres. The idea of composite citizenship brings the (legal) interplay between the citizen and the various layers or parts of (national or EU) government to the foreground. The responsibilities that the various public authorities (municipal, national or European) have towards the 'composite' European

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[92] Olivier Duhamel, "Terrorism and Constitutional Amendment in France", *European Constitutional Law Review*, (2016) Issue 01, pp 1 – 5.

[93] See also bEUcitizen Deliverable 7.6 on access to travel documents, forthcoming in Spring/Summer 2016.

[94] http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/docs/communication-back-to-schengen-roadmap_en.pdf

[95] http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160406/towards_a_reform_of_the_common_european_asylum_system_and_enhancing_legal_avenues_to_europe_-_20160406_en.pdf

citizen in their respective fields of competence, as well as the fundamental rights, that the European, national or local governmental layers grant these citizens, thus become the central focal point. The 'composite' Union citizen, thus sometimes enjoys direct protection by virtue of Union law (e.g. free movement or the principle of non-discrimination), sometimes by national law implementing Union law (i.e. directives), and in yet other –he or she enjoys such protection by virtue of national legislation without any European dimension.[96] This compositeness is visible in the current report on barriers to core EU citizenship rights: an EU citizen has certain core rights based on EU law, on account of the fact that he or she is a EU citizen, but for the substance of that right he or she is mostly dependent on the substantive national laws of the Member State in which he or she resides.

[96] H. van Eijken, *EU Citizenship & the Constitutionalisation of the European Union*, Groningen: Europa Law Publishing 2015, pp. 286-274.

ANNEX I - QUESTIONNAIRE DELIVERABLE 7.3: CASE STUDY 'CORE CITIZENSHIP RIGHTS'

Extract from the DoW:

(i) A case study exploring obstacles that citizens face in trying to enjoy their core citizenship rights (e.g. right of residence in the EU). The analysis will focus on the following obstacles:

- Acquiring, keeping and regaining EU citizenship in the light of diverse national nationality/citizenship laws (e.g. limitations on dual citizenship; the granting of national citizenship to 'nationals' of a Member State living in another Member State/third country, effects of deception in application for citizenships, etc.);

- Obtaining residency rights for family members who are third-country nationals, even when the EU citizen has not exercised his or her right to free movement (in the light of national immigration rules and family laws).

INTRODUCTION

The objective of WP7 is to study, from the perspective of EU citizenship, specific problems EU citizens face in exercising civil rights and liberties in areas which fall within the scope of EU law, but also in areas beyond the scope of EU law. In the EU legal context, fundamental rights, including civil rights, have gained not only visibility but also, arguably, significance, now that the Lisbon Treaty has made the Charter of Fundamental Rights legally binding.

This case study will focus specifically on actual and potential barriers to core citizenship rights. These core citizenship rights entail, for the purpose of this deliverable, access and lose of nationality (and thereby also acquire and lose of EU citizenship status), the right to reside in a host Member State and in the Member State of nationality, the right to family life and family reunification in a Member State for EU citizens, the right to free movement of EU citizens and the derogations to those rights: expulsion measures and abuse situations. The questionnaire is built on these themes.

PRACTICAL INFORMATION AND GUIDELINES

Task leaders: Sybe de Vries, Hanneke van Eijken

Please structure the country report based on the questionnaire below (including headings).

Make sure to include precise references to constitutional, legislative and regulatory provisions, cases and other relevant policy and legal documents. We also encourage you to look for and identify relevant empirical evidence of specific obstacles to civil rights implementation and enforcement in the EU (NGO reports, statistics, press extracts, testimonies, interviews, surveys, etc)

Please note that there may be some overlap with answers given in the context of the first and second tasks (country reports for Deliverable 7.1 and 7.2), and those sought this questionnaire. In such case, we kindly ask you incorporate relevant points into this country report, using appropriate cross-referencing.

The country report should be written in English. The text of country reports should give a general overview, and should be clear, easily accessible and easy to read. If certain concepts or notions do not translate well in English, we recommend that you use both the original language as well as the most appropriate English translation the first time a concept is referred to. Later mention may be in either language. Language editing is the responsibility of each author.

Please use the Kluwer author guidelines for references and citations:
http://www.kluwerlawonline.com/files/COLA/COLAHOUSERUL2013.pdf.

Deadline for the report: 31 December 2015

Please, be reminded that the deadline is a very strict one. In case of delay, we will not be able to submit the deliverable on time.

BACKGROUND INFORMATION

The FIDE Congress of 2014 (Copenhagen) focussed, as one of the three main themes, on EU citizenship. In the general report (Union Citizenship: Development, Impact and Challenges) written by Jo Shaw and Niamh Nic Suibhne and the national reports the core citizenship rights and their transposition in the national context were analysed. The general report as well as the national reports serve as a starting point of this present questionnaire, in order to build up on the research that has been carried out by the FIDE reports. Even though the FIDE report included a wider range of topics (e.g. political rights), the information of the general report and of the national report (which were submitted in September 2013) may serve as a good starting point of analysis.

The general report can be found:
http://www.research.ed.ac.uk/portal/files/15442767/Topic_2_on_Union_Citizenship_Edit.pdf.

See also the volume with national reports: http://fide2014.eu/post-congress-materials/.

ANOTHER USEFUL SOURCE FOR INFORMATION IS THE WEBSITE OF EUDOCITIZENSHIP, ON WHICH YOU CAN CONSULT DATA WITH REGARD TO NATIONALITY LAWS. SEE: HTTP://EUDO-CITIZENSHIP.EU/DATABASES.

RELEVANT EU LEGAL INSTRUMENTS

DIRECTIVE 2004/38/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC

Treaty of the Functioning of the European Union: Article 18, Article 20, Article 21.

EU Charter: Article 7, Article 20, Article 21, Article 45.

Relevant case law:

CJEU case law on Article 20 TFEU:

C-34/09, *Ruiz Zambrano,* ECLI:EU:C:2011:124
C-434/09, *McCarthy*, ECLI:EU:C:2011:277
C-256/11, *Dereci and Others* ECLI:EU:C:2011:734
C-40/11, *Iida*, ECLI:EU:C:2012:691
C-87/12, *Ymeraga*, ECLI:EU:C:2013:291

CJEU case law on nationality:

C-369/90, *Micheletti*, ECLI:EU:C:1992:295
C-135/08, *Rottmann,* ECLI:EU:C:2010:104.

CJEU case law on EU citizenship and family life:

C-127/08, *Metock* [2008] ECR I-06241, ECLI:EU:C:2008:449
C-34/09, *Ruiz Zambrano,* ECLI:EU:C:2011:124
C-256/11, *Dereci and Others* ECLI:EU:C:2011:734
C-40/11, *Iida*, ECLI:EU:C:2012:691
C-457/12, *S. en G.*, ECLI:EU:C:2014:136
C-456/12, *O. en B.*, ECLI:EU:C:2014:135

QUESTIONNAIRE

Theme I: Access and loss of nationality and EU citizenship status

Question 1 – Access to EU citizenship: nationality

1.1. What are the national conditions to acquire nationality of your country? Are there specific rules with regard to persons, who are threatened to become stateless? Are the conditions of acquiring nationality changed under the influence of the judgment *Ruiz Zambrano* of the CJEU?

1.2. Under which conditions can nationals of your country be deprived of their nationality? Is there a difference in whether a citizen has (i) only the nationality of your country, (ii) has the nationality of another Member State of the European Union and (iii) those citizens having the nationality of your country and the nationality of a third country?

1.3. What is the current political and legislative discussion in your member state with regard to acquiring and withdrawing nationality? (e.g. In the Netherlands there is a fierce debate whether the Dutch nationality can be withdrawn of persons, who are suspected to be part of a terroristic organisation).

Theme II: Free movement rights of EU citizens

Question 2 - The right to free movement as a core citizenship right (Article 21 TFEU and the Citizens' Directive)

2.1. What conditions are laid down for EU citizens with the nationality of another Member State to reside in your country for a maximum period of three months?

2.2. What conditions are laid down for EU citizens EU citizens with the nationality of another Member State to reside in your country for a period longer than three months?

2.3. Are there any measures in your country that would prevent own nationals to use their right to free movement? (e.g. a prohibition to leave the country on ground of criminal proceedings)

Question 3 – The right to reside in the European Union (Article 20 TFEU and Directive 2004/38)

3.1. What is the current trend in case law in your country with regard to the applicability of Article 20 TFEU and references to the case *Ruiz Zambrano*? Are there specific issues noteworthy? (e.g. in the Dutch case law the question whether one or both parents of dependent children should be granted a derived residence right under Article 20 TFEU remains an important question).

3.2. What is the relation between Article 21 and 20 TFEU in national case law? Do national courts assess the scope of applicability of both articles?

3.3. According to Article 16 of Directive 2004/38 "Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there." Are there any additional conditions in your country for EU citizens to acquire a permanent residency status in your country?

Question 4 – Family Life and free movement rights

4.1. Who are defined as family members of EU citizens in your country?

4.2. Under which conditions can third country nationals have a (derived) residence right as a family member of (i) an EU citizen with the nationality of another Member State or as a family member of (ii) a citizen with the nationality of your country?

4.3. What are obstacles for EU citizens in your country with regard to family life with a third country national and or an EU citizen?

THEME III: LIMITATIONS TO CORE CITIZENSHIP RIGHTS

QUESTION 5 – EXPULSION

5.1. Please explain how the grounds of expulsion of Article 27 and 28 of Directive 2004/38 are used by national authorities and how they are referred to in national case law.

5.2. Is there evidence in decisions of the national authorities and case law that not fulfilling the conditions laid down in Article 7 (1) (b) Directive 2004/38 for the right to reside in another Member State (having a comprehensive healthcare insurance and sufficient means) leads to expulsion?

5.3. Is there evidence that in decisions of national authorities or case law a different (lower) standard of public order than prescribed by Directive 2004/38 and the case law of the CJEU is used with regard to expulsion grounds? (e.g. In the Netherlands there seems to be a tendency to ground expulsion orders on a national ground of public order, which has a lower threshold than the EU ground for public order)

Question 6 – Abuse

According to the case law of the CJEU citizens may not benefit from abusing EU law. In the case *G and S* the CJEU ruled that "Proof of such an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the European Union rules, the purpose of those rules has not been achieved, and, secondly, a subjective element consisting in the intention to obtain an advantage from the European Union rules by artificially creating the conditions laid down for obtaining it."

Could you provide information on how abuse of EU free movement rules for EU citizens is interpreted and applied by national authorities and in national case law?

Theme IV: EU citizenship core rights in practice

Question 7 – Barriers from an empirical perspective: actual barriers to core citizenship rights

What are barriers to core citizenship rights (the rights to nationality, the right to reside, the right to family life) according to legal professionals working in the field of migration law?

(Please ask a lawyer, legal officer of the national migration services for information on what the actual barriers are in your country in their perspective.)

Question 8 – Systematic or notorious deficiencies in the country under study?

Please, discuss here in detail any 'revealing' cases of weaknesses in the effective exercise of core citizenship rights in your country.

Question 9 – Good practices

Please highlight any other legal norms, policies, instruments or practical tools which facilitate the exercise core citizenship rights in the country under study.

Annexes

- ✓ National provisions

Please provide a list of the most important national legal provisions (constitutional acts, legislation, regulations, domestic transposition and implementation measures, etc) and a list of relevant cases for your Member State (name, date and publication reference).

- ✓ Bibliography

Please provide a list of what you consider the most relevant recent bibliographic sources with respect to your country. You can also suggest references to books or articles which in your view should be included in the bibliography concerning relevant EU law (limit your suggestions to a maximum of 5 references). Please mention the title in the original language and include a translation in English, in brackets.

For the bibliography only, rather than stating the foreign language title in italics, please use single quotation marks so as to distinguish it from the title of the journal.

ANNEX II – COUNTRY REPORT BELGIUM

WP 7 Civil Rights

Deliverable Case Study 7.3

EXPLORING OBSTACLES IN EXERCISING CORE CITIZENSHIP RIGHTS

Report on Belgium

CONTRIBUTOR: UA

CASE STUDY WP 7.3: EXPLORING OBSTACLES IN EXERCISING CORE CITIZENSHIP RIGHTS

Theme I: Access and loss of nationality and EU citizenship status

Question 1 – Access to EU citizenship: nationality

1.1 What are the national conditions to acquire nationality of your country? Are there specific rules with regard to persons, who are threatened to become stateless? Are the conditions of acquiring nationality changed under the influence of the judgment Ruiz Zambrano of the CJEU?

Nationality is the legal bond that connects a person to a state. In a state, the quality of national is opposite to that of foreigner. In Belgian legal doctrine nationality has been defined as the legal and political affiliation of a person to a constituted state. It belongs to the state, then, to determine under its own law who are its nationals and who are not.[97]

In this vein, the general legal framework on the conditions for acquiring nationality is established by the Belgian Constitution. Its article 18 states that the Belgian nationality is acquired, preserved and lost according to rules determined by civil law. This reference is directed towards articles 9, 10, 12, and 17 to 20 of the Belgian Civil Code. Currently, the acquisition, preservation and loss of nationality is mainly the object of regulation by special laws enacted after the Belgian Constitution entered into force. The predominant one is that of 28 June 1984 establishing the Code of Belgian Nationality.[98] This law has been amended several times, the more recent version dating from 4 December 2012.[99] This law entered into force on 1 January 2013, and has since then been the object of a judgment of 14 January 2013 and a Circular of 8 March 2013.[100] Among the main changes introduced, further

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[97] A-C. VAN GYSEL (ed.), *Les Personnes. Incapables, Droit judiciaire familial, Questions de droit International Privé (Volume I)*, Bruxelles: Bruylant 2015, p. 261.

[98] Code de la nationalité belge / Wetboek van de Belgische nationaliteit, *Moniteur Belge / Belgisch Staatsblad* 12 July 1984. The Code came into force on 22 July 1984.

[99] Loi modifiant le Code de la nationalité belge afin de rendre l'acquisition de la nationalité belge neutre du point de vue de l'immigration / Wet tot wijziging van het Wetboek van de Belgische nationaliteit teneinde het verkrijgen van de Belgische nationaliteit migratieneutraal te maken, *Moniteur Belge / Belgisch Staatsblad* 14 December 2012. The Code came into force on 1 January 2013.

[100] Arrêté royal portant exécution de la loi du 4 décembre 2012 modifiant le Code de la nationalité belge afin de rendre [l'acquisition] de la nationalité belge neutre du point de vue de l'immigration/ Koninklijk besluit tot uitvoering van de wet van 4 december 2012 tot wijziging van het Wetboek van de Belgische nationaliteit teneinde het verkrijgen van de Belgische nationaliteit migratieneutraal te maken, *Moniteur Belge / Belgisch Staatsblad* 21 January 2013. The Code came into force on 1 January 2013; Circulaire relative à certains aspects de la loi du 4 décembre 2012 modifiant le Code de la nationalité belge afin de rendre l'acquisition de la nationalité belge neutre du point de vue de l'immigration/ Omzendbrief betreffende bepaalde aspecten van de wet van 4 december 2012 tot wijziging van het Wetboek van de belgische nationaliteit teneinde het verkrijgen van de Belgische nationaliteit migratieneutraal te maken, *Moniteur Belge / Belgisch*

discussed below, are a new definition of legal residence, the marginalisation of the naturalisation procedure, and a reform of the reporting procedure.

After the entry into force of the Law of 4 December 2013, the conditions, and thus the opportunities to acquire Belgian Nationality have become stricter. At present, Belgian nationality will be granted only to those possessing an unlimited right to stay/reside on the territory. It is therefore no longer possible to make an application when the party concerned is abroad. In addition, in certain circumstances, others conditions such as social integration and effective economic participation are to be met.[101] This tightening in terms of the rules for acquiring citizenship is reflected in the number of persons that have been able to obtain Belgian nationality in recent years. When comparing the official statistics derived from the Report of 2013 on the migration and immigration of the Belgium population, a sizeable decrease can be observed. Where in 2012, 5.777 foreigners were conferred Belgian nationality,[102] in 2013 the number dropped to 3.111.[103] As indicated in the 2013 Report, the downward trend can be directly attributed to the reform of the Code of the Belgian nationality by the Law of 4 December 2012.[104]

The main prerequisites or conditions to acquire Belgian nationality differ depending on the approach taken. In Belgium there are three main channels towards this objective: *attribution, acquisition* and *naturalisation*.

Before analysing these in closer detail, it is first necessary to clarify some key concepts. For starters, it needs to be understood what counts as Belgian territory. The Code of Belgian Nationality refers expressly to the territory of Belgium. Ordinarily, this term does not create particular confusion or difficulties as the territorial borders of the Kingdom have been clearly defined. However, it is useful to specify that a Belgian embassy or consulate in a foreign country is not regarded as a part of Belgium, in terms of territory. Legal doctrine however assumes that for the purposes of nationality, the territory of Belgium does extend to aircrafts registered in Belgium while in transit, and to vessels flying the Belgian flag.[105] As regards the principle of residence, the Law of 4 December 2012 has introduced in the Belgian Code of Nationality a new definition in its article 1(2) sub 1. This provision defines the 'residence' as the place of registration in the population register, the register of foreigners or the 'waiting register'.

Staatsblad 14 March 2013. The Code came into force on 14 March 2013. See further A-C. VAN GYSEL, op. cit. (n. 1), pp. 260-261.

[101] X. MANCHA and G. GEERTS, 'Comment devenir belge?', Conseil Jeunesse Developpement avect le soutien de la Fédération Wallonie Bruxelles et de la Commission Communautaire française, 2013. The full text is available at <http://www.cjdasbl.be/wp-content/uploads/2013/04/Brochure-comment-devenir-belge-avril-2013.pdf>.

[102] According to the data contained in the *Rapport statistique et démographique 2013- Migrations et populations issues de l'immigration en Belgique*, Centre pour l'égalité des chances, 2013, p. 116. The full text is available at <http://www.diversite.be/sites/default/files/documents/publication/rapport_statistique_et_demographique.pdf>.

[103] According to the data collected by P. WAUTELET, 'La nationalité Belge en 2014 – L'Equilibre enfin trouvé?', in: P. WAUTELET and F. COLLIENNE (eds.), *Droit de L'immigration et de la nationalité: fondamentaux et actualités*, Bruxelles: Larcier 2014, pp. 273-382, p. 274.

[104] *'Rapport statistique et démographique 2013- Migrations et populations issues de l'immigration en Belgique',* op. cit. p. 112.

[105] A-C. VAN GYSEL, op. cit. (n. 1), p. 269.

The *attribution of Belgian nationality* is reserved to citizens under 18 years old. Legal doctrine has tended to distinguish the acquisition of nationality from the attribution of it.[106] The Second Chapter of the Belgian Code of Nationality (articles 8 to 12) contains the rules by which Belgian nationality is attributed, either by birth or adoption from Belgian parents, or by birth on Belgian territory. Belgian nationality is automatically granted, or granted at the request of the parents, if the relevant conditions are met with regard to the place of birth or residence. Mainly, the attribution of Belgian nationality can proceed either on the basis of filiation or adoption by Belgian parents, or by being born on Belgian territory.

For attribution of nationality on the basis of Belgian parentage, there are a number of cumulative conditions that need to be fulfilled.[107] Article 8 of the Code of Belgian Nationality requires that either one is born in Belgium (in which case, the attribution of Belgian nationality is unconditional), or one is born abroad, while the father (or the mother, or both) are Belgian and born in Belgium. In case none of the parents are Belgian but wish to obtain that nationality, they must submit (or have submitted) a declaration of parentage before the child is five years old.[108] In addition, article 10 of the Code of Belgian Nationality indicates that a child born in Belgium will be considered Belgian if it would otherwise be stateless at that moment – as long as, at any time before reaching the age of 18 (or earlier in case of emancipation therebefore), it does not obtain another nationality.[109] Additional prerequisites to be granted Belgian nationality in this way are that the child officially resides in Belgium[110] and that the parents holding Belgian nationality exercise parental authority over it.[111]

It is thus only possible under limited conditions to obtain the Belgian nationality *jure soli*, i.e. by being born on Belgian territory. According to article 11 of the Code of Belgian Nationality, this only occurs when:

- The child is born in Belgium from a Belgian father and mother who have had their main residence in the country during the last five months in the last 10 years before the child was born (the same rule applies in case of adoption);[112]
- The child is born in Belgium and holds no other nationality, i.e. it is stateless. In this case the child will obtain Belgian nationality only if his/her father, mother or legal representative proves that (s)he has made all possible efforts at his/her consulate in order to the nationality of the parent(s);[113]
- The child born in Belgium and is younger than 12 years old. The parents can request that Belgian nationality be attributed to their child if a number of conditions are met,

[106] A-C. VAN GYSEL, op. cit. (n. 1), p. 272.

[107] These are applicable both to biological filiation and to filiation by adoption. See further A-C. VAN GYSEL, op. cit. (n. 1), pp. 272 -273. See also X. MANCHA and G. GEERTS, op. cit. (n. 7), p. 5.

[108] This declaration will be done before the Officer of the Civil Status in the official place of residence of the father, the mother (or both), or in a Belgian consulate if they are living abroad.

[109] This does not apply if the child can obtain another nationality upon completion (by his/her legal representative(s)) of an administrative procedure at the diplomatic or consular authorities of their nationality.

[110] If the parents have become Belgians before the Law of 4 December 2012 entered into force (*viz.* 1 January 2013), the condition of residence in Belgium does not have to be fulfilled. See X. MANCHA and G. GEERTS, op. cit. (n. 7), p. 5.

[111] X. MANCHA and G. GEERTS, op. cit. (n. 7), p. 5.

[112] See further A-C. VAN GYSEL, op. cit. (n. 1), p. 276.

[113] X. MANCHA and G. GEERTS, op. cit. (n. 7), p. 6. See further A-C. VAN GYSEL, op. cit. (n. 1), pp. 275-6.

viz. it is born in Belgium, has resided in the country since it was born, is younger than 12 years old, and if both parents have had their main residence in Belgium since (at least) ten months before. To be attributed Belgian nationality in this manner, the parents must submit an official declaration before the Officer of the Civil Status;[114]

- Belgian nationality is attributed through the collective effect of an act of acquisition. In this regard, article 12 of the Belgian Code of the Nationality envisages the case where the parent(s) or adopter of the child become(s) Belgian only after birth or after the adoption. Belgian nationality is then also attributed to the child that is under 18 years, not emancipated before that age, and has its main residence in Belgium.

The acquisition of the Belgian nationality. This procedure is reserved to those older than 18 years old. The key condition applicable to those seeking to acquire Belgian nationality, in accordance with article 7.2 of the Code of Belgian Nationality, is that one needs to have obtained a residence permit for an unlimited duration.[115] It is also possible to acquire the Belgian nationality for a person who has resided in Belgium for five years, provided a number of additional conditions, worked out further below, are fulfilled. A similar regime applies to persons with a Belgian spouse with whom (s)he has lived for at least three years, or a child under 18. Persons who have resided in Belgium for at least five years and are handicapped, disabled or have reached retirement can also acquire the Belgian nationality under these conditions, as well as persons who have held Belgian nationality before but have lost it by forfeiture. Certain restricted periods of absence are not considered automatically detrimental.[116] After the entry into force of the Law of 4 December 2012, the main requirements to be complied with are social integration and active economic participation. If these conditions are not met, or in case of serious person-related objections, nationality can be refused.[117] Such a rejection may however be challenged in court.[118]

In the first situation mentioned above, i.e. persons above 18 who have resided since birth in Belgium, there no requirement of integration or language knowledge applies. Nonetheless, the legal residence conditions have to be met, i.e. the applicant must not only have a right of

[114] As further detailed in Article 15 of the Code on Belgian Nationality. The general rule is that the declaration is made by both parents. However, a declaration made by one of the parents is also accepted if (s)he possesses an unlimited right to reside in Belgium.

[115] To be in possession of a B,C,D,E, E+, F, F+ card or their original paper version equivalent. X. MANCHA and G. GEERTS, op. cit. (n. 7), p. 16.

[116] X. MANCHA and G. GEERTS, op. cit. (n. 7), p. 7.

[117] The description of a serious person-related objection is left to the discretion of the Public Prosecutor and the Naturalisation Commission. However, the following disqualifications have been applied: the fact of joining an organisation considered 'dangerous'; the inability to control the identity or the residence of the person concerned; a judicial sentence with a force of *res judicata*, rendered pursuant to any form of tax or social security fraud; any criminal conviction leading to a prison sentence, listed on the criminal record, unless a rehabilitation has been obtained; any circumstance that gave rise to a criminal conviction leading to imprisonment; engaging in any activity which endangers or might endanger the fundamental interests of the state. See X. MANCHA and G. GEERTS, op. cit. (n. 7), p. 15.

[118] X. MANCHA and G. GEERTS, op. cit. (n. 7), p. 7. The full acquisition procedure, also indicating where to submit claims against an adverse decision, is contained in article 15 of the Belgian Code of Nationality.

permanent residence at the moment of the request, but also must have been residing legally since his/her birth.[119]

In the second case, i.e. persons acquiring Belgian nationality after having resided in Belgium for at least five years, the conditions are a bit different. They are:

1. To have been legally resident in Belgium, without interruption, for the last five years;[120]
2. To possess demonstrable knowledge of one of the three national languages.[121] This condition is defined in article 12 paragraph 5 of the Code of Belgian Nationality, which indicates that proof must be given of a minimum knowledge of one of three national languages corresponding to level A2 of the Common European Framework for Languages. The foreigner will thus be free to choose one of the three languages, regardless of the Community of his/her residence;[122]
3. To prove his/her social integration. The legislator has listed four ways to do so in article 12bis (2)(d) of the Code of Belgian Nationality. Proof is constituted by a diploma or a certificate from a centre of education recognised or subsidised by a Community or the Royal Military Academy, at least at secondary education level; or by having completed vocational training of at least 400 hours recognised by a competent authority; or by having completed an integration course provided by the competent authority of his/her principal residence; or by having worked without interruption for the past five years as an employee in private or public service or under the primary title of the self-employed;
4. To prove his / her economic participation. In article 12bi (2)(e) of the Code of the Belgian Nationality, the legislator has listed as minimum thresholds: having worked for at least 468 days of work over the past five years as an employee in the public or private sector; or having paid in Belgium, as part of a primarily independent occupational activity, the quarterly social security contributions that are payable by self-employed for at least six quarters over the last five years.

As mentioned above, persons who have lived for at least five years on Belgian territory and have a Belgian spouse with whom they are residing for at least three years, or a Belgian child under 18 years of age, can pursuant to article 12bis paragraph 3 of the Code of Belgian Nationality also acquire Belgian nationality. Hereby the following conditions apply: being legally resident in Belgium without interruption for at least five years, being able to demonstrate sufficient knowledge of one of the three official languages in the country, and proving his/her social integration in Belgium.[123]

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[119] X. MANCHA and G. GEERTS, op. cit. (n. 7), p. 7.

[120] In case any interruption in the time period of residence has occurred, it will be necessary to prove that this interruption did not impact on the right of legal residence; see X. MANCHA and G. GEERTS, op. cit. (n. 7), p. 16; see also A-C. VAN GYSEL, op. cit. (n. 1), pp. 281-282.

[121] Dutch, French and German.

[122] A-C. VAN GYSEL, op. cit. (n. 1), pp. 283-284.

[123] Social integration can be proven in the same way as required in article 12bis paragraph 2 sub d.

In accordance with article 12bis paragraph 4 of the Code of Belgian Nationality, persons who have lived for at least five years and are handicapped, disabled or has reached retirement age (currently 67) can also acquire Belgian nationality. It is then necessary to have been legally resident, without interruption, for at least five years; the handicap must have prevented the person from having a job or engaging in other economic activity. Moreover, it must concern a permanent disability for at least 66%.[124]

A person who has had the Belgian nationality before but lost it can also re-acquire it after have been legally residing in Belgium, without interruption, for at least one year. After the amendment of the Belgian Code of the Nationality by the law of 4 December 2012, the residence on Belgian territory must be effective, i.e. it is not possible to apply for the acquisition of Belgian nationality from abroad.[125]

The final method to acquire Belgian nationality is by *naturalisation*. This procedure is regulated in section 2, articles 18 to 21, of the Belgian Code of Nationality. This route constitutes a special favour granted by the Belgian House of Representatives. It is reserved to person over 18 years of age. According to article 19, apart from that age threshold, the following prerequisites must be met: to be legally resident on Belgian territory; to demonstrate that it is not possible to start a procedure of acquisition of Belgian nationality by other means; to have evinced exceptional merits in science, sports or socio-cultural activities in the country, and thus to make a special contribution to the international reputation of Belgium. The possibility can also be granted to persons who have been stateless for over two years. To qualify for this procedure, it is necessary to remain legally resident in Belgium during the entire procedure. When taking its decision, the House of Representatives takes into special account if the claimant is integrated socially and culturally, if (s)he has knowledge of one of the three national languages.[126]

In conclusion, it should be noted that the judgement of the European Court of Justice in Case C-34/09, *Ruíz Zambrano*, has had a significant impact on the conditions for acquiring the Belgian nationality. It was this case, which originated in Germany, that actually sparked the amendment of the Code of Belgian Nationality through the Law of 4 December 2012, in order to avoid similar situations as the one in which Mr Ruíz Zambrano found himself. The rules have consequently become stricter. To this effect, article 10 of the Code nowadays indicates that Belgian is only the child born in Belgium who at any moment before turning 18 years old (or upon an earlier emancipation) would be stateless if (s)he would not possess Belgian nationality. However, this main rule is no longer applicable if the child can obtain another nationality through action undertaken by his/her legal representatives at the diplomatic or consular authorities of the country of nationality of the child's parent(s) or legal representative(s). [127] However, as rightly noted in doctrine by the Belgian scholar N. CAMBIEN, not all third countries with a *ius solis* based nationality law allow for acquisition by way of such a simple declaration. In some cases therefore, children born in Belgium to third

[124] X. MANCHA and G. GEERTS, op. cit. (n. 7), p. 9.

[125] X. MANCHA and G. GEERTS, op. cit. (n. 7), p. 10.

[126] X. MANCHA and G. GEERTS, op. cit. (n. 7), p. 12. See further A-C. VAN GYSEL, op. cit. (n. 1), pp. 289-291. See also P. WAUTELET, op. cit. (n.9) , pp. 319-328.

[127] The Belgian Constitutional Court interprets this article 10 very strictly, limiting the room to escape from this obligation.

country national parents will continue to acquire 'automatically' a Belgian nationality and therewith Union citizenship, entailing a right of residence for their parents.[128]

1.2. Under which conditions can nationals of your country be deprived of their nationality? Is there a difference in whether a citizen has (i) only the nationality of your country, (ii) has the nationality of another Member State of the European Union and (iii) those citizens having the nationality of your country and the nationality of a third country?

The Belgian Code of Nationality not only regulates how Belgian nationality may be obtained, but it also outlines different scenarios in which a person can lose it. Though overlooked or neglected for quite a long time, these have attracted considerable attention in recent years. The new-found desire to combat fraud and punish related offenses has given extra incentives for a revised approach towards the Belgian Code of the Nationality. The available data from the 1988 – 2007 period shows that on average 67 persons lost their Belgian nationality. There are some extremes such as 1995, in which year this concerned only 20, in stark contrast to 2007 when the number was 118.[129] In any case, the Code nowadays distinguishes between the loss of nationality based on *voluntary reasons, automatic loss,* and *deprivation or (judicial) forfeiture*.[130]

In regard to the *loss of the nationality based on voluntary reasons*, article 22(1) sub 2 of the Code of Belgian nationality first of all refers to persons who, having reached the age of 18, explicitly declare that (s)he renounces Belgian nationality. This declaration can be made only if the declarant proves that (s)he holds or acquires a foreign nationality.[131] This formula equals a repudiation of nationality. It correlates with article 15 of the Universal Declaration of Human Rights, which indicates that nobody can be arbitrarily deprived from his/her rights to change his/her nationality. The repudiation of nationality will not result in the claimant becoming stateless.[132] On the contrary, by deliberately preventing such, Belgian legislation takes clear account of foreign legislation with regard to nationality. The declaration of the repudiation of the Belgian nationality must be done before the Officer of the Civil Status at the official place of residence in Belgium.[133] The request will be registered in the Register designated to that effect.[134]

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[128] N. CAMBIEN, 'The Impact of Union Citizenship on Member State Immigration Laws. Some Potentially Perverse Side-Effects Resulting from Recent ECJ Case Law', 16 December 2012, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2189492>, p. 19.

[129] The data are extracted from P. WAUTELET, op. cit. (n. 9), p. 331 and from the Federal Ministry of Economic Affairs, <http://economie.fgov.be/fr/statistiques/chiffres/population/change_nationalite/perte/>.

[130] A-C. VAN GYSEL, op. cit. (n. 1), p. 291.

[131] In case the acquisition of the foreign nationality will produce effects after the declaration and the person will thus be stateless, the statement will be considered to only have legal effect at the time of acquisition or recovery of the foreign nationality.

[132] A-C. VAN GYSEL, op. cit. (n. 1), p. 291.

[133] In case the request is made abroad, it must be submitted to the head of the resident Belgian diplomatic mission or head of the Belgian consulate.

[134] A-C. VAN GYSEL, op. cit. (n. 1), p. 292.

According article 22(1) sub 3 of the Code of Belgian Nationality, the general rule with regard to a non-emancipated child who has not attained the age of 18 years and is still subject to the authority of a single parent or adopter, is that (s)he may lose the Belgian nationality as corollary of a loss by the parent or adopter. This rule follows from the idea that a minor, non-emancipated child will then obtain the new nationality of the parent/adopter. Here also, the condition remains that the child will not became stateless. However, the effect occurs only if both parents/adopters act in concert. When both parents or two adopters hold responsibility for the child, the child does not lose Belgian nationality if one of them still possesses it.[135]

With respect to *the automatic loss of the Belgian nationality*, since the entry into force of the Law of 27 December 2006, the person who voluntarily acquires a foreign nationality no longer loses his/her Belgian nationality automatically.[136] However, the forfeiture of Belgian nationality has been maintained for cases wherein the person concerned is deemed do not have any genuine attachment with Belgium. These cases come within the same scope as the voluntary repudiation of the nationality, outlined above. Nevertheless, in such cases the will of the persons concerned is not formally expressed, i.e. is implied, in contrast to when a repudiation of Belgian nationality occurs.[137]

As established in article 22(1) sub 4, the non-emancipated Belgian child who has not yet attained the age of 18 and is adopted by a foreigner couple or single parent will be granted the nationality of the adopter(s). Obviously then, it will then not lose the Belgian nationality.

Article 22(1) sub 5 indicates another situation in which Belgian nationality will automatically be forfeited. This is the case in which a Belgian is born abroad,[138] when (s)he had his/her main residence abroad even after attaining the age of 18 years, and remains abroad until the age of 21, provided (s)he does not exercise a function in Belgian public service or is employed by a company or association under Belgian law. This loss of nationality is automatic unless the person concerned expressly indicates that (s)he does not want to lose it.[139]

As regards the *deprivation of Belgian nationality*, this concerns a hefty measure that has not always existed in Belgium. The Law of 27 December 2006 nevertheless caters for that course of action, and extended the grounds for revocation to fraudulent acquisition of the Belgian nationality. The Law of 4 December 2012 has removed further conditions and provided additional grounds for a deprivation.[140] Article 23 of the Code of Belgian nationality currently enables Belgian authorities to pronounce themselves on the deprivation of nationality.

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[135] A-C. VAN GYSEL, op. cit. (n. 1), p. 292.

[136] Loi portant des dispositions diverses / Wet houdende diverse bepalingen, *Moniteur Belge / Belgisch Staatsblad* 28 December 2006. The Code came into force on 7 of January 2007.

[137] A-C. VAN GYSEL, op. cit. (n. 1), p. 292.

[138] With the exception of the former Belgians colonies.

[139] As before, this declaration should be submitted before the Officer of the Civil Status of the official place residence in Belgium. If the declaration is made abroad, it must be submitted to the head of the resident Belgian diplomatic mission or head of the Belgian consulate. See A-C. VAN GYSEL, op. cit. (n. 1), pp. 292-293.

[140] A-C. VAN GYSEL, op. cit. (n. 1), p. 293.

What makes deprivation different from the other ways of losing Belgian nationality is that it can be considered a true sanction.[141] Deprivation is indeed ordinarily presented as a civil sanction. It will usually normally be complementary to a civil or penal one, but can equally be administered as a principal sanction. Deprivation can be pronounced on the basis of a specific procedure, but also form part of other procedures (public decisions).[142] To this extent, article 23 of the Law of Belgian Nationality presents two main scenarios in which a person can be deprived of his / her Belgian nationality. First of all, if Belgian nationality has been acquired as a result of a fraudulent conduct, false information, by the use of false documents, under a false identity or by fraud in obtaining the residence right. The second scenario is when a Belgian national has seriously failed in his/her duties as a Belgian citizen.[143] A third scenario is actually where the deprivation is imposed by a judge, as a result of a sentence of unconditional imprisonment for at least 5 years.[144] Also, if the acquisition of nationality followed from wedlock, in case the latter is annulled for constituting a marriage of convenience, this may result in a deprivation of nationality as well.[145]

The revision of article 23 of the Law of Belgian Nationality by the Law of 4 December 2012 has, in the eyes of scholars, significantly broadened the possibilities for deprivation. Consequently, a person of the Belgian nationality could e.g. be considered deprived if it the person has lied about his/her birthplace, even when this element is not relevant upon the acquisition.[146] The provision also different circumstances that may be conducive to a deprivation of the Belgian nationality, e.g. when certain behaviour is engaged in that is considered particularly reprehensible by the legislator. These types of conduct are described with regard to the sanctions they might trigger, with a number of offenses falling under criminal law.[147] These are serious violations of international humanitarian law, terrorist offences, human trafficking, or certain crimes that have been committed which jeopardised state security[148].

In any case, it has to be noted that a court will not order deprivation in case the person concerned will become stateless, unless the acquisition of nationality has been the result of a fraud, supply of false information, or concealment of a crucial material fact. In that case, even if the person concerned has failed to recover his original nationality, deprivation will ensue after the expiry of a reasonable period of time granted by the court to allow him/her to attempt to do so.

1.3. What is the current political and legislative discussion in your member state with regard to acquiring and withdrawing nationality? (e.g. In the Netherlands there is a fierce debate whether the Dutch nationality can be withdrawn of persons, who are suspected to be part of a terroristic organisation).

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[141] P. WAUTELET, op. cit. (n.9), pp. 334-337.

[142] A-C. VAN GYSEL, op. cit. (n. 1), pp. 293-294.

[143] Deprivation in this second scenario is very rare, so far occurring mainly in connection acts of participation in extremist movement, as indicated by X. MANCHA and G. GEERTS, op. cit. (n. 7), p. 14.

[144] X. MANCHA and G. GEERTS, op. cit. (n. 7), p. 14.

[145] X. MANCHA and G. GEERTS, op. cit. (n. 7), p. 14.

[146] P. WAUTELET, op. cit. (n.9), p. 336.

[147] P. WAUTELET, op. cit. (n.9), p. 337.

[148] P. WAUTELET, op. cit. (n.9), p. 337 footnote 229.

Belgian nationality has been a subject of debate for a very long time. A clear example are the repeated amendments to the Belgian Code of Nationality changing (and narrowing down) the conditions for acquisition, already mentioned above. Recent (im)migration surges have reinforced the general trend, so that the debate appears far from over. Currently, the discussion mainly revolves around the possible withdrawal of the nationality for those convicted for terrorist attacks. In July 2015, after the terrorist attack on *Charlie Hebdo*, the Belgian government approved a first package of 12 measures to counter such threats. One of the measures proposed was an enhanced possibility for withdrawal of Belgian nationality, the implementation of which has been accelerated as well.[149] Currently on the table is the project of Law, document n.º 54 7798/03 of the Belgian House of Representatives, aiming to intensify the fight against terrorism.[150] One of its provisions stipulates that Belgian citizens of first or second generation may be deprived of their citizenship if they are convicted for terrorist offenses. The Law also means to deprive jihadists of any social advantage enjoyed. Thus, the proposed legislation foresees both forfeiture of the Belgian nationality and a financial sanction for those who adhere voluntarily to groups, associations or entities pledging jihadi allegiance.

Theme II: Free movement rights of EU citizens

Question 2 - The right to free movement as a core citizenship right (Article 21 TFEU and the Citizens' Directive)

2.1. What conditions are laid down for EU citizens with the nationality of another Member State to reside in your country for a maximum period of three months?

The legal framework regulating the freedom of movement of EU citizens on the Belgian territory is;

- Articles 40 to 47 of the Law of 15 December 1980 on access to the territory, residence, establishment and removal of foreigners[151]

- Articles 43 to 69 of the Royal Decree of 8 October 1981 on access to the territory, establishment and removal of foreigners[152]

- Directive 2004/38 of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely

[149] For an accessible overview, see <http://www.koengeens.be/fr/news/2015/08/25/anti-terrorisme-des-mesures-qui-tardent-a-se-concretiser>.

[150] The full test of the proposed law is available at <http://www.dekamer.be/flwb/pdf/54/1198/54K1198003.pdf>.

[151] Loi sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers / Wet betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, *Moniteur Belge / Belgisch Staatsblad* 31 December 1980. The Law came into force on 1 July 1981.

[152] Arrêté royal sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers / Koninklijk besluit betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, *Moniteur Belge / Belgisch Staatsblad* 27 October 1981. The Royal Decree came into force on 27 October 1981.

within the territory of the Member States,[153] as a background for the national transposing the Directive:

- The Law of 25 April 2007 amending the Law of 15 December 1980 on access to the territory, residence, establishment and removal of foreigners;[154]
- Royal Decree of 7 May 2008 on access to the territory, residence, establishment and removal of foreigners;[155]
- Royal Decree of 12 October 2015 amending the Royal Decree of 15 October 1981 on access to the territory, residence, establishment and removal of foreigners.[156]

In application of basic principle contained in article 21(1) of the TFEU, in Belgium every citizen of the Union is granted the right to move and reside freely within the territory of the Member State, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect. To that effect, article 40(3) of the Law of 15 December 1980 states that every citizen of the Union has the right to reside in the Kingdom of Belgium for a period of three months without any conditions or formalities other than those mentioned in article 41(1). This article 41(1) only requires the presentation of an identity card or passport,[157] in order to prove his/her status as a beneficiary of the right to move and reside freely within the EU. It moreover indicates, wholly in line with vested ECJ case law, that if the Union citizen is not in possession of the required documents, public authorities will allow him/her a reasonable time to procure the necessary instruments, so as to confirm or prove by other means that (s)he is a beneficiary of the right to move and reside freely, before further action is taken and the person is possibly expelled from the country.

With regard to the exact place of residence, according to article 5 of the Law of 15 December 1980, an EU citizen is obliged to notify the public administration of the community where (s)he prefers to be domiciled of his/her presence.[158] This notification should be submitted

[153] OJ 30.04.2004 L 158/77.

[154] Loi modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers / Wet tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, *Moniteur Belge / Belgisch Staatsblad* 10 May 2007. The Law came into force on the 10 May 2007.

[155] Arrêté Royal du 7 mai 2008 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, *Moniteur Belge / Belgisch Staatsblad* 13 May 2008.

[156] Arrêté royal modifiant l'arrêté royal du 8 octobre 1981 sur l'accès au territoire, le séjour, 'établissement et l'éloignement des étrangers/ Koninklijk besluit tot wijziging van het van koninklijk besluit 8 oktober 1981 toegang tot het betreffende of grondgebied, het verblijf tot vestiging en verwijdering van vreemdelingen, *Moniteur Belge / Belgisch Staatsblad* 4 November 2015.

[157] Residing in Belgium for a short period without being in possession of this documentation can result in the imposition of a fine of EUR 200.

[158] This does not apply when the person resides in a hotel, youth hostel or similar establishment subjected to the regulations on the control of travelers or in the hospital, according to what it is established in article 5 of the Law of 15 December 1980, in conjunction with Royal Decree of 27 April 2007 on the registration and control of travelers residing in a tourist accommodation service / Arrêté royal relatif à l'enregistrement et au contrôle des voyageurs résidant dans un service d'hébergement touristique / Koninklijk besluit betreffende de registratie en de controle van reizigers die

within three working days after the arrival in the municipality concerned. If this period is exceeded, the EU citizen risks the imposition of a fine of EUR 200. Upon notification, an official confirmation (in line with Appendix 3ter) is drawn up by way of evidence of having submitted the notification.

It goes without saying that, in application of the principles laid down by the TFEU and vested ECJ case law, failure to report one's presence to the local authorities might result in a fine, but will never constitute a ground for expelling the citizen. What is however considered a reason for loss of the residence right and possible expulsion is the fact that a citizen, not being a worker or jobseeker, has become an 'undue burden' for the state, more precisely, for the Belgian social welfare system.[159] In general, this is deemed to be the case when the persons concerned request a (non-contributory) CPA / OCMW benefit. Moreover, in accordance with article 24 of the Directive, an EU citizen and his/her family members are not entitled to social assistance or medical aid during the first three months of their stay in Belgium (and, if applicable, during a longer job search period).[160]

2.2. What conditions are laid down for EU citizens with the nationality of another Member State to reside in your country for a period longer than three months?

The applicable legal framework for long term residence in Belgium is the same one as exposed in the previous question. According to what is established in article 40(4) of the Law of 15 December 1980, every EU citizen has the right to reside on the territory of Belgium for a period of more than three months if (s)he meets the condition laid down in article 41(1), i.e. is in possession of a valid identity card or passport, or able to demonstrate by other means his/her status as a beneficiary of the right to move and reside freely within the EU. This right is not granted unconditionally and subject to the modality of activity of the person concerned.[161] Article 40(4) imposes additional conditions in this regard, further detailed below.

The *first modality* is that one can prove one holds a job or is self-employed in the Kingdom of Belgium, or in case one entered the country with the intention to look for a job, that one is actively looking for a job and that there are real chances of being engaged. The first category, i.e. being (self-)employed is considered the most protected status. An EU citizen will be automatically granted a residence permit for more than three months then. By way of extension, job seekers will be granted this right automatically as long as they can demonstrate they are actively looking for a position.[162] However, a jobseeker may be denied a residence right or be deprived of it in case (s)he is unable to prove this or (for the longer period) has a genuine change of obtaining one.[163] In order to prove one is actively seeking a

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verblijven in een toeristische verblijfsaccommodatie, *Moniteur Belge / Belgisch Staatsblad* 18 May 2007. The Code came into force on the 28 May 2007.

[159] CIRE, *Le droit de séjour des citoyens européens en Belgique'*, April 2014, p. 5.

[160] Ibid., p. 9.

[161] P. WAUTELET, op. cit. (n. 9), p. 16.

[162] P. WAUTELET, op. cit. (n. 9), pp. 16-17.

[163] According to what it is establish in article 14(4) sub b of Directive 2004/38.

job, one is expected to register at one of the unemployment offices in either the Flemish,[164] Brussels,[165] Walloon[166] or German[167] Community.

EU workers can be denied their right to reside or deprived of their residence permit in case they do not meet the conditions any longer of being a worker anymore, in accordance with what it is established in article 14(2) of Directive 2004/38. This may also occur on grounds of the public order,[168] public security or public health.[169] Taken into account must be the person's length of stay on the territory, his age, state of health, family and economic situation, social and cultural integration, and intensity of links with his/her country of origin.[170]

Both Directive 2004/38 and the Law of 15 October 1980 do contain some exceptions, on the basis of which EU citizen will still be considered employed (after having worked before) in the following situations: the EU citizen who is in temporary unable to work due to an illness or an accident, the EU citizen who finds himself in involuntary unemployment after at least one year of work and after having registered as a jobseeker in one of the employment offices; the EU citizen that is in involuntary unemployment after working under a CDD contract[171] for less than a year and has registered as a job seeker; the EU citizen engaged in vocational/professional training connected to his/her previous occupation, unless (s)he finds himself in a situation of involuntarily unemployment.[172]

For the *second modality*, pertaining to non-economically active EU citizens, article 40(4) imposes the additional condition that they possess sufficient economic resources in order to avoid becoming a burden on the social welfare system of Belgium. It will also be necessary to dispose of an all-risk health insurance. In case EU citizens become an unreasonable burden for the social welfare system of the state, the right to reside can be terminated. Such termination is however not possible for the category of EU workers and job seekers.

In order to determine what constitute sufficient resources, the Belgian Aliens Office (*Dienst Vreemdelingenzaken*) has established specific guidelines.[173] Therein, it is stated that the enjoyment of a minimum income, pension or a disability allowance in combination with a health insurance is considered sufficient. In the case the EU citizen has resources but these are not sufficient, the municipal authorities will verify if other sources of income exist, or if other persons provide such to the EU citizen. The file will simultaneously be transferred to the Aliens Office, which will take the final decision whether or not the residence right will be revoked. In case further clarifications are in order, or any necessary document is missing, the EU citizen has three months in which (s)he can present these documents to complete the file. In case the documents are presented and deemed sufficient, the EU citizen will be

[164] The unemployment institution is called VDAB. See further <https://www.vdab.be/jobs>.
[165] The unemployment institution is called ACTIRIS. See further <http://www.actiris.be/>.
[166] The unemployment institution is called FOREM. See further <https://www.leforem.be/>.
[167] The unemployment institution is called ADG. See further <http://www.adg.be/>.
[168] According to what it is established in article 27 of Directive 2004/38.
[169] According to what it is established in article 16 of the Belgian Constitution and article 27 of Directive 2004/38.
[170] *Le droit de séjour des citoyens européens en Belgique*, op.cit. (n. 63), p. 5.
[171] A contract of a determined duration, i.e. fixed-time contract / c**ontrat de travail à durée déterminée / arbeidsovereenkomst voor bepaalde tijd.**
[172] *Le droit de séjour des citoyens européens en Belgique*, op.cit. (n. 63), p. 6.
[173] The guidelines are available at: <https://dofi.ibz.be/sites/dvzoe/FR/Guidedesprocedures>.

granted immediately a registration certificate, pursuant to Annex 8, certifying the right to reside in Belgium for more than three moths. In contrast, if this timeframe is exceeded, the authority will refuse registration, and offer the citizen another month period to present with the necessary clarification/documentation. Upon a default after the expiry of this extra period, the citizen will receive an order to leave the Belgian territory. To this effect, article 42bis of the Law of 15 October 1980 indicates that the Minister of his/her delegate may terminate the right to reside to an EU citizen when the conditions established in the articles 40(4) and 40bis (1) sub 2 are not fulfilled, i.e. when (s)he constitutes an unreasonable burden for the Belgian social welfare system. However, the Minister or his/her delegate can, if necessary, undertake further verification, taking into account the temporary or permanent nature of his/her difficulties, the duration of his/her stay in the territory of Belgium, his/her personal situation and the amount of aid granted to him/her.

Correspondingly, in practice, when deciding on the termination the right of residence, the Minister or his/her delegate take into account the length of the stay of the person in Belgium, his/her age, health, family and economic situation, integration in the social and cultural life Belgium and intensity of his/her links with the country of origin. In practice, in accordance with the rules elaborated upon above, EU citizens are allowed to retain the right of residence in any case when suffering a temporary disability resulting from an illness or an accident; when in an involuntary unemployment after having been employed at least one year and having registered as a job seeker with the relevant employment services; when in an involuntary unemployment at the expiry of a fixed-term employment contract of less than a year or after having been involuntarily unemployed for the first 12 months, and having registered with the relevant employment service. In these cases, the persons concerned retain the status of worker for at least six months.[174]

A *third modality* foreseen in article 40(4) of the Law of 15 October 2015 that qualifies for granting the right to reside in Belgium for a period longer than 3 months, is that one is a student, i.e. enrolled in a recognised institution for higher education, including vocational training centres. The EU citizen sojourning as student must also be covered by an all-risk health insurance. (S)he must demonstrate to be in possession of sufficient economic resources in order to avoid becoming a burden on the social welfare system during his/her stay.[175] This financial autonomy can however relatively easily be demonstrated, either by a statement indicating the student is recipient of a grant or a loan, or by a funding commitment for the period of study by a Belgian citizen or a foreigner resident in Belgium or abroad.[176] An EU student can however be denied or deprived of the right to sojourn in Belgium in case (s)he is no longer enrolled in a recognised institution, no longer possesses the necessary health insurance, or in case that (s)he no longer disposes of sufficient economic

[174] As also already indicated above, when commencing vocational training, retention of the worker status requires that a relationship exists between the future training and the previous professional activity.

[175] For 2014-2015, the Belgian Aliens Office considers that the minimum amount considered sufficient is EUR 614 per month; see <http://inforjeunes.eu/les-demarches-pour-venir-etudier-en-belgique-le-cas-des-etudiants-non-europeens/>.

[176] In this situation, the guarantor must himself dispose of stable sufficient resources, i.e. a minimum income of EUR 1764. See <http://inforjeunes.eu/les-demarches-pour-venir-etudier-en-belgique-le-cas-des-etudiants-non-europeens/>.

resources.[177] According to what it is established in article 40(4) of the Law, the sufficient economic resources must at least match the level of income where the EU citizen does not require social assistance. As a part of the evaluation of the sufficient resources requirement will be taken into account the personal circumstances of the EU citizen, including in particular the nature and regularity of income, and the number of family members who are dependents.

2.3. Are there any measures in your country that would prevent own nationals to use their right to free movement? (e.g. a prohibition to leave the country on ground of criminal proceedings)

There are not many measures that would prevent Belgians from using their freedom of movement. As exposed in the replies to previous questions, what can first of all prevent a Belgian citizen from using his/her freedom of movement is a hypothetical loss of nationality. This can occur on a voluntary basis,[178] or follow from deprivation.[179] What could moreover be detrimental for a citizen to make use of his free movement right is a potential loss of social rights. For example, in case a Belgian national is beneficiary of unemployment fees, a period of residence longer than three years abroad entails a loss of those benefits.[180] A final measure that would assuredly prevent Belgian nationals from use their right to freedom of movement is a prohibition to leave the country, imposed in criminal proceedings. Judges may also allow for release of those in custody under certain conditions, amongst which the requirement to not leave the country. Such orders can imposed for or extended to periods of three months, or longer if properly motivated.

Question 3 – The right to reside in the European Union (Article 20 TFEU and Directive 2004/38)

3.1. What is the current trend in case law in your country with regard to the applicability of Article 20 TFEU and references to the case Ruiz Zambrano? Are there specific issues noteworthy? (e.g. in the Dutch case law the question whether one or both parents of dependent children should be granted a derived residence right under Article 20 TFEU remains an important question).

First and foremost, as already mentioned above, the *Ruíz Zambrano* judgment has had a marked impact on Belgian legislation, triggering the amendment of the Law of 15 December 1980. It introduced a new situation in article 40ter, entailing a right to family reunification of the ascendants of a Belgian citizen when the latter is a minor, accompanied by the parents in Belgium. This amendment introduced more restrictions to who could legally be considered family member of a Belgian national; to this extent, only the parents of the Belgian minor were granted the right to join the child in Belgium, with other types of ascendants excluded.

The general trend in Belgian case law in situations similar to *Ruíz Zambrano* is to analyse whether the Belgian minor has a particular dependency on his/her parents. In this vein, the

[177] *Le droit de séjour des citoyens européens en Belgique*, op.cit. (n. 63), p. 7.

[178] According to what it has been established in article 22.1 of the Belgian Code of Nationality.

[179] According to what it is established in article 23 of the Belgian Code of Nationality.

[180] <http://www.jeminforme.be/travail/travailler-a-l-etranger/demarches-avant-le-depart-a-l-etranger>.

Belgian Constitutional Court in judgment no. 121/2013 of 26 September 2013 has indicate that, by authorising in article 40ter the family reunification of a Belgian minor with his/her parents without additional conditions, in accordance with the case law of the European Court of Justice, a special relationship of dependency between the young children and his/her parents must exist and be proved.[181] Refusal of reunification with his/her family members can only be excluded when, in the factual circumstances of a specific case, this would result in the deprivation of the Belgian citizen from enjoying most of the rights conferred as an EU citizen.

3.2. What is the relation between Article 21 and 20 TFEU in national case law? Do national courts assess the scope of applicability of both articles?

As mentioned, article 40(3) of the Law of 15 December 1980 establishes that every EU citizen has the right to reside in Belgium for a period of three months without any conditions or formalities to be complied with, other than those mentioned in article 41(1). As it also mentioned, these conditions refer in particular to being in possession of a valid identity card or passport. It is equally clearly established in article 40(4) that every EU citizen can reside for a period longer than 3 months if additional conditions are met, corresponding to the terms included in Directive 2004/38/EC. These mainly relate to being a worker, self-employed, job seeker, student, having sufficient economic resources and all-risk health insurance.

In general, it may be said that distinctions between both provisions are rarely drawn by Belgian judges, and if so, do not appear wholly premeditated. To better appreciate how Belgian case law have occasionally linked the scope of applicability of article 20 and 21 TFEU, it should be noted that most decisions refusing or withdrawing the right to reside in Belgium of EU citizens are related to a failure to comply with the conditions for being a worker or job-seeker.[182] In these types of cases, Belgian courts generally asses the scope of application of both articles in disputes revolving around about the citizen's residence permit, adhering to the pertinent case law of the European Court of Justice to this extent. For example, the main competent body in such matters, the Aliens Litigation Council (*Raad voor de Vreemdelingenbetwistingen / Conseil du Contentieux des Etrangers*) held in its judgement no. 33.504 of 30 October 2009 that, since the applicant had not included in his request for a resident permit for longer than three months any document proving that he could be considered as a beneficiary of this right as a worker or job seeker, the municipal authority had every right to deny the request.[183] In close conjunction, the Council in its judgment no. 13.495 of 30 July 2008 indicates that the burden to proof to be actively working or seeking a

[181] As further discussed in S. BODART, S. SAROLEA and P. VENDERCAM (coord.), *Droit des Étrangers, Code annoté*, Bruxelles: La Charte 2015, p. 243.

[182] E. DERRIKS, K. SBAI, M. VAN REGEMORTER, *Le Droit des Étrangers, Chronique de jurisprudence 2007-2010*, Bruxelles: Larcier 2013, p. 192.

[183] As discussed in E. DERRIKS, K. SBAI, M. VAN REGEMORTER, op. cit. (n. 86), p. 193. The full judgment can be accessed at <http://www.rvv-cce.be/fr/arr>. Other rulings of the Aliens Litigation Council in the same sense are the judgment no. 12.1364 of 30 May 2009 and judgment no. 14.163 of 29 July 2008, among others.

job, in order to obtain a delay in the review of his application, lies squarely on the applicant.[184]

Another relevant aspect in the application of article 20 and 21 TFEU, evidencing that both are often considered together in Belgian case law, pertains to the interpretation of the condition of having sufficient economic resources. In this vein, the Aliens Litigation Council in its judgment no. 41.638 of 16 April 2010 indicated that the amount the applicant must attain has to match at least the income level below which a social assistance may be granted.[185] Relatedly, in its judgment no. 12.171 of 30 May 2008, the Aliens Litigation Council ruled that an amount solely received by the applicant from the CPAS/OCMW cannot be considered as sufficient economic resources, thus disqualifying him under both article 20 and 21 TFEU.[186]

3.3. According to Article 16 of Directive 2004/38 "Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there." Are there any additional conditions in your country for EU citizens to acquire a permanent residency status in your country?

In accordance with the guidelines provided by the Aliens Office, the main prerequisites for obtaining the right of permanent residence in Belgium are:[187]

- the EU citizen must be authorised to stay in Belgium for an unlimited period of time;
- the EU citizen must have resided legally and continuously in Belgium during the five years immediately preceding the application for the status of long term resident;
- the EU citizen must have a stable, regular and sufficient means of subsistence to meet the needs and those of his/her family members who are dependent on him/her so as to avoid becoming a burden on to the Belgian Government;
- the EU citizen must have a health insurance covering all risks in Belgium;
- the EU citizen must have a valid ID card or valid passport;
- the EU citizen must not pose any risk to public order or national security.

In essence therefore, no additional conditions apply in Belgium for EU citizens to acquire a permanent residence status. As stated in article 42quinquies of the Law of 15 October 1980, such permanent right of residence will be recognised to the EU citizen referred to in article 40(4) of (i.e. a worker, self-employed or job seeker or EU citizen with sufficient economic resources or student), as long as (s)he meets the conditions mentioned in that provision, and (s)he has resided in Belgium for a (continuous) time period of 5 years. This right may be granted to the family member of the EU citizen also.[188]

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[184] Ibid., p. 193.

[185] Ibid.

[186] As discussed in S. BODART, S. SAROLEA and P. VENDERCAM, op. cit. (n. 85), p. 243. The full judgment is accessible at <http://www.rvv-cce.be/fr/arr>.

[187] As derived from the website of the Aliens Office itself, <https://dofi.ibz.be/sites/dvzoe/FR/Pages/Le_statut_de_resident_de_longue_duree_accorde_par_la_Belgique.aspx>.

[188] In case the family member are non-EU citizens only if they were jointly residing with the Union citizen during this period, or if they can claim an autonomous right under Directive 2003/109/EC.

Regarding the period of time, the continuity of residence is not affected by temporary absences not exceeding a total of six months per year, neither by longer absences due to compulsory military services, or one absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training outside Belgian territory. At the request of the EU citizen and after verification of the length of stay in the country by the Minister or his/her representative, a document certifying the right of permanent residence is issued to the EU citizen. The application for the permanent residence permit must be done before the expiry of the period of validity of the residence permit obtained before.[189] In case the application is not made in time, the Minister or his/her delegate may impose an administrative fine of EUR 200.[190] The right of permanent residence shall however be lost in case of absence from the Kingdom of Belgium for a period exceeding two consecutive years.

Article 42septies establishes that the Minister of his/her delegate may refuse the entry to Belgian territory or put an end to the right of residence of an EU citizen or the member of his/her family when (s)he or any of his family member have supplied false or misleading information, false or falsified documents, or have engaged in fraud or other illegal activities that have been decisive for the recognition of the right to permanent residence.

An EU citizen or his/her family can be deprived of the right to permanent residence in accordance with article 43 of the Law of 15 October 2015 for reasons of public order, national security or public health. However, these may not be invoked for economic purposes, the measures of public order or national security must respect the principle of proportionality and be based exclusively on the personal conduct of the concerned EU citizen,[191] and in case of expulsion based on public health, only the diseases listed in the Annex of the Law of 15 October 1980 may justify a refusal of access to or residence in Belgium.[192] Moreover, if an EU citizen falls ill after a period of three months following the entry into the territory, this reason cannot justify the expulsion. In any event, when the Minister or his/her delegate takes a decision of put an end to the right of permanent residence of an EU citizen and/or his/her family members on grounds of public order, national security or public health, the length of stay, the age, family situation, economic situation, social and cultural integration and intensity of the links with the home/host country will be examined.

Question 4 – Family Life and free movement rights

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[189] According to article 42(3) of the Law of 15 October 1980.

[190] This fine is levied in accordance with article 42octies of the Law of 15 October 1980.

[191] In accordance with vested ECJ case law and the terms of Directive 2004/38, the existence of previous criminal convictions shall not in themselves constitute grounds for such measures. The behaviour of the EU citizen concerned must represent a genuine, present and sufficiently serious fundamental interest of society justifications linked to the individual case or relating to reasons of general prevention cannot be accepted.

[192] The annex lists as illnesses that may endanger Belgian public health all the quarantine diseases referred to in the International Health Regulation of the World Health Organization (Geneva 23 May 2005), as well as tuberculosis of the respiratory system, and other infectious or contagious parasitic diseases insofar as they are, in Belgium, subjected to protective measures in relation to nationals.

4.1. Who are defined as family members of EU citizens in your country?

As stated in article 40bis (2) of the Law of 15 October 2015, as family members of the EU citizen can be considered:

1. The spouse or the foreigner with whom (s)he is bound by a registered partnership considered equivalent to marriage in Belgium, who accompanies or joins the EU citizen in Belgium. The definition of registered partnership on the basis of foreign law considered equivalent to a marriage in Belgium is established in article 4 of the Royal Decree of 7 May 2008 implementing certain rules of the law of 15 December 1980 on access to the territory, residence, establishment and removal of aliens.[193]

2. The partner to whom the EU citizen is linked by a registered partnership, where this partner accompanies and joins him/her. In this case the conditions apply that:
* the EU citizen and his/her partner maintain a lasting, stable, duly established relationship;[194]

* both partners are over 21 years of age;

* neither partner is in another lasting stable relationship with another person;

* neither partner is a person referred to in articles 161-163 of the Belgian Civil Code, i.e. persons bound by family links with a degree of consanguinity that prohibits the marriage between them;

* neither partner is the partners have been subjected to a decision based on article 167 of the Belgian Civil Code with force of *res judicata*.[195]

3. As family member of an EU national are also considered the descendants, including the descendants of the spouse or partners under 21 years old, or those that are dependants. These descendants must join or accompany the partners. This situation supposes that the EU citizen, his/her spouse or registered partner enjoys the custody over the descendants; in cases of shared custody, the other parent or custodiant of the descendant will have to give his/her consent as applicable;

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[193] See further I. DOYEN, 'Le Droit au Regroupement familial en mutation. Aperçu des Principes et de la Jurisprudence depuis la Loi du 11 Juillet 2001', in: P. WAUTELET and F. COLLIENE (Coord.), *Droit de L'Immigration et de la Nationalité: Fondamentaux et Actualités*, Bruxelles: Larcier 2014, p. 181.

[194] The lasting and stable nature of the relationship is demonstrated if the partners prove they have lived in Belgium or another country without interruption for at least one year before the application; or in case the partners prove that they have known for at least two years preceding the application and can provide evidence that they have maintained regular contact by phone, regular or electronic e-mail and have met at least three times during the last two years before the application. The duration of these meetings must have had a total of 45 days or more. Another way to demonstrate the existence of a stable relationship is that the partners have a common child.

[195] I.e. an earlier decision taken by a registrar to refuse to celebrate a marriage because the qualities and conditions laid down to enter into a marriage were not satisfied, or because he believed that the celebration of the marriage would be contrary to the principles of public order.

4. Ascendants of the EU citizen and ascendants of his/her spouse or partner will also be considered as family members, provided the partners are married or registered in a form equivalent to marriage. These ascendants must be dependants of the EU citizen or the partner and have to accompany or join them. By way of exception, the ascendants of an EU citizen who has a residence permit as a student will not be covered by the right of residence as a dependent ascendant;[196]

5. As family members will also be considered the parents of an EU citizen under 18 years. In this situation however, the minor must possess an unlimited right to reside in the country, and must dispose of sufficient economic resources. Moreover, the parents must enjoy the legal custody of the child.[197] This new category was introduced by the Law of 19 March 214, amending the Law of 15 December 1980 on access to the territory, residence, establishment and removal of aliens.[198] In this amendment, the Belgian legislator has transposed the ruling of the ECJ in Case-200/02 *Zhu and Chen* of 19 October 2004.[199]

On the aside, the Law of 19 March 2014, also introduced a new article 47(1) in the Law of 15 December 1980 in order to effectively transpose the article 3(2) of the Directive 2004/38/EC. It enjoins Member States to facilitate under their national legislations the entry end right to reside of the 'extended family'.[200] Thus, according to the article 47(1) of the Law of 15 December 1980, as family members of an EU citizen will also be considered any other members of his/her family where in the country of origin there are dependents or members of the household of the EU citizen. These family members must have the same main residence, and in case of serious health reasons, the EU citizen must personally be taking care of the family member concerned.[201]

4.2. Under which conditions can third country nationals have a (derived) residence right as a family member of (i) an EU citizen with the nationality of another Member State or as a family member of (ii) a citizen with the nationality of your country?

Article 40bis (2) of the Law of 15 December 1980 provides that the family members of an EU citizen have the right to accompanying and join him/her as long as certain conditions are met. This same right is granted to family members of a Belgian citizen in article 40ter of the Law.[202]

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[196] I. DOYEN, op. cit. (n. 97), p. 182.

[197] Ibid., pp. 182-183.

[198] Loi du 19 Mars 2014 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers / Wet tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, *Moniteur Belge / Belgisch Staatsblad* 5 May 2014. The Law enter into force on 15 May 2014.

[199] The summary is taken from I. DOYEN, op. cit. (n. 97), pp. 182-183.

[200] Ibid., p. 183.

[201] Ibid.

[202] E. DERRIKS, K. SBAI, M. VAN REGEMORTER, op. cit. (n. 86), p. 194.

In Belgium, there is single way of family reunification. However, in all relevant procedures the following general common principles apply:[203]

* the application for family reunification must be done abroad, at a Belgian diplomatic or consular office of the place of residence of the applicant. Nonetheless, there are some exceptions to this general rule that will allow in certain circumstances to submit the application directly in Belgium;[204]

* the foreigner wishing to join his relative (EU citizen, Belgian citizen or third country citizen) – must prove a family link exists between them.[205] This proof must consist of official or other valid, persuasive documents;

* the person who enables the right of residence for the purposes of family reunification must him/herself possess an unconditional right or residence in Belgium.

In line with the question posted, may distinguish between family reunification of third country nationals with an EU citizen who is national of another Member State, and family reunification with a Belgian citizen.

1. Family reunification with an EU citizen national of another Member State.

If an EU citizen enjoys in Belgium the right to reside as a worker or job-seeker or student, family reunification with another EU citizen is not subjected to any special conditions. This does not mean however that no requirements can be imposed with regard to the quality of the 'sponsor', i.e. the person with whom the latter will be reunited.[206] In this vein, article 41(2) establishes that free entry into the Belgian territory is granted to the family members of the EU citizen, referred to in article 40bis (2). The family member who is not an EU citizen must however present a valid passport, and depending on the nationality, a valid entry visa pursuant to Regulation 539/2001 listing the third countries whose nationals are subjected to the visa requirement when crossing the external borders of the Member States and those whose nationals are exempted from that requirement. When the family member of an EU citizen is not in possession of the required documents, the Minister or his/her delegate will allow him/her to enable to procure the required documents within a reasonable amount of time, or to corroborate or prove by other means that (s)he is a beneficiary of the right to move and reside. As article 41(2) of the Law of 15 December 2015 makes clear though, the possession of a family member residence card or permanent residence card for family

[203] F. COLLIENNE and P. WAUTELET, 'Introduction Générale – ou le Droit des Étrangers pour les non Initiés', in: F. COLLIENNE and P. WAUTELET (coord.), *Droit de l'Immigration et de la Nationalité: Fondamentaux et Actualités*, Bruxelles: Larcier 2014, pp. 48-49.

[204] The application must be made by the family member seeking to join the EU citizen residing in Belgium.

[205] By marriage, partnership, filiation, etc.

[206] I. DOYEN, op. cit. (n. 97), p. 197.

members of an EU citizen[207] exempts the family member of an EU citizen from the entry visa requirement.

The main aspect to be taken into account here is that the stay of the family member is based on the possession of sufficient means of subsistence. If this is the case, then the sponsor must prove (s)he has sufficient resources to maintain his/her family member(s) in Belgium.[208] To this end, as indicated in article 40(4)(2) of the Law of 15 December 2015, the sponsor must demonstrate that (s)he is in possession of sufficient resources guaranteeing that his/her family members do not become a burden to the social welfare system of the state, and that (s)he disposes of a health insurance that covers all the risks of his/her family members in Belgium.

In accordance with EU law, no special requirement applies however to the origin of the financial resources, and the income of the partner residing in the host state must be taken into consideration even in the absence of an agreement before a notary containing an assistance clause.[209]

As article 42(3) of the Law of 15 December 1980 makes clear, the right of residence of the family members of an EU citizen who are not themselves EU citizens is confirmed by a residence permit. The validity of the permit is equal to the expected length of the one granted to the EU citizen whom they accompany or join, and shall not exceed five years from the date of issue.

Article 42quattur lists the grounds on which a third country family member of an EU citizen can be expelled, namely:

* If the right of residence of the EU citizen to they accompanied or joined has expired;

* If the EU citizen they accompanied or joined leaves the country;

* If the EU citizen they have accompanied or joined dies;

* If the marriage with the EU citizen they have joined or accompanied is dissolved or annulled, or the registered partnership has ended;

* If the family members of the EU citizen, referred to in article 40(4) sub 2 and sub 3 imposes an unreasonable burden on the social welfare system of Belgium.[210]

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[207] I.e. the card issued on the basis of the Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of EU citizens and their family members to move and reside freely within the territory of the Member States.

[208] I. DOYEN, op. cit. (n. 97), p. 197.

[209] Ibid., pp. 197-198.

[210] To determine whether the family members of the EU citizen constitute an unreasonable burden on the social welfare system of Belgium, taken into account is the possibly temporary character of their difficulties, the duration of their stay in Belgium, the personal situation and the amount of the aid granted to the family members.

Again, the Minister or his/her delegate, in the decision to terminate the residence right, must take into account the length of stay of the person concerned, his/her age, health, family and economic situation, social and cultural integration and intensity of its links with the country of origin.

These general rules will however not apply to descendants in the first line of an EU citizen who reside in Belgium and are enrolled in an educational institution. It will not apply either to family members who have resided for at least a year in Belgium and are able to prove that they are workers or self-employed in Belgium, or that they have for themselves and their family members sufficient economic resources so as not to become a burden to the social welfare system. In addition, they must prove that they are in possession of a health insurance covering all the risks in Belgium and/or their family members. As indicated in article 42quattur (4), the general rules will not be applicable either when the marriage, registered partnership has lasted for at least 3 years, and they have lived together for at least one year in Belgium; when the right to custody of the EU citizen, residing in Belgium, was granted to the spouse or partner who is not an EU citizen, by agreement between the spouses; and in particularly difficult circumstances, such as when the family member has been the victim of domestic violence in the context of marriage or registered partnership.

2. - Family reunification with a Belgian citizen

The prerequisites for a family reunification with a Belgian citizen are established in article 40ter of the Law of 15 December 1980. For the sake of clarity, it is has to be noted that cases of family reunification of a Belgian citizen with a third country national are not covered by EU law, but principally governed by Belgian domestic law. However, if the family member of a Belgian national is an EU citizen, the provisions of Belgian Law that correspond with those adopted for the transposition of the Directive 2004/38/EC will be applicable as well. Before detailing these further, it needs to be clarified which are considered family members of Belgian citizens. In this regard, the Law of 8 July 2011[211] has modified the concept of beneficiary of family reunification of a Belgian citizen.[212] In particular, it has excluded from the concept of family members the ascendants of a Belgian citizen, but has included as family members, in the wake of the *Ruíz Zambrano* case, the foreign parents of a Belgian child.[213] It has also excluded from the concept of family member of the Belgian national the 'extended family', in contrast to the regime applicable to the EU citizen.[214] Consequently, as family members of a Belgian national are nowadays considered:[215]

[211] Loi du 8 juillet 2011 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers en ce qui concerne les conditions dont est assorti le regroupement familial / Wet tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen wat betreft de voorwaarden tot gezinshereniging, *Moniteur Belge / Belgisch Staatsblad* 12 September 2011. The Law entered into force on 22 September 2011.

[212] In order to avoid contamination with the family members of an EU citizen.

[213] I. DOYEN, op. cit. (n. 97), p. 184.

[214] Ibid.

[215] Ibid., pp. 184-185.

* the foreign spouse to whom the Belgian citizen is bound by a registered partnership, marriage or bond considered equivalent in Belgium;[216]

* the partner to whom the EU citizen is bound by a registered partnership, marriage or equivalent, in accordance with law, who accompanies or joins the EU citizen in Belgium;[217]

* one's descendants and the descendants of the spouse or registered partner. These descendants must be under 21 years old and be joining or or accompanying his/her parents;

* the father and the mother of a Belgian minor, accompanying and joining their child.

Article 40ter of the Law of 15 December 1980 thus provides for a more narrow scope of 'family member' and stricter prerequisites than those applicable to EU citizens. The main conditions that continue to apply a stable and regular household, sufficient resources, and an all-risk health insurance for her/himself and his/her family members.[218] However, to the minor child of not yet 18 years old, exceptions may be granted to the foregoing requirements, in the context of a marriage or established partnership equivalent to marriage in Belgium.[219]

4.3. What are obstacles for EU citizens in your country with regard to family life with a third country national and or an EU citizen?

The main obstacle for EU citizens regarding their family life with a third national or another EU citizen is to fulfil the prerequisite of not becoming a burden on the Belgian social welfare system.[220] To this extent, the position of the Aliens Litigation Council, as well as the prevailing sentiment in politics and as expressed by the legislature, is to subordinate the right of residence in order to protect the (sustainability of) Belgian public finances. As elsewhere, this posturing can largely be explained by a fear of so-called 'benefit tourism'. The main discussion thus pertains to determining the nature of a 'sufficient' and 'stable' income. Some illustrations will be provided in the next paragraphs.

The Council of the State for instance, in its reply to question no. 9227 of 20 November 2012, confirms the reading of Aliens Litigation Council of article 40ter of the Law of 15 December 1980, considering that the conditions of that article were not met in the case at hand; the latter basically held that particular revenues accruing to an elderly person had to be regarded as falling into the category of complementary resources from assistance schemes, and cannot be taken into account in the assessment of sufficient resources, as referred to in article 40ter.[221]

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[216] Both partners must be older than 21 years old.

[217] A minimum age of 21 applies, which can however be lowered to the age of 18 years if the partners can prove the existence of a marital link before coming to Belgium.

[218] I. DOYEN, op. cit. (n. 97), p. 198.

[219] I. DOYEN, op. cit. (n. 97), pp. 198 – 199.

[220] This may be extended to Belgian nationals seeking reunification with a third country national.

[221] As discussed further in S. BODART, S. SAROLEA and P. VENDERCAM (coord.), op. cit. (n. 85), p. 248.

In turn, the Aliens Litigation Council, in its judgment no. 12.171 of 30 may 2008 has clarified what it understood as sufficient economic resources and the relation to the social welfare systems of the state, i.e. the funds dispensed through the CPAS or OCMWs.[222] It here ruled that a certificate of CPAS attesting that the applicant only receives emergency medical support cannot constitute proof that he can be deemed to dispose of sufficient resources himself, in order to allow his son to fully benefit from their right to free movement. [223] In similar vein, the Aliens Litigation Council in its judgment no. 103.342 rendered on 23 May 2013 decided that as the applicant's partner did not possess of sufficient resources, in light of the average means required to ensure a sustainable household, it could not be ruled out that he would become a burden on the public welfare system. In this regard, the Council observed that article 42(1)(2) of the Law of 15 December 1980 presupposes the existence of a stable and regular income of the person seeking the reunification, which was not the case here, since the applicant's partner was (in need of) receiving financial assistance from a third party. The defendant (representing the government) thus rightly considered that this aid could not be considered a steady income within the meaning of article 40ter of the Law of 15 December 1980.[224]

We may equally point to the judgment no. 118.833 of the Aliens Litigation Council rendered on 13 February 2014. It makes clear that the revenues of the applicant as an interim worker constituted temporary income, and thus is by definition uncertain and flexible. In result, income from temporary or interim work is not considered as a stable and regular income falling within the scope of article 40ter of the Law of 15 December 1980.[225]

An interesting situation arose in the case that gave rise to judgment no. 121.650[226] of the Aliens Litigation Council rendered on 27 March 2014. Here, the applicant criticised that the defendant did not take into account his revenues as a temporary worker either, though it ensured a regular and stable household, so that it could be considered as sufficient economic resources. The Council again stresses that temporary work is by definition uncertain and flexible and, therefore, that the revenues as such could not be considered stable and regular. On top of this, the Council notes that the applicant produced only five temporary employment contracts, one per worked day, so that in total there was only evidence of five days of work.[227]

Additional barriers that may be encountered in the reunification procedure are *inter alia* the non-recognition of a genuine marital life, difficulties in proving that the ascendants are dependants, non-recognition of foreign legal acts, not being offered access to proper accommodation, or to see visa refused. A sample of cases will be highlighted in what follows.

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[222] CPAS or OCMWs are centres for social action. They deliver a number of social services and ensures the well-being of every citizen. Each city or town has its own office, offering a wide range of services. Offered by these institutions are *inter alia* financial aid, housing, medical aid, home care, mediations in debts, counselling and legal aid.

[223] As discussed in S. BODART, S. SAROLEA and P. VENDERCAM, op. cit. (n. 85), p. 243. The full text of the Council's judgments is accessible at <http://www.rvv-cce.be/fr/arr>.

[224] Ibid., p. 248.

[225] Ibid.

[226] Ibid., p. 248-249.

[227] Ibid., p. 248.

In judgment no. 226.914 of 27 March of 2014 regarding the refusal of a visa, the Council of State indicates that, contrary to article 40ter of the Law of 15 December 1980, article 9(1) provides that only the Minister or his/her representative can authorise a foreigner who does not fall within the scope of application of article 10 to reside longer than expected under article 6 of the Law. Thus, while article 40ter grants the right to residence, article 9(1) regulates the permission to reside, so that it cannot be deduced that article 9(1) allows for delegation in article 40ter.[228]

In relation to the marital link, judgment no. 1397 of the Aliens Litigation Council rendered on 28 August 2007 sets down that the notion of marital life provided for in article 40(6) of the Law of 15 December 1980 does not imply an effective cohabitation, but that in general terms, a marital link will still only be recognised if there has existed a minimum form of cohabitation and a shared household between the spouses.[229]

As regards proving that one takes care of an ascendant, so that the latter can be considered a dependant, in judgment no. 155.694 rendered on 1 March 2006, the Council of State ruled that the argument of the applicant, mainly based on medical reasons and old age, did not sufficiently prove that the son was taking care of old and ill parent. Merely being 'in charge' can thus not be assumed on the basis of the applicant's statements and opinions.[230]

THEME III: LIMITATIONS TO CORE CITIZENSHIP RIGHTS

QUESTION 5 – EXPULSION

5.1. Please explain how the grounds of expulsion of Article 27 and 28 of Directive 2004/38 are used by national authorities and how they are referred to in national case law.

Expulsions based on the principles of public security, public order and public health are regulated in article 43 of the Law of 15 December 2015. The measures of public order or public security under article 43, terminating the right of residence or establishment of an EU citizen, represent an expulsion decision referred to in article 20 of the Law of 15 December 1980. Article 20(3) of that Law provides that an expulsion decision must be exclusively based on the personal conduct of the EU citizen.[231] This provision has to be understood as an requirement for the authorities engage in a specific appreciation, in the interest of the public order or public security itself. The outcome does not have to coincide with a (subsequent) appreciation in a penal sentence.[232]

In the same vein, article 43 of the Law of 15 December 1980 states that the entry to or residence on Belgian territory may be denied to EU citizens and their family members for

[228] Ibid., p. 250.
[229] Ibid., p. 242.
[230] Ibid.
[231] Ibid., p. 134.
[232] Ibid.

reasons of public order, national security and public health, but within certain limitations. The abovementioned grounds cannot be invoked for economic reasons or when the document allowing the entry and the residence in Belgium has expired. Only the diseases listed in the annex of the Law of 15 December 1980 constitute a justification of the refusal to entry or termination of the residence permit. It must be noted that the scope of application *ratione personae* of article 43 is exclusively EU citizens and their family members.

The Law further indicates in the same provision that the measures based on public order or national security must respect the principle of proportionality. Moreover, they must be based on the personal conduct of the individual concerned. The existence of a previous criminal conviction shall not constitute in itself a ground for such a measures; it is required that the behaviour of the concerned individual must represent a genuine, present and sufficient serious menace for the fundamental interest of the Belgian society.

Relatedly, the judgment no. 83.750 of the Aliens Litigation Council rendered on 27 June 2012 ruled that, by refusing the applicant a residence permit as a family member of an EU citizen based on his conviction of 20 July 2004 by the Criminal Court of Mons, by the Criminal Court of Charleroi on 15 April 2005, and by the Mons Court of Appeal on 13 August 2009, it failed to determine whether his personal conduct constituted at the time of the examination of the residence permit requested a genuine and sufficiently serious menace for the Belgian society. The defendant party thus breached article 43(1)(2) and wrongly interpreted that the refusal was compatible with the case law of the European Court of Justice. The reference made to the (potential) recidivist character of his activities was not enough to indicate that the administration duly assessed the actual personal behaviour of the applicant.[233]

In its judgment no. 105.770 rendered on 25 June 2013, the Aliens Litigation Council the Council decided that it could only conclude that the lack of offenses committed by the applicant since 2006 demonstrated an error of appreciation from the part of the defendant, regarding the degree of risk the applicant presented to the public order at the moment of the request.[234]

By way of conclusion, we may point to judgment no. 107.819 of the Aliens Litigation Council of 31 July 2013, in which it concluded that the persistent engagement in criminal activities of the person concerned (convictions in 2004, 2005 and 2009) was duly appreciated by the defendant as a live and current danger for the Belgian public order. In the contested decision, the defendant also took into consideration that it was not apparent from the track record that the degree of risk had diminished. Yet, it still failed to indicate or explain explained why it would meet the threshold of a genuine, current and sufficient menace for a fundamental interest of society.[235]

5.2. Is there evidence in decisions of the national authorities and case law that not fulfilling the conditions laid down in Article 7 (1) (b) Directive 2004/38 for the right to reside in another Member State (having a comprehensive healthcare insurance and sufficient means) leads to expulsion?

[233] Ibid., p. 275.
[234] Ibid., p. 276.
[235] Ibid., p. 276.

One leading reason for the expulsion of EU citizens from Belgium is indeed that they do not have sufficient means, thus disqualifying themselves from the right to residence under the terms of Directive 2004/38. In 2013 and 2014 the Belgian authorities, retracted the residence permit of an average of 2.700 EU citizens, for one and the same reason: insufficient resources, so that they are likely to constitute a burden on the domestic social welfare system. After an amendment of the Law of 15 December 2011 in 2015, the conditions for EU citizens to establish themselves in Belgium have become even stricter. This can be attributed to the difficulties experienced in forming the federal government of Elio Di Rupo, for which the different political parties had to reach an agreement. Part of the deal was that immigration portfolio would be granted to the Flemish Liberal Party, Open VLD, more precisely on Ms. Maggie De Block. Ms. De Block was simultaneously entrusted the social integration portfolio.[236] This combining in one person of these two portfolios resulted in the fusion of two relevant databases, viz. the database of the beneficiaries of social benefits with the database on employment. The additional novelty was to fix a minimum amount for EU and third country families to allow for their (continued) lawful stay on the territory of Belgium. The prerequisite to not be considered a burden on the public welfare system was to dispose of an income of 120 % of the minimum revenue that qualifies for social assistance, i.e. an amount of +/- EUR 1.300 per month. Consequently, to the mind of the competent Belgian authorities, an EU citizen will be considered a burden when e.g. a low pension is compensated with financial assistance from CPAS/OCMW.[237] In other cases, numerous situations were exposed in which the EU citizen did not work for a sufficient period of time in Belgium to be able to claim unemployment benefits, but received CPAS/OCMW subsidies or employability aid. Yet, to obtain CPAS/OCMW support means the EU citizen admits to fall under the 120% of minimum income threshold required to not become a burden for Belgian welfare system; thus, (s)he is poised to be expelled from the county.[238] To be sure, not in all such cases actual expulsion has followed, yet the residence card will be withdrawn, which may result in a form of 'administrative death'.
Rising in protest against this strategy, especially spurred by the fact that one of the largest groups of EU citizens expelled from Belgium are Spanish, the organisation *15M Bruselas Marea Granate* has presented a petition to the European Parliament regarding the violation by the Belgian Government of the rights of freedom of movement and residence of EU citizens on its territory. [239] In response to this complaint, the Parliament answered on 29 September 2009 in the following terms:

Belgium has set up a system of automatic exchange of data between the administrations in charge of social assistance and the support of foreigners. After a number of months of entitlement to social assistance, the Office Foreign receives information and can then check whether the EU citizen concerned continues to meet the conditions of legal stay in Belgium. The data exchange is immediate when the European citizen applies for registration in Belgium. The Commission is currently in discussions with the Belgian authorities. These

[236] P. SIMÓN, 'Por qué expulsan a los españoles de Bélgica?', <http://politikon.es/2014/02/15/por-que-expulsan-a-los-espanoles-de-belgica/>.
[237] Ibid.
[238] Ibid.
[239] The full text of the petition can be found on <http://mareagranate.org/wp-content/uploads/2014/05/Peticion-sobre-expulsiones-directiva-200438.pdf>.

discussions have clarified the nature of several particular employment contracts.[240] According to information provided by the Belgian authorities, they no longer consider such employment contracts as an element that could lead to an examination of the withdrawal of the residence permit. Discussions are still ongoing between the Belgian authorities and the Commission, within the framework of EU-PILOT, concerning the exchange of data and the administrative implementation of the procedure for notification of a withdrawal of the residence permit, as well as on the implementation of the procedure for the unemployed who have worked in Belgium. A further important point to clarify pertains to the information given to EU citizens during the procedure and the possibility for them to be heard and respond to the arguments advanced by the Belgian administration to justify a possible order to leave the territory.[241]

Further follow-up to this campaign has not materialised so far. The Aliens Litigation Council has dealt with a number of complaints related to this situation but not exhibited substantial tolerance. Thus, in for example judgement no. 223.807 of 11 June 2013, it underlined that the fact that the person concerned received help from CPAS could be taken to imply the absence of any means of subsistence for the purposes of the article 40ter. Since income from supplementary schemes is to be excluded from the assessment, the defendant could entertain no reasonable doubt that there were not enough means for the proper subsistence of the household.[242] Similarly, judgment no. 225.915 of the Aliens Litigation Council rendered on 19 December 2013 indicates that the amount of 120% of the minimum income is clearly a minimum amount of reference, failing which all forms of family reunification may be refused, in absence of overriding reasons to the contrary. In this situation, it does still befall the administration to conduct a review of the individual situation, as provided for in article 42(1)(2) of the Law of 15 December 1980, so as to determine the actual needs and means of the applicants and his family. It nevertheless remains necessary to demonstrate that they have sufficient resources in order to not become a burden for the Belgian social welfare system.[243]

5.3. Is there evidence that in decisions of national authorities or case law a different (lower) standard of public order than prescribed by Directive 2004/38 and the case law of the CJEU is used with regard to expulsion grounds? (e.g. In the Netherlands there seems to be a tendency to ground expulsion orders on a national ground of public order, which has a lower threshold than the EU ground for public order)

As already suggested above, there appears to be a creeping tendency in case law of lower courts and decisions of public authorities in Belgium to adhere to lower standards of public order than prescribed by Directive 2004/38/EC. At the same time, when examining disputes regarding public order, the Aliens Litigation Council does attempt to faithfully apply the case law of the European Court of Justice regarding the interpretation of the Directive 2004/38. It consequently endeavours – and succeeds – in restoring the proper EU basis for expulsion on

[240] According to what is established in article 60 of the Law of 8 July 1976 on public social actions centers.

[241] The full text is equally available at <http://mareagranate.org/2015/11/marea-granate-defiende-ante-la-ue-la-libre-circulacion-de-personas/>.

[242] As discussed in S. BODART, S. SAROLEA and P. VENDERCAM, op. cit. (n. 85), p. 255.

[243] Ibid.

the basis of said grounds. Reference may be had for example to its judgment no. 83.750, rendered on 27 June 2012.[244]

Question 6 – Abuse

According to the case law of the CJEU citizens may not benefit from abusing EU law. In the case G and S the CJEU ruled that "Proof of such an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the European Union rules, the purpose of those rules has not been achieved, and, secondly, a subjective element consisting in the intention to obtain an advantage from the European Union rules by artificially creating the conditions laid down for obtaining it."

Could you provide information on how abuse of EU free movement rules for EU citizens is interpreted and applied by national authorities and in national case law?

As already indicated above, the Law of 15 of December 1980 provides several options for terminating the residence permit of an EU citizen and/or one of his/her family members. Particular attention deserve articles 41ter, 42bis, 42ter, 42quattur and 42septies. Apart from the cases of fraud or abuse of the EU rules established in articles 42septies, article 42quattur has given rise to the most extensive number of judgments.[245] It can thus be advanced that in the great majority of the cases, when a judge is confronted with of an abuse of EU free movement rules, the solution is found in annulment of the measure which has enabled the right of residence or establishment in Belgium in the first place.

Absence of cohabitation forms is regulated in article 42quattur. When no cohabitation takes place in the first two years of residence in Belgium, the Minister or his/her delegate may proceed to terminate the residence permit of family members of an EU citizen who are themselves EU citizens. Article 42quattur also indicates that during the third year of the stay of the family members of the EU citizen, in case there is no evidence of marital or common cohabitation, this reason will still be sufficient to indicate that the situation cannot be considered genuine and lawful.[246] As mentioned above, this provision has thus been fruitfully exploited in a number of decisions rendered by the Aliens Litigation Council. The established case law on refusal of residence with regard to the notion of cohabitation and the necessary proof of the existence of a common household is applicable mutatis mutandis to article 42quattur.[247] In this vein, in judgment no. 32.259 of 30 September 2010, the Aliens Litigation Council has ruled that it is the applicant who takes advantage of a situation who can be considered responsible for informing the administration of any element likely to have an influence on the review of his situation now or in the future, such a physical separation of the couple. In the present case however, the Council estimated that the reasons for the

[244] See the reply to question 5.1 above.
[245] E. DERRIKS, K. SBAI, M. VAN REGEMORTER, op. cit. (n. 86), p. 214.
[246] Ibid.
[247] Ibid., p. 215.

separation of the couple should have been considered as not jeopardising the existence of the family.[248]

A distinct abuse of the right of freedom of movement is the fraud regulated in article 42septies. This article provides that the Minister or his/her delegate may refuse the entry or may terminate the right of residence of EU citizens or their family members when they have used false or misleading information or false or falsified documents or engaged in fraud or other illegal methods that were decisive for the recognition of the right. This type of abuse, equal to a failure to demonstrate cohabitation, will also impact directly on the situation under which the right to reside in Belgium was obtained, and thus will put an end to that right.

Judgment no. 52.090 of Aliens Litigation Council of 30 November 2010 makes clear though that it will not be considered sufficient motivation for a decision of nullity of the marriage to refer to the principle of law *fraus omnia corrumpit*, but that it will be necessary to expressly indicate the substance of the fraud that was decisive for the applicant to lose his right to reside in Belgium. In conjunction, in its judgment no. 83.351 of 21 June 2012, the Aliens Litigation Council noted that in this case, the applicant had obtained a residence permit of a member of the family of an EU citizen on the basis of a false passport, triggering the application of article 42septies, but pleaded an absence of fraudulent intent. The Council considered that this argument should be dismissed, as the possibility of withdrawing the right of residence for presumptive fraud also remains expressly provided by law.[249] In its kindred judgment no. 50.39 of 28 October 2010, the Council recognised that the withdrawal of the right of residence of an EU citizen or his family members falls squarely within the scope of application of article 42septies whenever the EU citizen or his family used false or misleading documents or other illegal means which were decisive for the recognition of that right. [250]

Theme IV: EU citizenship core rights in practice

Question 7 – Barriers from an empirical perspective: actual barriers to core citizenship rights

What are barriers to core citizenship rights (the rights to nationality, the right to reside, the right to family life) according to legal professionals working in the field of migration law?

(Please ask a lawyer, legal officer of the national migration services for information on what the actual barriers are in your country in their perspective.)

[248] Ibid.

[249] S. BODART, S. SAROLEA and P. VENDERCAM, op. cit. (n. 85), p. 270.

[250] E. DERRIKS, K. SBAI, M. VAN REGEMORTER, op. cit. (n. 86), p. 217.

The main barriers that can be highlighted with regard to core citizenship rights in this context are, from a professional point of view:

- To prove the existence of a stable relationship when applying for family reunification of a EU citizen with a Belgian national. In this type of procedure, Belgian public authorities are known to delve deeply into the life of citizens, and mere declarations of honour of the partners, combined with personal archival sources, are often considered insufficient proof of a sustainable and stable relationship. Even when the couple has been married for considerable amounts of time, it remains necessary to have spent at least one year of marital cohabitation;

- To prove one is in possession of sufficient resources when applying for family reunification. In this regard, it does not help that, even with a Belgian sponsor, unemployment fees do not count as a sufficient income, nor do OCMW or CPAS allowances. To prove there are sufficient means to maintain a living, i.e. 120% of the minimum social income, or at least EUR 1.300 per month, proves in many cases extremely difficult, not least because of the stringent calculation of the available means;

- On a related note, it proves equally troublesome to prove that there is sufficient income in the family of a third country national when reuniting with an EU citizen in Belgium. Cases are known in which the Belgian authorities have rejected the application on the mere basis that the income of the spouse was slightly below the aforementioned minimum threshold. In one such case, discussed above, it was not even taken into account that the third country national was working in Belgium and also enjoyed some income to compensate for the deficiency.

Question 8 – Systematic or notorious deficiencies in the country under study?

Please, discuss here in detail any 'revealing' cases of weaknesses in the effective exercise of core citizenship rights in your country.

As explained, the main systematic deficiency in Belgium for EU citizens seeking to effectively exercise their core citizenship rights is the troublesome conceptualisation of disposing of sufficient economic resources in order to not become a burden for the Belgian welfare system. The main explanation to the current situation in Belgium has been provided in the answer of question 5.2.

Another deficiency that has been detected pertains to the exercise of the right to family reunification with a Belgian national. In this regard, the EU ascendants of a Belgian citizen, older than 18, regularly see their rights inhibited, due to the diverging concepts of family members of a Belgian citizen and of an EU citizen. Thus, it can be the case that an elderly parent of a Belgian citizen, himself a EU national, dependant on his/her child and enjoying a low retirement pension, will be expelled from Belgium because he does not comply with the conditions required, i.e. does not possess sufficient economic resources to reside in Belgium.

Question 9 – Good practices

Please highlight any other legal norms, policies, instruments or practical tools which facilitate the exercise core citizenship rights in the country under study.

Apart from the Law of 15 December 1980 and Directive 2004/38/EC, Belgium has other instruments in order to facilitate the exercise of core EU citizenship rights. The Royal Decree of 8 October 1981 on access to the territory, residence, establishment and removal of aliens forms one example. The aim of this Royal Decree is to develop the procedure regarding the application of core citizenship rights in Belgium, settled in the Law of 15 December 1980.

Reference may also be had to the Law of 8 July 1976 on public social actions centres.[251] The aim of this Law is to develop the right of human dignity with the creation of centres to public welfare assistance.

In addition, due to a looming lack of workers in certain sectors of the Belgian economy, the federal government has developed dedicated policies in order to attract highly-skilled and qualified migrants. To this effect, the Circular of 15 September 1998 and the Circular of 23 September 2002 on the residence of a foreign national who wish to study in Belgium have been approved. This keen willingness, chiming with some recently adopted EU initiatives and instruments, has also sparked Belgium to develop measures to facilitate the mobility of international researchers (e.g. the PEGASUS programme in higher education).

Lastly, Belgium has also set up a policy to address specific needs of the labour market, targeting the so-called 'bottlenecks-jobs' that are specifically listed by the regions. The overwhelming majority of jobs on this list are considered low-skilled, but some of the technical ones call for more advanced knowledge and training. The stated objective is that these vacancies are eventually fulfilled by workers from other Member States and third-country nationals, holding out that only a minimum formalities require completion in the work permit application procedure, and a processing in a timeframe of 5 days maximum.[252]

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[251] Loi organique de 8 Juillet 1981 des centres publics d'action sociale / Organieke wet betreffende de openbare centra voor maatschappelijk welzijn, *Moniteur Belge / Belgisch Staatsblad* 5 August 1976. The Law entered into force on 10 January 1997.

[252] J. ANTOONS and A. PIROTTE, *Attracting Highly Qualified and Qualified Third Country Nationals to Belgium*, Focus Study of the Belgian National Contract Point of the European Migration Network, 2013, p. 7, <http://www.emnbelgium.be/sites/default/files/attachments/attracting_highly_qualified_and_qualified_tcn_to_belgium_emn-study_2013.pdf>.

ANNEXES

LEGISLATION

Loi du 15 Décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers / Wet betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, *M.B. / B.S.* 31 December 1980.

Arrêté Royal du 8 Octobre 1981 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers / Koninklijk besluit betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, *M.B. / B.S.* 27 October 1981

Code 28 Juin 1984 de la nationalité Belge / Wetboek van de Belgische nationaliteit, *M. B./B. S.* 12 July 1984.

Loi 27 Décembre 2006 portant des dispositions diverses / Wet houdende diverse bepalingen, *M.B. / B.S.* 28 December 2006

Loi du 25 Avril 2007 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers / Wet tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, *M.B. / B.S.* 10 May 2007.

Arrêté Royal du 27 Avril 2007 relatif à l'enregistrement et au contrôle des voyageurs résidant dans un service d'hébergement touristique / Koninklijk besluit betreffende de registratie en de controle van reizigers die verblijven in een toeristische verblijfsaccommodatie, *Moniteur Belge / Belgisch Staatsblad* 18 May 2007.

Arrêté Royal du 7 Avril 2008 fixant certaines modalités d'exécution de la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, *Moniteur Belge / Belgisch Staatsblad* 13 May 2008

Arrêté Royal du 7 mai 2008 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, *M.B. / B.S.* 13 May 2008.

Loi du 8 juillet 2011 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers en ce qui concerne les conditions dont est assorti le regroupement familial / Wet tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen wat betreft de voorwaarden tot gezinshereniging, *M.B. / B.S.* 12 September 2011

Loi du 4 Décembre 2012 modifiant le Code de la nationalité belge afin de rendre l'acquisition de la nationalité belge neutre du point de vue de l'immigration / Wet tot wijziging van het Wetboek van de Belgische nationaliteit teneinde het verkrijgen van de Belgische nationaliteit migratieneutraal te maken, *M. B. / B. S.* 14 December 2012

Arrêté royal du 4 Décembre 2013 portant exécution de la loi du 4 décembre 2012 modifiant le Code de la nationalité belge afin de rendre [l'acquisition] de la nationalité belge neutre du point de vue de l'immigration/ Koninklijk besluit tot uitvoering van de wet van 4 december 2012 tot wijziging van het Wetboek van de Belgische nationaliteit teneinde het verkrijgen van de Belgische nationaliteit migratieneutraal te maken, *M. B. / B.S.* 21 January 2013.

Circulaire 8 Mars 2013 relative à certains aspects de la loi du 4 décembre 2012 modifiant le Code de la nationalité belge afin de rendre l'acquisition de la nationalité belge neutre du point de vue de l'immigration/ Omzendbrief betreffende bepaalde aspecten van de wet van 4 december 2012 tot wijziging van het Wetboek van de belgische nationaliteit teneinde het verkrijgen van de Belgische nationaliteit migratieneutraal te maken, *M. B./ B.S.* 14 March 2013.

Loi du 19 Mars 2014 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers / Wet tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, *M.B. / B.S.* 5 May 2014.

Arrêté Royal du 12 Octobre 2015 modifiant l'arrêté royal du 8 octobre 1981 sur l'accès au territoire, le séjour, 'établissement et l'éloignement des étrangers/ Koninklijk besluit tot wijziging van het van koninklijk besluit 8 oktober 1981 toegang tot het betreffende of grondgebied, het verblijf to vestiging into verwijdering van Vreemdelingen, *M.B. / B.S.* 4 November 2015.

CASE LAW

Judgment n.º 155.694 of the Council of the State of 1 March 2006

Judgment n.º 1397 of the Aliens Litigation Council of 28 August 2007

Judgment n.º 12.171 of the Aliens Litigation Council of 30 May 2008.

Judgment n.º 13.495 of the Aliens Litigation Council of 30 July 2008.

Judgment n.º 14.163 of the Aliens Litigation Council of 29 July 2008

Judgment n.º 12.1364 of the Aliens Litigation Council of 30 May 2009

Judgment n.º 33.504 of the Aliens Litigation Council of 30 October 2009.

Judgment n.º 41.638 of the Aliens Litigation Council of 16 April 2010.

Judgment n.º 32.259 of the Aliens Litigation Council of 30 September 2010.

Judgment n.º 50.39 of the Aliens Litigation Council of 28 October 2010.

Judgment n.º 52.090 of Aliens Litigation Council of 30 November 2010.

Judgment n.º 83.351 of the Aliens Litigation Council of 21 June 2012.

Judgment n.º 83.750 of the Aliens Litigation Council of 27 June 2012.

Judgment n.º 9227 of the Council of the State of 20 November 2012.

Judgement n.º 95.335 of the Aliens Litigation Council of 18 January 2013.

Judgment n.º 103.342 of the Aliens Litigation Council of 23 May 2013.

Judgement n.º 223.807 of the Aliens Litigation Council of 11 June 2013.

Judgment n.º 105.770 of the Aliens Litigation Council of 25 June 2013.

Judgment n.º 121/2013 of the Belgian Constitutional Court of 26 September 2013.

Judgment n.º 225.915 of the Aliens Litigation Council of 19 December 2013.

Judgment n.º 118.833 of the Aliens Litigation Council of 13 February 2014.

Judgement n.º 121.650 of the Aliens Litigation Council of 27 March 2014.

Judgment n.º 226.914 of the Council of the State of 27 March of 2014

BIBLIOGRAPHY

J. ANTOONS and A. PIROTTE, *'Attracting Highly Qualified and Qualified Third Country Nationals to Belgium'*, Focused Study of the Belgian National Contract Point of the European Migration Network, July 2013, p. 7. The full inform can be found in <http://www.emnbelgium.be/sites/default/files/attachments/attracting_highly_qualified_and_qualified_tcn_to_belgium_emn-study_2013.pdf>

S. BODART, S. SAROLEA and P. VENDERCAM (coord.), *Droit des Étrangers, Code annoté*, Bruxelles: La Charte, 2015

N. CAMBIEN, *'The impact of Union Citizenship on Member State Inmigration Laws. Some Potentially Perverse Side-Effects Resulting from Recent ECJ Case Law'*, 16 December 2012, paper posted on Social Science Research Networks, < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2189492>

Centre pour l'égalité des chances, *Rapport statistique et démographique 2013 – Migrations et populations issues de l'immigration en Belgique*, 2013, <http://www.diversite.be/sites/default/files/documents/publication/rapport_statistique_et_demographique.pdf>

CIRE, *Le droit de séjour des citoyens européens en Belgique*, Avril 2014, <http://www.cire.be/publications/analyses/le-droit-de-sejour-des-citoyens-europeens-en-belgique>

E. DERRIKS, K. SBAI, M. VAN REGEMORTER, *Le Droit des Étrangers, Chronique de jurisprudence 2007-2010*, Bruxelles: Larcier 2013

X. MANCHA and G. GEERTS, 'Comment devenir belge?', Conseil Jeunesse Developpement avect le soutien de la Fédération Wallonie Bruxelles et de la Commission Communautaire française. The full text is available in <http://www.cjdasbl.be/wp-content/uploads/2013/04/Brochure-comment-devenir-belge-avril-2013.pdf>. *(How to become Belgian?).*

P. SIMÓN, *'Por qué expulsan a los españoles de Bélgica?'*, <http://politikon.es/2014/02/15/por-que-expulsan-a-los-espanoles-de-belgica/>. *(Why Belgium expulses Spanish citizens?)*.

A-C. VAN GYSEL (ed.), *Les Personnes. Incapables, Droit judiciaire familial, Questions de droit International Privé (Volume I)*, Bruxelles: Bruylant 2015

P. WAUTELET and F. COLLIENNE, *Droit de L'Immigration et de la nationalité: fondamentaux et actualités,* Bruxelles: Larcier 2014

ANNEX III – COUNTRY REPORT DENMARK

BEUCITIZEN
BARRIERS TOWARDS EU CITIZENSHIP

CASE-STUDY D 7.3:

Exploring obstacles in exercising core citizenship rights

WP 7 CIVIL RIGHTS

National Report: Denmark

COPENHAGEN UNIVERSITY

RAPPORTEUR: SILVIA ADAMO

INDEX

Contribution towards Deliverable 7.3: Case study 'Core citizenship rights'

THEME I: ACCESS AND LOSS OF NATIONALITY AND EU CITIZENSHIP STATUS

QUESTION 1 – ACCESS TO EU CITIZENSHIP: NATIONALITY

1.1. What are the national conditions to acquire nationality of your country? Are there specific rules with regard to persons, who are threatened to become stateless? Are the conditions of acquiring nationality changed under the influence of the judgment *Ruiz Zambrano* of the CJEU?

1.2. Under which conditions can nationals of your country be deprived of their nationality? Is there a difference in whether a citizen has (i) only the nationality of your country, (ii) has the nationality of another Member State of the European Union and (iii) those citizens having the nationality of your country and the nationality of a third country?

1.3. What is the current political and legislative discussion in your member state with regard to acquiring and withdrawing nationality? (e.g. In the Netherlands there is a fierce debate whether the Dutch nationality can be withdrawn of persons, who are suspected to be part of a terroristic organisation).

1.1.

The rules for acquisition of nationality [253] in Denmark can be found in the Danish Constitutional Act [254], the Danish Citizenship Consolidation Act [255] and the Naturalisation Circular. [256] The modalities by which Danish citizenship can be acquired are 1) birth; 2) legitimation [257]; 3) adoption; 4) declaration; and 5) naturalisation. [258]

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[253] In the following, the terms 'nationality' and 'citizenship' will be used interchangeably. The terms in Danish are '*indfødsret*' or '*statsborgerskab*', which also refer to the same legal status.

[254] The Constitutional Act of Denmark of June 5th 1953, *Danmarks Riges Grundlov af 5. Juni 1953*.

[255] Citizenship Consolidation Act, LBK no. 422 of 07.06.2004 with later amendments, *Bekendtgørelse af lov om dansk indfødsret*.

[256] Naturalisation Circular, CIS no. 10873 of 13.10.2015, *Cirkulæreskrivelse om naturalisation*.

[257] I.e. by effect of the marriage of the parents of a new-born, who has not automatically acquired citizenship at birth.

[258] The following description provides an overview of the structure and main provisions of the citizenship set-up in Denmark, but is not intended to be an exhaustive study of the topic (which comprises a number of detailed rules, procedures, and conditions).

As regards the constitutional provision, Section 44 (1) of the Danish Constitutional Act establishes that 'No alien shall be naturalised except by statute'. This entails that while the first four modalities for acquiring citizenship mentioned above are set by the Citizenship Consolidation Act, the procedure for acquiring citizenship via naturalisation is divided in two steps. The first step is **administrative**: an application for naturalisation is received by the Police, who first interviews the applicant[259] and then sends the application to the Ministry of Immigration, Integration and Housing[260] which processes the application and checks whether the conditions for naturalisation are met (this first step can take up to 14–16 months at the time of writing). The second step is **legislative**: in order to be naturalised, the applicant's name must be included in a list that is enacted as a citizenship statute or 'act on communication of citizenship' (*lov om indfødsrets meddelelse*)[261], which is passed twice a year as a regular bill after a debate in the Parliament. If an applicant's case is submitted by the Ministry to the Parliament with reservation[262], a designated Parliamentary Committee (*indfødsretsudvalg*) will discuss the case and decide on an individual basis whether a particular applicant can be included in the citizenship statute, even if they do not meet some of the conditions for naturalisation. This second step in the Parliament adds additional months to the processing time for naturalisation.

Acquisition of citizenship at **birth** follows the *jus sanguinis* principle: a child born by a Danish citizen (father, mother, or co-mother[263]) will inherit their citizenship status. The *jus soli* principle is only applied to foundlings on Danish territory and thus its practical relevance is minimal, as in average only one child a year is found alive in Denmark, if they are abandoned right after birth.[264] Children born in Denmark by foreign nationals therefore will have to be registered as nationals of the country of origin(s) of their parents, as they will not automatically become Danish nationals; this is also valid when the parents are stateless.

Another mode of acquisition is by **legitimation**: the child of a Danish father and a foreign mother, who has not acquired citizenship at birth, will acquire Danish citizenship if the parents decide to marry. Before 2014, a child born abroad by an unmarried couple comprising a Danish father and a foreign mother did not automatically acquire Danish citizenship at birth by means of *jus sanguinis*. After the ECtHR decision in the *Genovese v.*

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[259] The interview is carried out in order to ascertain, if the applicant can speak the Danish language, but also to check that an application can be presented, i.e. if the applicant meets the requirements set up in the Naturalisation Circular. At the time of the writing, the waiting time for a police interview after handling an application is 2 months.

[260] The *Udlændinge-, Integrations- og Boligministeriet* is a new Ministry created after the election of a new Parliament and Government in June 2015 (the government shifting from social democratic to liberal/right-wing).

[261] For an example, see the bill for October 2015 at the Danish Parliament's website: <www.ft.dk/Aktuelt/Indfodsret/Lovforslag%20om%20indfodsret%20meddelelse.aspx>.

[262] For example if an applicant does not meet one of the requirements listed for naturalisation, e.g. the language requirement, or the self-sufficiency requirement.

[263] The notion of co-mother was introduced in the Citizenship Act in 2014, after a revision of the Children Act in 2013.

[264] <politiken.dk/indland/ECE1966060/fakta-se-listen-over-de-seneste-10-aars-hitteboern/>.

Malta case, the legislation was amended in order to respect the child's right to social identity.[265]

As regards **adoption**, a foreign child under 12 years old becomes a Danish citizen when the legal effects of adoption set in[266] if the child is adopted by a married couple or a cohabitating couple, where at least one of the spouses is a Danish citizen. Adoption by a single/unmarried individual is also allowed, thus single parents who are Danish citizens can pass on their citizenship status to their adopted child. The child must be adopted by means of a Danish adoption order or a recognized foreign adoption order.

The **declaration** mode of acquisition allows for certain categories of individuals to bypass the strictly regulated and time-consuming naturalisation procedure and file a declaration about their intent of becoming Danish citizens.[267] The rule has been much debated since the beginning of the 2000s, as it opened the possibility for youngsters (minors) born and raised in Denmark by foreign parents to easily acquire Danish citizenship. Originally the rule was formulated in order to avoid statelessness[268], but some of the political voices criticizing the rule would find fault with the fact that individuals not mastering the Danish language properly (although having lived most of their life in Denmark) would get citizenship status. The rule was then limited to comprise only Nordic nationals in 2004, and then reintroduced as a possibility for all nationalities in 2014. The latest, current liberal/right-wing government has committed itself to again limiting this acquisition mode to former Danish citizens, Finnish, Icelandic, Norwegian and Swedish nationals only, and in respect of a set of conditions (among which a 7-10 years residence requirement and no criminal record).[269]

Finally, citizenship can be acquired by means of **naturalisation**. This mode of acquisition is the one mostly affecting foreigners – hereunder EU nationals – who are living in Denmark, as it is normally the one modality they will apply for in case they intend to acquire Danish citizenship. The requirements in the Naturalisation Circular have been amended in different directions five times between 2002 and 2015 (creating a highly complex and opaque legislation), and this follows from very animated political debates on what constitute a reasonable threshold for acquiring Danish citizenship. The threshold has slowly but steadily risen and the requirements have been made stricter along the years. Naturalisation is now made conditional upon meeting, *inter alia*, the following requirements:

- a long and uninterrupted residence in Denmark (as a starting point 9 years, though reduced for refugees and stateless to 8 years, to 6 years for individuals married to a Danish citizen, and to 2 years for Nordic nationals);
- no criminal record (this is a good conduct requirement, though it has to be noticed that the Danish law foresees waiting time of several years for even less serious offences, such as traffic fines);

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[265] Please refer to the Danish report for D 7.5 on life events, question 1.3.4, for a deepening of the development of this rule.

[266] Typically, when the child arrives to Denmark.

[267] The Regional State Administration informs that the processing time is 11 weeks as of December 2015.

[268] The Danish legislation on the declaration mode was first introduced in 1968, and was inspired by Articles 1 and 2 of the UN Convention on the Reduction of Statelessness.

[269] See Agreement on Citizenship (*Aftale om Indfødsret*) in the Naturalisation Circular.

- self-sufficiency (not receiving social benefits or having any debt due to the State);
- not receiving social benefits for an aggregate period exceeding six months within the five years prior to application;
- a specialist doctor's statement in case of mental or psychic condition (including PTSD) for applicants who cannot meet the language requirement;
- passing a high level Danish proficiency language test [270] (against the payment of a fee of 1265 DKK, ca. 170 €);
- passing a citizenship test on Danish societal conditions, history, and culture (a new test will be introduced in 2016, as the previous one was considered to be too easy to pass), which is only offered twice a year and also against the payment of a fee (728 DKK, ca. 98 €);
- paying a naturalisation processing fee of 1200 DKK (ca. 160 €, amount adjusted in 2015).

Before 1 September 2015, an applicant for naturalisation in Denmark was also required to renounce their former citizenship. The removal of the ban on dual citizenship[271] has entailed an increase in applications for naturalisation, which in part explains the long processing times in these cases. The requirements in Danish citizenship law regarding naturalisation, here described cursively, although in line with similar general requirements in other legal systems, do in practice render the acquisition of citizenship status via naturalisation very difficult for applicants, manifesting a clear restrictive approach to naturalisation in Denmark.[272]

As regards **statelessness** in the Danish citizenship legislation, Denmark has ratified the 1989 UN Convention on the Rights of the Child; moreover, Denmark has also accessed but not ratified the 1961 UN Convention on the Reduction of Statelessness. [273] These conventions, although not incorporated, have impacted the national legislation and the political life surrounding the topic of citizenship and statelessness. In 2011 the then Minister of Integration and Immigration Affairs lost her post after it came to the attention of the media that the rules on acquisition of citizenship for stateless children born in Denmark had not

[270] The *Dansk Prøve 3* is equal to a C1-level of proficiency, the second highest level of proficiency in the Common European Framework of Reference for Language. Only foreigners who have passed a long educational program in their home country can enrol in the Danish language course that prepares adequately to the test in *Dansk Prøve 3*.

[271] The ban on dual citizenship meant that people who had been resident for many years in Denmark had to renounce to their former citizenship, which many considered an unreasonable request. Moreover, it also affected the Danes living abroad, who had to renounce their citizenship if they wanted to naturalize in another country. The lobby work of these citizens, and not the integration potential for foreigners living in the country, finally tipped the scale in the political debates for all parties.

[272] Adamo, S. (2008), Northern Exposure: The New Danish Model of Citizenship Test, *International Journal on Multicultural Societies* (now '*Diversities*') vol. 10, no. 1, pp. 10-18, UNESCO. Special Issue: Citizenship Tests in a Post-National Era.

[273] Refer to the country report for Deliverable 7.1, at p. 9 ff.

been correctly enforced for some years with respect to a notable number of stateless (mostly Palestinian) applicants.[274]

The *jus soli* rule for foundlings and two articles in the Naturalisation Circular explicitly target the reduction of statelessness. Article 17 and 27 in the Naturalisation Circular state that according to the Convention on the Rights of the Child, applicants who are born stateless in Denmark can be naturalised without having to meet the normal requirements for naturalisation (as described in the list provided the previous sections above). The provision is though limited to applications filed *before* the child turns 18 years old, and only if the child resides in Denmark.

For stateless persons born in Denmark who apply for citizenship *after* they turn 18 years old, section 26 in the Naturalisation Circular states that according to the Convention on the Reduction of Statelessness, they can also be naturalised without having to meet the normal requirements. However, if applicants apply after they turn 18 years old, they must meet the following requirements as well: residence in country at the time of application; 5 years of residence directly before application, or 8 years total of residence in Denmark; age between 18 and 21 years old; no conviction for a crime against State security or prison sentence for a crime of more of 5 years or more. Finally, the applicants must prove that they always have been stateless.

The applications for citizenship for stateless individuals have to be filed directly to the Ministry of Immigration, Integration and Housing. The application fee is waived for applicants under 18 years old, while applicants between 18–21 years of age have to pay the full naturalisation fee. Stateless individuals, whose applications was wrongly processed (not according to the principles in the UN Conventions) or who were wrongly informed about their rights in the years previous to the 2011 statelessness 'scandal', can also apply for naturalisation even if they are over 21 years of age.[275]

The declaration mode which in the past was applied for children of stateless individuals born and/or raised in Denmark, as mentioned above has been limited to former Danish citizens and Nordic nationals and thus it no longer serves its original purpose.

As stated above, children in Denmark can only acquire citizenship at birth if one of their parents is a Danish national. Therefore, in the aftermath of the *Ruiz Zambrano*[276] case, but also considering the *Dereci*[277] and *O and S*[278] cases, the Ministry of Justice in a legal commentary stated that application of the judgement only in very few cases would entail a

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[274] It had also been a problem that many were wrongfully registered (by Danish authorities) in the national registry not as stateless, but as nationals of other countries. Ersbøll, E. (2015), Report on Citizenship Law: Denmark. EUDO Citizenship Observatory, p. 28.

[275] All other applicants who are stateless and over 21 years of age have to fulfil the normal naturalisation requirements as other foreigners. See the information on the Ministry's website (in Danish): <uibm.dk/statsborgerskab/statslose-fodt-i-danmark-1/personer-over-21-ar-som-er-fodt-statslose-i-danmark-herunder-personer-som-er-blevet-fejlbehandlet-eller-fejlvejledt-om-deres-rettigheder-i-henhold-til-fn2019s-bornekonvention-eller-fn2019s-konvention-om-begraensning-af-statsloshed>.

[276] C-34/09, *Ruiz Zambrano*, ECLI:EU:C:2011:124.

[277] C-256/11, *Dereci and Others*, ECLI:EU:C:2011:734.

[278] C-356/11, *O. and S*, ECLI:EU:C:2012:776.

residence permit for a third country national in Denmark.[279] Thus there were no substantial legal amendments for the conditions of acquiring nationality under the influence of the judgement in the *Ruiz Zambrano* case.

1.2.

According to Danish law, citizens can be deprived of their status in several cases.[280] Until September 2015 citizenship could automatically be lost if a national was enrolled in a foreign military service, but also if he or she applied for another citizenship. Since the ban on dual nationality has eventually been lifted, this instance of automatic loss of citizenship is no longer enforced.

Other modalities of loss are 1) birth abroad without residence in Denmark (automatic loss at the age of 22 years old)[281]; 3) fraudulent conduct in connection with an application for citizenship status[282]; and 3) violation of the Danish Criminal Code Part 12 and 13 concerning crimes against the State.[283] Whether a citizen only holds Danish nationality status, or the nationality of another Member State of the European Union, or holds both Danish nationality and the nationality of a third country has a potential impact on the decision on deprivation, in those case were loss of Danish citizenship would render the individual stateless.

In the case of birth and residence abroad, or violation of the Criminal Code, Danish nationals cannot be deprived their nationality if that would render them stateless (in case of EU or third country nationals, deprivation can thus be allowed). In the case of fraudulent acquisition of citizenship via declaration or naturalisation, loss of Danish citizenship is not impaired by considerations on statelessness.

1.3.

The rules on citizenship via naturalisation were relaxed during the Social democratic government, in power from 2011–2015. Since the parliamentary elections of June 2015, the new liberal/right-wing government currently in power has directed the debate towards a narrowing of the conditions to acquire citizenship. Consequently, in October 2015, a new Naturalisation Circular was enforced, raising the bar for the requirements that are to be met in order to acquire Danish citizenship.[284] The government intends to reinstate restrictive

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[279] Ministry of Justice (*Justitsministeriet*), *Juridisk Fortolkningsnotat om Zambrano-dommen (sag C-34/09) med indarbejdede præciseringer som følge af senere domme. 11. maj 2011 (revideret 22. juni 2012 og 15. juli 2013), Sagsnr. 2011-6102-0053.*

[280] See Citizenship Consolidation Act, at sections 8, 8A-8D, and 9. For more details on modes of loss of citizenship cfr. also EUDO CITIZENSHIP (2015). Global Database on Modes of Loss of Citizenship. San Domenico di Fiesole: European University Institute. Available at: <eudo-citizenship.eu/databases/modes-of-loss>.

[281] Section 8 of the Citizenship Consolidation Act.

[282] Section 8A of the Citizenship Consolidation Act.

[283] Section 8B of the Citizenship Consolidation Act. For instances of 'quasi-loss' of citizenship, see Ersbøll, E. (2015), Report on Citizenship Law: Denmark. EUDO Citizenship Observatory, p. 36.

[284] For a graphic overview of the rules (in Danish) see <www.dr.dk/nyheder/politik/grafik-saadan-er-de-nye-regler-faa-dansk-statsborgerskab>.

policies, and especially limit the 'exception cases' (*dispensationssager*), where applicants who do not meet all the requirements are nonetheless allowed to acquire Danish citizenship. These legal amendments are enforced as part of a large-scale reform of the whole area of migration law in Denmark, which also aims at reducing the number of asylum seekers accessing the country, lowering the social benefits for recognized refugees, introducing new modes of controlling that immigrants respect the working conditions set up for their residence permit, etc.

THEME II: FREE MOVEMENT RIGHTS OF EU CITIZENS

QUESTION 2 - THE RIGHT TO FREE MOVEMENT AS A CORE CITIZENSHIP RIGHT (ARTICLE 21 TFEU AND THE CITIZENS' DIRECTIVE)

2.1. What conditions are laid down for EU citizens with the nationality of another Member State to reside in your country for a maximum period of three months?

2.2. What conditions are laid down for EU citizens EU citizens with the nationality of another Member State to reside in your country for a period longer than three months?

2.3. Are there any measures in your country that would prevent own nationals to use their right to free movement? (e.g. a prohibition to leave the country on ground of criminal proceedings)

2.1

Union citizens are allowed to enter Denmark without any obligation to registering for an EU residence card if their intended stay is of a maximum of three months (six months if they are looking for a job in Denmark). Within the first three months of their stay, an administrative decision to terminate the right of residence of a Union citizen can only be taken on grounds of lack of sufficient funds.[285] A request for social benefits is not sufficient to ascertain whether an individual does not possess sufficient funds, and the authorities are therefore required to carry out an individual assessment of the personal circumstances in a case.[286] A Union citizen who has been living in Denmark for less than three months can also be expelled by administrative decision if he/she constitutes a threat against public order, security or health, or if they have previously been prohibited to re-entry the country.[287]

[285] The grounds for expulsion are listed in the Aliens Consolidation Act, LBK no. 1021 of 19.09.2014, *Lovbekendtgørelse af Udlændingelov* (Aliens Act), Article 28; the possibility for expulsion or denial of entry on grounds of insufficient funds is mentioned at Article 28 (5).

[286] Jacqueson, C. (2014), National Report on Denmark, in Neergaard, U., Jacqueson, C. and Holst-Christensen, N. (eds.), *Union Citizenship. Development, Impact, and Challenges.* DJØF Publishing, Copenhagen, p. 456.

[287] Aliens Act, Article 28 (7) and (1).

2.2.

Union citizens and their family members who want to settle in Denmark for a longer period than six months have to fulfil the conditions for residence as stipulated in chapter two of the EU Residence Order (*EU-opholdsbekendtgørelse*) [288] , which implements Directive 2004/38/EC in the Danish legal system. According to these rules, a residence permit can be issued to workers (including posted workers and self-employed workers), students, and persons with sufficient resources so not to become a burden on the national social assistance system. In this last case, the resources must correspond to a minimum of the sum of the benefits that citizens can receive according to the Active Social Policy Act.[289] Also, a resident permit can be issued in certain cases of cessation of employment or business activity: after reaching state pension age (65 years); on grounds of permanent incapacity to work; and after at least three years of residence in Denmark, if the worker or self-employed moves to another Member State but continues to return to Denmark at least once a week.[290]

2.3

The question of hindrance of free movement for Danish nationals can be related to the question of withdrawal of travel documents, a topic which has been explored for Deliverable 7.6. Please refer to the Danish national report for the relationship between withdrawal of passports and hindrance to free movement in cases of criminal charges, sentence of imprisonment, pecuniary sentences, existing obligations towards the State or private persons, and possible participation in activities abroad that can imply a danger or threat to the state security or public order.[291]

QUESTION 3 – THE RIGHT TO RESIDE IN THE EUROPEAN UNION (ARTICLE 20 TFEU AND DIRECTIVE 2004/38)

3.1. What is the current trend in case law in your country with regard to the applicability of Article 20 TFEU and references to the case *Ruiz Zambrano*? Are there specific issues noteworthy? (e.g. in the Dutch case law the question whether one or both parents of dependent children should be granted a derived residence right under Article 20 TFEU remains an important question).

3.2. What is the relation between Article 21 and 20 TFEU in national case law? Do national courts assess the scope of applicability of both articles?

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[288] EU Residence Order, BEK no. 474 of 12.05.2011, *Bekendtgørelse om ophold i Danmark for udlændinge, der er omfattet af Den Europæiske Unions regler (EU-opholdsbekendtgørelsen).*

[289] Article 25 and Article 34 of the Active Social Policy Act, LBK no 806 of 01.07.2015, *Bekendtgørelse af lov om aktiv socialpolitik*. For example, a foreigner who is single must prove that he/she is in possession of at least 10.500 Dkk (around 1.400 €) a month for his subsistence, and 13.952 Dkk (around 1.869 €) if he/she has duty to support a child.

[290] Article 7 of the EU Residence Order.

[291] Adamo, S. (2016), Access to Travel Documents Case Study. Contribution towards Deliverable 7.6, Barriers to European Citizenship, *bEUcitizen*, p. 10–13.

3.3. According to Article 16 of Directive 2004/38 “Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there.” Are there any additional conditions in your country for EU citizens to acquire a permanent residency status in your country?

3.1.

As mentioned above under question 1.1, the impact of the *Zambrano* ruling is quite limited in Denmark in view of the general rules for acquisition of citizenship. In 2011, the then Ministry of Refugees, Immigration and Integration issued a Briefing Note on the interpretation of the judgement and on how it was supposed to be applied in Denmark.[292] This would only be the case, according to the interpretation given by the Danish Ministry, if a Danish child was obliged to leave the country; in that case the third country national that has custody over the child would be granted a right of residence pursuant to Article 20 TFEU. The narrow interpretation of the *Zambrano* case has been criticised for not complying with EU law, as the link of dependency criteria could also arise in other circumstances than in a parent/child relationship.[293] Several cases decided administratively by the Ministry of Integration have referred to the *Zambrano* case.[294] In a couple of cases, a residence permit was given to third country nationals who were widower of Danish nationals, and with whom they have had a child.[295] In one case which arrived to the courts[296] in 2015, the Eastern High Court mentioned Article 20 and the ruling in the *Ruiz Zambrano* case: The Court reviewed (and sustained) the decision of the Immigration Appeals Board (*Udlændingenævnet*), which had validated the Immigration Service’s withdrawal of a Pakistani citizen’s residence permit after a seven year stay in Pakistan with her Danish husband and three children, who also are Danish nationals. The Eastern High Court ruled that the decision to deport the mother to Pakistan did not impair the children’s right to remain in Denmark with their father, and thus the ruling did not deprive them of the effective enjoyment of their Union citizenship. The apparent contradiction in this ruling is between the right to family life and unity, which the Court referred to continue in Pakistan – thus outside of the EU – and the right to enjoy the substance of Union citizenship, which could only be realised in Denmark without the mother being present – thus impairing family life and unity.

3.2.

It was not possible to find Danish case law that explores the relationship between Article 20 and Article 21. As regards the applicability of Article 20 TFEU, in the abovementioned Eastern High Court case, the ruling cites the Immigration Appeals Board’s statement about the conditions for determining that a third country national, who is the parent of a minor

[292] The Ministry of Justice updated the briefing note in 2012 and 2013, see *Juridisk fortolkningsnotat om Zambrano-dommen (sag C-34/09) med indarbejdede præciseringer som følge af senere domme*, Sagsnr. 2011-6102-0053.

[293] Jacqueson (2014), *op. cit.*, p. 471.

[294] Starup, P. (2012), *Grundlæggende udlændingeret I*, DJØF, p. 354, cited in Jacqueson (2014), *op. cit.*, p. 471.

[295] Jacqueson (2014), *ibid.*

[296] Ugeskrift for Retsvæsen U.2015.1069Ø.

Union citizen, whom he has a duty to provide for, can derive a right to reside in virtue of Article 20 TFEU. These conditions are: 1) the foreign applicant is the parent to a minor child, who is a Union citizen; 2) the parent is a third country national; 3) the parent is residing and providing for the minor Union citizen in the Member State, where the child lives and is a national of; and 4) the limitation of the right to reside has the effect, that the minor Union citizen actually is deprived the genuine enjoyment of the substance of Union citizenship.[297] This interpretation is in line with the Briefing Note issued by the Ministry of Integration mentioned above at 3.1.

3.3.

Article 16 of the Directive 2004/38 has been implemented in the EU residence order, and it establishes that after five years of continuous residence in Denmark, Union citizens are entitled to an unconditional and automatic right of permanent residence.[298] The authorities cannot require that the applicant proves the conditions of work or self-sufficiency at the time of the application for permanent residence, but they may be required to provide other documentation than a registration certificate in order to prove continuous lawful residence in Denmark.[299]

Question 4 – Family Life and free movement rights

4.1. Who are defined as family members of EU citizens in your country?

4.2. Under which conditions can third country nationals have a (derived) residence right as a family member of (i) an EU citizen with the nationality of another Member State or as a family member of (ii) a citizen with the nationality of your country?

4.3. What are obstacles for EU citizens in your country with regard to family life with a third country national and or an EU citizen?

4.1.

Danish legislation follows the definitions of Directive 2004/38/EC as regards the notion of family members. Moreover, registered partnership and a long-standing relationship in the same dwelling are also assimilated to marriage. Other beneficiaries of the right to residence as family members to a Union citizen are family members who are dependent in the country of origin or have serious health problems requiring the Union citizen's care.[300] In case of ascendants and other family members who can be considered dependant on the Union

[297] Ugeskrift for Retsvæsen U.2015.1069Ø, at 1073.
[298] Article 19 in the EU Residence Order.
[299] Jaqueson (2014), *op. cit.*, p. 458, referring to a Briefing Note by the Ministry of Integration, *Notat om tidsubegrænset ophold efter opholdsdirektivet*, 18.05.2009.
[300] Jacqueson (2014), *op. cit.*, p. 454.

citizen, the applicants must demonstrate economic dependency in the home country as well as in the host country.[301]

4.2.

A third country national holds a derived residence right as a family member of a Union citizen when the Union citizen has established an effective and genuine residence in Denmark, following the wording of the ruling in the *Metock* case.[302] The requirement of prior lawful residence in the EU was repealed after the judgement was released and caused a heated debate in the political discussions about family reunification in Denmark, and about the limits of state sovereignty to control the entry conditions for third country nationals.

As regards third country nationals who are family members to a Danish national, EU law will only be applied if the Danish national has established an effective and genuine residence in another Member State before re-entering in Denmark. In these cases, the residence right for third country nationals is expected to be granted following a relatively uncomplicated legal set-up.[303] On the other hand, if a Danish national is applying for being family reunited with a third country national being a 'static' citizen, he or she will have to comply with the family reunification rules in the Aliens Act, which set up a fairly complex system of conditions to be fulfilled. The challenges to the realisation of the right to family life have been presented in the national report for D 7.2.[304] In the following is an overview of the current requirements that Danish nationals have to fulfil in order to be family reunited with a third country national[305]:

- a minimum age of 24 for both spouses/partners;
- there must be no doubt that the marriage was based on the will of both parties (marriage between close relatives or otherwise closely related parties may be considered doubtful), and there must be no reason to assume that the decisive purpose of contracting the marriage was to obtain a residence permit;
- the person residing in Denmark must prove that they have a dwelling-place of a 'reasonable size' and that they are able to support the applicant financially;
- the person residing in Denmark must provide a bank-guarantee of 53.224,98 Danish kroner[306] (circa 7.131 €) to cover any future public expense of supporting the spouse/partner;
- the applicant (person seeking family reunification with a person residing in Denmark) must pass a test in Danish as a second language at the A1

[301] Jacqueson finds this in line with the ECJ ruling in the *Jia* case, case C-1/05, ECLI:EU:C:2007:1.
[302] C-127/08, *Metock*, ECLI:EU:C:2008:449.
[303] Although in practice, difficulties may arise as far as documenting the residence in another Member State or the authenticity of a marriage can arise, see below at question 7.
[304] Adamo, S. (2015), Mechanisms for Enforcing Civil Rights. Contribution towards Deliverable 7.2, Barriers to European Citizenship, *bEUcitizen*, at 2.1.
[305] The following is based on Adamo, S. (forthcoming 2016), Let me in, it's cold outside – migration and law in Denmark.
[306] Amount required in 2016, but the rate is adjusted on a yearly basis.

level or higher at the latest six months after being granted a permission to stay;

- the couple must sign a declaration of active participation in Danish language and integration into Danish society;
- the person residing in Denmark shall hold either a Danish/Nordic citizenship, a residence permit as a refugee or have had a permanent residence permit in Denmark for at least 3 years;
- the person residing in Denmark may not have received public social security assistance under the terms of the Active Social Policy Act (*lov om aktiv socialpolitik*) or the Integration Act (*integrationsloven*) for the past 3 years prior to the application for family reunification;
- the person residing in Denmark may not have been sentenced to imprisonment or other criminal sanction involving deprivation of liberty for violent assault on a spouse or cohabited within the last 10 years[307];
- the spouses'/partners' aggregate ties with Denmark must be stronger than their aggregate ties with any other country. The requirement of aggregate tie is not applied to persons who have held Danish citizenship or permanent residency in the country for at least 26 years.

[307] Violence includes, among other things, rape, cf. the Danish Criminal Act, section 216, manslaughter, cf. the Danish Criminal Act, section 237, simple and aggravated assault, cf. the Danish Criminal Act, sections 244-246, coercion, including forcing a person into marriage, cf. the Danish Criminal Act, section 260, confinement, cf. the Danish Criminal Act, section 261, and human trafficking, cf. the Danish Criminal Act, section 262a.

The complexity and ambiguity of these conditions have given rise to non-transparent and unpredictable administrative practices. This is partly due to the fact that the rules are to be found in several different legal texts, but also to the fact that the existing Aliens Act has been amended and not entirely revised in order to create a more manageable set of rules. Furthermore, the legislation has been contended, debated and amended several times since its first introduction. At present time, all the requirements for family reunification are specified in Article 9 of the Aliens Act, which contains no less than 37 sections (*stk*.) and 15 sub-articles (9a to 9o, each having between one and eleven sections) as a result of the numerous revisions on this particular issue. Two additional conditions were introduced in another act (Formation and Dissolution of Marriage Act) in the sections regarding the requirements that spouses must meet in order to marry lawfully, adding to the complexity of the legal set-up.[308]

4.3.

As explored in the previous section, Union citizens who are lawfully residing in Denmark and have established an effective and genuine residence in the country do not face the same type of obstacles as much as Danish nationals who are applying for family reunification with a third country national. For a further discussion of the obstacles to family life for EU citizens with a third country national or a Union citizen, please refer to question 7 below.

Theme III: Limitations to core citizenship rights

QUESTION 5 – EXPULSION

5.1. Please explain how the grounds of expulsion of Article 27 and 28 of Directive 2004/38 are used by national authorities and how they are referred to in national case law.

5.2. Is there evidence in decisions of the national authorities and case law that not fulfilling the conditions laid down in Article 7 (1) (b) Directive 2004/38 for the right to reside in another Member State (having a comprehensive healthcare insurance and sufficient means) leads to expulsion?

5.3. Is there evidence that in decisions of national authorities or case law a different (lower) standard of public order than prescribed by Directive 2004/38 and the case law of the CJEU is used with regard to expulsion grounds? (e.g. In the Netherlands there seems to be a tendency to ground expulsion orders on a national ground of public order, which has a lower threshold than the EU ground for public order)

[308] Section 11 (a) prohibits marriage between foreigners who do not possess a lawful residence permit (e.g. asylum-seekers in Denmark who are awaiting a decision on their application), while section 11 (b) requires that both parties are aware of the rules of the Aliens Act on family reunification before they marry. These provisions do not apply to Nordic or EU citizens. Formation and Dissolution of Marriage Act no. 1818 of 23/12/2015 (*Lovbekendtgørelse om ægteskabets indgåelse og opløsning – Ægteskabsloven*) as modified by Act no. 365 of 06/06/2002 and Act no. 324 of 18/05/2005.

5.1.

The Aliens Act is the legislative framework for the rules on expulsion for all foreigners. The Act states that expulsion of Union citizens can only occur in accordance with EU law, but the Act does not refer to Article 27 and 28 of Directive 2004/38/EC.[309] The rules on expulsion follow the logic that the longer a Union citizen has stayed in Denmark, the more serious the offense leading to expulsion should be, in line with the Directive's rationale.[310] However, the reasoning of the courts has been evaluated to be very 'formalistic' in its approach, since the courts start by assessing whether expulsion can be founded on provisions in the Aliens Act and only later they evaluate, whether the expulsion would be contrary to the Directive.[311]

5.2.

A notorious case of expulsion practice that was later rectified, and which targeted Union citizens who did not hold sufficient means of subsistence occurred between 2009 and 2001 in Denmark. During this period, according to a Danish NGO working with homeless people, 278 persons were expelled when they were in possession of less than 350 kr. (about 46 €), which was the price of a night stay in a hostel.[312] The practice was rectified in 2011 by the then Ministry of Integration.[313]

5.3.

Illegal residence in Denmark will lead to expulsion of a Union citizen on grounds of serious threat to the public order and security, where personal circumstances would likely not lead to any other result.[314] If a Union citizen does not reside in the country, or has resided in Denmark for less than five years, the courts will base an expulsion order taking into consideration the following elements: whether the offense was circumstantial or if it followed a pattern; whether the offence constituted a substantial damage; and whether there exist previous convictions.[315] The Danish courts balance the protection of the individual's right to free movement against the state's need for public order and security; in this balancing, the personal circumstances of the persons involved do not seem to play a major role.[316] For a thorough review of Danish case law on expulsion on grounds of public order and imperative grounds, cf. Article 27 and 28 of the Directive, please refer to the analysis presented by Jacqueson (2014) in the FIDE national report.[317]

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[309] Article 2(3) of the Aliens Act and Jacqueson (2014), *op. cit.*, p. 463.
[310] Jacqueson (2014), *ibid.*
[311] Jacqueson (2014), *ibid*.
[312] Jacqueson (2014), *op. cit.*, p. 456.
[313] Briefing note of 30.06.2011 on deportation on grounds of lack of sufficient resources or on the ground of protection of the public order (*Notat om adgangen til ud- og afvisning af EU/EØS statsborgere på baggrund af subsistensløshed eller af hensynet til den offentlige orden*).
[314] Jacqueson (2014), *op. it.*, p. 464.
[315] Jacqueson (2014), *ibid.*
[316] Jacqueson (2014), *op. cit.*, p. 465.
[317] Jacqueson (2014), *op. cit.* Case law reviewed at pp. 464–468.

QUESTION 6 – ABUSE

According to the case law of the CJEU citizens may not benefit from abusing EU law. In the case *G and S* the CJEU ruled that "Proof of such an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the European Union rules, the purpose of those rules has not been achieved, and, secondly, a subjective element consisting in the intention to obtain an advantage from the European Union rules by artificially creating the conditions laid down for obtaining it."

Could you provide information on how abuse of EU free movement rules for EU citizens is interpreted and applied by national authorities and in national case law?

It is either the State Administration (*Statsforvaltning*) or the Immigration Service (*Udlændingestyrelsen*) which decides on matters of residence as a first administrative instance, depending on which cases are at stake. The authorities have to undertake concrete evaluation of the circumstances of the case when there is a suspect of abuse of EU rules, for example in order to ascertain that a marriage is not contracted with the sole purpose of achieving a residence permit (so-called pro-forma marriage), but that it is in fact a real marriage.

After the ruling in the Metock case, the then Ministry for Refugees, Immigration and Integration issued a communication to the Immigration Service where it stressed the fact that in case of suspect of abuse of EU rules when a Union citizen applies for a residence permit in Denmark, the applicants have to show to have taken up a real and effective residence in the country by providing documentation for address, housing contracts, registration in schools etc.[318] The Ministry also sent an information letter to the municipalities, focusing on the effort that the municipalities have to do in order to '*avoid abuse of residence right in these types of family reunification cases*'.[319] The letter highlighted the fact that it may have a consequence for the right of residence of a foreigner if the Danish citizen/spouse/family member receives social benefits from the municipalities. In these and in cases of abuse of EU rules for family reunifications the municipalities are therefore expected to contact and inform the Immigration Service.

[318] Ministeriet for Flygtninge, Indvandrere og Integration (2008), Meddelelse til Udlændingeservice om ændringer af EU-opholdsbekendtgørelsen og praksis som følge af Metock-dommen m.v., 02.10.2008, p. 8, available at <www.nyidanmark.dk/NR/rdonlyres/4898EC2A-C05C-4999-86CB-1CD97CB89F9F/0/meddelelse_til_u>.

[319] Ministeriet for Flygtninge, Indvandrere og Integration (2009), Kommunernes indsats i forhold til misbrug af EU-borgeres opholdsret, 19.08.2009, Journ. no. 09/0431, p. 1, available at <www.nordfynskommune.dk/referater/iApz75ogfnZblR-TnM4XQw.pdf>.

Theme IV: EU citizenship core rights in practice

QUESTION 7 – BARRIERS FROM AN EMPIRICAL PERSPECTIVE: ACTUAL BARRIERS TO CORE CITIZENSHIP RIGHTS

What are barriers to core citizenship rights (the rights to nationality, the right to reside, the right to family life) according to legal professionals working in the field of migration law?

(Please ask a lawyer, legal officer of the national migration services for information on what the actual barriers are in your country in their perspective.)

For answering this question an immigration lawyer with extensive experience in this field, has kindly agreed to share his practical experience with cases related to barriers to core citizenship rights. [320] He has consequently reported on specific issues where he has encountered difficulties in ensuring that his clients could claim their rights in accordance to EU law.

According to him, one of the areas most challenged is that of **family reunification of Danish nationals with third country nationals**. More specifically, he highlights that, in case of secondary movement, when a Dane has been living in another EU country and then, upon re-entry in Denmark, he/she applies for a residence permit for a spouse, the requirements for documentation required appear to be quite high. This may pose a problem for citizens who cannot always provide the documents to the authorities. These requirements can revolve around e.g. documentation for the authenticity of a marriage certificate, or effective residence and work in another Member State, etc. There seems to be a general, almost systematic approach to these cases by the authorities as if they were fraud cases, and not mere acknowledgment of rights deriving by correctly enforcing EU law rules. Thus the authorities will try to verify the information provided as thoroughly as possible.

Another area where he could see a weakening of the core citizenship rights was that of **automatic loss of Danish and Union Citizenship**. The most effective barrier is the fact that it has proven extremely difficult to challenge the decision regarding loss of Danish citizenship. These type of cases occur when a child born abroad by Danish parents does not reside in Denmark at the time of turning 22 years old, and does not formally present a request to maintain his/her Danish nationality (see Art. 8 in the Citizenship Act and question 1.2 above). The citizens are not informed by the authorities about the fact that they can lose their citizenship at a certain age, and thus some may be uninformed and 'accidentally' lose their citizenship. When they apply for re-acquisition, they may face severe difficulties. There

[320] The interview took place in Copenhagen, on 2 February 2016. The interviewed is an Attorney-at-Law with Right of audience at the Danish High Court, and Member of the Danish Bar and Law Society.

is in fact no access to previous decisions on cases of loss of nationality, and there are no guidelines from the Ministry that the case-handlers could follow in order to ensure legal certainty in this sensitive area. Re-acquisition can be granted if the applicant has proven attachment and belonging (*samhørighed*) to Denmark, documenting it via stays in the country, or attendance of school/courses, or knowledge of the national language, etc. Unfortunately, it is difficult to try these cases in court without knowing which one, among these elements, can tip the scale and ensure, that a Danish national who has lost his/her nationality can re-acquire it.

The area of **expulsion** was also mentioned as a problematic area, especially when the expulsion sentence is stated for indefinite time, and with an attached prohibition to re-entry the country. This is a particularly intrusive measure for the Union citizens expelled with this type of sentencing. The legislation states that in the case an expulsion for an indefinite time, with a ban on re-entry, the court has to take into consideration the concrete and individual circumstances of the case in order to evaluate whether the applicant will constitute a threat for public security and interests also in the future. However in practice this evaluation does not seem hold particular value in court, although these decisions may affect for example the family life established by the convicted citizen in Denmark.

Finally, the basic conditions for loss of residence permit in Denmark, which should directly derive from the Citizenship Directive, are administered by the State Administration according to the EU residence order, thus discrepancies may occur in the interpretation of what is in fact required. The attorney has also engaged the European Commission in a series of cases where, according to him, the Danish authorities were not respecting EU law; in his opinion, there is a general lack of legal certainty derived by a lack of resources, and also a less favourable position for third country nationals seeking family reunification in Denmark as a consequence of the opt-out in the Justice and Home Affairs cooperation.

QUESTION 8 – SYSTEMATIC OR NOTORIOUS DEFICIENCIES IN THE COUNTRY UNDER STUDY?

Please, discuss here in detail any 'revealing' cases of weaknesses in the effective exercise of core citizenship rights in your country.

Access to citizenship via naturalisation is not especially promoted or encouraged in Denmark.[321] There has been an increase in applications for naturalisation, also by Union citizens, after the Citizenship Act has been amended, in September 2015, so that the legislation now allows dual citizenship. No longer discouraged by the prospect of having to renounce their former citizenship, a larger number of foreigners have decided to finally naturalise in their country of residence.[322] However, the requirements for naturalisation have

[321] Ersbøll, E. (2013), Naturalisation Procedures for Immigrants – Denmark. EUDO Citizenship Observatory, p. 7.
[322] This is a trend highlighted by a police officer working with applications for naturalisation.

successively been changed by the new liberal/right-wing government, imposing stricter conditions on language proficiency, citizenship testing, residence, self-sufficiency etc. This may impact the naturalisation rate in the future, although it is of course at this point too early to foresee.

The amendments to the naturalisation circular were introduced with retroactive power, thus including already presented applications, and consequently weakening the rule of law in citizenship affairs (regrettably, this is a recurrent tendency in Danish citizenship legislation).

QUESTION 9 – GOOD PRACTICES

Please highlight any other legal norms, policies, instruments or practical tools which facilitate the exercise core citizenship rights in the country under study.

A good practice to be highlighted is the amount of information on the various legal requirements for residence, nationality, etc. that is available through diverse websites, in English, and provided by the Danish Ministry of Immigration, Integration and Housing.[323] The State Administration is the dedicated authority for EU residence matters, and constitute a separate office from the general Immigration Service's office (which deals with all nationalities), in an effort to provide a faster processing of Union citizens' applications by a more specialized staff.[324]

On the internet there is also a lot of official digital services and information on rights and duties of citizens that are easy accessible via the website <www.borger.dk>, which is for Danes and foreign citizens alike. A 'Move to Denmark' app has also recently been developed as a practical guide for people who are considering relocating to Denmark and/or Copenhagen.[325]

Moreover, International Citizen Service points throughout the country offer a one-stop office where to deal with practicalities of residence. In Copenhagen, the International House Copenhagen[326] also provides administrative help in registering and offers help and guidance at its International Citizen Service (for EU and non-EU nationals). As far as possible, the public authorities are also typically able to provide foreigners with information and application forms in English, if the foreigners do not master Danish.

[323] E.g. the Immigration Service's website: New in Denmark, <www.nyidanmark.dk>.
[324] See < www.statsforvaltningen.dk/site.aspx?p=6394>.
[325] < www.copcap.com/our-services/finding-talent/move-to-dk-app>.
[326] < ihcph.kk.dk/>.

Annexes

NATIONAL PROVISIONS

- The Constitutional Act of Denmark of June 5th 1953, *Danmarks Riges Grundlov af 5. Juni 1953*. Available at <http://www.thedanishparliament.dk/Publications/The_Constitutional_Act_of_Denmark.aspx>
- Naturalisation Circular, CIS no. 10873 of 13.10.2015, *Cirkulæreskrivelse om naturalisation*
- Citizenship Consolidation Act, LBK no. 422 of 07.06.2004 with later amendments, *Bekendtgørelse af lov om dansk indfødsret*
- EU Residence Executive Order, BEK no. 474 of 12.05.2011, *Bekendtgørelse om ophold i Danmark for udlændinge, der er omfattet af Den Europæiske Unions regler (EU-opholdsbekendtgørelsen)*
- Aliens Consolidation Act, LBK no. 1021 of 19.09.2014, *Lovbekendtgørelse af Udlændingelov*

BIBLIOGRAPHY

Adamo, S. (2016), Access to Travel Documents Case Study. Contribution towards Deliverable 7.6, Barriers to European Citizenship, *bEUcitizen*

Adamo, S. (2015), Mechanisms for Enforcing Civil Rights. Contribution towards Deliverable 7.2, Barriers to European Citizenship, *bEUcitizen*

Adamo, S. (2008), Northern Exposure: The New Danish Model of Citizenship Test, *International Journal on Multicultural Societies* (now '*Diversities*') vol. 10, no. 1, pp. 10-18, UNESCO. Special Issue: Citizenship Tests in a Post-National Era

Ersbøll, E. (2013), Naturalisation Procedures for Immigrants – Denmark. EUDO Citizenship Observatory

Ersbøll, E. (2015), Report on Citizenship Law: Denmark. EUDO Citizenship Observatory

Jacqueson, C. (2014), National Report on Denmark, in Neergaard, U., Jacqueson, C. and Holst-Christensen, N. (eds.), *Union Citizenship. Development, Impact, and Challenges.* DJØF Publishing, Copenhagen

Starup, P. (2012), *Grundlæggende udlændingeret I*, DJØF, Copenhagen

ANNEX IV – COUNTRY REPORT FRANCE

BEUCITIZEN
BARRIERS TOWARDS EU CITIZENSHIP

CASE-STUDY D 7.3:

Exploring obstacles in exercising core citizenship rights

WP 7 CIVIL RIGHTS

FRANCE

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BEUCITIZEN
BARRIERS TOWARDS EU CITIZENSHIP


SEVENTH FRAMEWORK
PROGRAMME


CEU
CENTRAL
EUROPEAN
UNIVERSITY

Questionnaire Deliverable 7.3: Case study 'Core citizenship rights'

Extract from the DoW:

(i) A case study exploring obstacles that citizens face in trying to enjoy their core citizenship rights (e.g. right of residence in the EU). The analysis will focus on the following obstacles:

- Acquiring, keeping and regaining EU citizenship in the light of diverse national nationality/citizenship laws (e.g. limitations on dual citizenship; the granting of national citizenship to 'nationals' of a Member State living in another Member State/third country, effects of deception in application for citizenships, etc.);

- Obtaining residency rights for family members who are third-country nationals, even when the EU citizen has not exercised his or her right to free movement (in the light of national immigration rules and family laws).

QUESTIONNAIRE

Abbreviations and acronyms

AEDH – Asssociation Européenne des Droits de l'Homme

ASSFAM - Association Service Social Familial Migrants

CAA – Cour admnistrative d'appel [appeal administrative court]

CC – Conseil constitutionnel [Constitutional Council: French constitutional court]

CE – *Conseil d'Etat* [Council of State: French supreme administrative court and government advisor]

Cedesa – Code de l'entrée et du séjour des étrangers et du droit d'asile [Code relating to the entry and residence and foreigners and the right to asylum]

CJEU - Court of Justice of the European Union

COMEDE – Comité médical pour les exilés [medical committee for exiled persons]

ERRC - European Roma Rights Center

EUDO – European Union Democracy Observatory on Citizenship

GISTI – Groupe d'information et de soutien des immigrés [Group for the information and support of immigrants]

IST – Interdiction de sortie du territoire [Prohibition to leave the territory]

LDH – Ligue des Droits de l'Homme

OQTF – Obligation de quitter le territoire français [Obligation to leave the French Territory]

QPC – Question prioritaire de constitutionalité [priority question of constitutionality: French premiminary ruling procedure on constitutional matters]

réf. – référé [judicial decision in emergency/interim proceedings]

SIS – Schengen Information System

TA – Tribunal Administrative [first instance administrative court]

TCN – Third-Country National

Theme I: Access and loss of nationality and EU citizenship status

Question 1 – Access to EU citizenship: nationality

1.1. What are the national conditions to acquire nationality of your country? Are there specific rules with regard to persons who are threatened to become stateless? Are the conditions of acquiring nationality changed under the influence of the judgment *Ruiz Zambrano* of the CJEU?

The acquisition, grant and loss of French nationality is regulated in the French *Code Civil*, and in compliance with international agreements to which France is a party.[327] French nationality can be obtained at birth or after, and consists in a mix of *ius soli*, *ius sangini* and state-controlled access (through naturalization).[328]

French nationality at birth

Are French at birth, individuals who are (i) born to a French national ;[329] (ii) born in France to stateless parents ; (iii) born in France to unknown parents or to persons of unclear nationality or who would be otherwise stateless ;(iv) born in France to at least one parent born herself in France.[330]

Since 1973, French nationals living abroad can pass their French nationality through an unlimited number of generations, provided that the French descendant applies and registers with a French authority. This ability to pass nationality whilst residing abroad is particularly important in the context of EU citizens' mobility and EU citizenship. There are however some limits. The authorities may indeed use a procedure certifying the loss of French nationality for descendants of French who have been long-established in a foreign country, ie more than fifty years.[331]

Acquisition of French nationality after birth

The acquisition of French nationality after birth includes: (i) the automatic acquisition through the application of *ius soli* after birth; (ii) acquisition through marriage; and (iii) acquisition through naturalisation.

The procedure related to these modes of acquisition is subject to the payment of a fiscal stamp (50 EUR).[332] Since the Law of 24 July 2006, the procedure for the conferral of French

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[327] Article 17 of the French *Code Civil*.

[328] For a detailled analysis in English on the acquisition of French citizenship, please refer to the country profile on France on the EUDO citizenship project website available at http://eudo-citizenship.eu/country-profiles/?country=France. Check, check in particular, the report by Bertossi et Hajjat on citizenship in France, updated in 2013, at http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=France.pdf, and the report by Hajjat and Abdelalli on naturalization, at http://cadmus.eui.eu/bitstream/handle/1814/29782/NPR_2013_03-CITIMP-France.pdf?sequence=1.

[329] Article 18 of the French *Code Civil*

[330] See Articles 19 ss of the French *Code Civil*.

[331] Article 23-6 of the *Code Civil*. See Bertossi et Hajjat on citizenship in France, updated in 2013, at http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=France.pdf.

[332] Circulaire No IOCV1102492C relative aux taxes liées à l'immigration et à l'acquisition de la nationalité, 11 March 2011 [circular concerning taxes relating to immigration and the acquisition of nationality]. A circular is an information note released by ministerial services, which usually detail how to implement laws and regulations. Since 2008, all circulars must be published.

citizenship has become more ceremonial and symbolic.[333] It is officiated by the Prefect or the mayor, within six month of the acceptance of the application. The 'new' citizens will receive a copy of the Charter of French citizens[334], which sets out the rights and duties of French citizens, a document which they must sign during the ceremony of conferral.

- Ius soli after birth

France's strong immigration history, partially an inheritance from its colonial past, explains its acceptance of *ius soli* as a basis for granting French citizenship to children of immigrants born in France. A child born in France whose parents are foreigners and where not born in France will automatically become French at eighteen if she still resides in France, and has been residing there for at least five years since the age of eleven, and if she does not object to it.[335]

This mode of acquisition of French citizenship can be anticipated by a court declaration at the age of sixteen. Moreover, foreign parents of a child born in France and living in France since the age of eight can apply for French nationality on her behalf and with her consent from the age of thirteen.[336]

- Acquisition by marriage

Since 2006, the foreign spouse of a French national can claim French nationality after four years of 'common affective and material life' after the date of the marriage. This period is extended to five years if the foreign spouse cannot prove - with a residence certificate - that she has resided in an uninterrupted and lawful manner in France for at least three years since the marriage, or *in case of residence abroad*, that the French spouse was registered in the Register of French persons living abroad (*Registre des Francais de l'Etranger*) during the period of communal life. If celebrated abroad, the marriage must be registered into the French civil register. The foreign spouse must display an awareness of the duties attached to French citizenship, and demonstrate linguistic knowledge, characterised by an understanding of the language necessary to daily life management and situations ('*compréhension du langage nécessaire à la gestion de la vie quotidienne et aux situations de la vie courante'*). This level corresponds to level B1 of the Common European Framework for languages of the Council of Europe; it was increased in 2011.[337]

The application for a declaration of nationality by reason of marriage (*déclaration de nationalite en raison du mariage*) is addressed to the Prefect (when the marriage is

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[333] Source: website of the French interior ministry, at http://www.immigration.interieur.gouv.fr/Accueil-et-accompagnement/L-acces-a-la-nationalite-francaise/Les-conditions-et-modalites-de-l-acquisition-de-la-nationalite-francaise.

[334] Source: website of the French interior ministry, at http://www.immigration.interieur.gouv.fr/Accueil-et-accompagnement/L-acces-a-la-nationalite-francaise/La-charte-des-droits-et-devoirs-du-citoyen-francais (approved by Décret n° 2012-127 approuvant la charte des droits et devoirs du citoyen français prévue à l'article 21-24 du code civil, 30 January 2012 [Decree approving the rigths and duties of the French citizen provided for Article 21-24 of the *Code Civil*]

[335] Article 21-7 of the *Code Civil*. A 1993 reform removed the automatic nature of this conferral of citizenship, but it was restored in 1998.

[336] Article. 21- 11 of the *Code Civil*.

[337] Site of the French public service, page on 'Nationalité Francaise par marriage: conditions', https://www.service-public.fr/particuliers/vosdroits/F2726.

celebrated in France) or the French Consul (when it is celebrated abroad), and transmitted to the Ministry of the Interior. The ministry may register the declaration, or reject it, where the conditions are not fulfilled. Moreover, the government may, by a simple decree, oppose the acquisition by declaration within two years of the marriage, on grounds of lack of integration, insufficient linguistic knowledge or where the person has committed an act which make her unfit for French citizenship.[338]

- *Naturalization*

Foreigners may apply for naturalisation. They must fulfil a number of conditions: five years of residence;[339] good behaviour (ie certain types of sanctions will prevent naturalizations); evidence of integration (*assimilation*), through a good knowledge of French (B1 COE Common Frame of reference), French culture, history and society, the rights and duties of French citizens, and the endorsement of French essential values and principles of the French republic.

The application is registered with the Prefect, who issues a positive or negative opinion, and then transmitted to the Ministry. In making its decision, the ministry takes into account factors such as the applicant's stability of residence in France, and her degree of autonomy and behaviour. The current rate of naturalisations is around 5 per cent of the foreign population in France, corresponding to 100 000 naturalisations per year.[340]

Regaining French citizenship

French citizen who had to renounce French citizenship may apply to regain it. They must fulfil the conditions for naturalization, except for the residence requirement.

Dual citizenship

French law does not specifically regulate dual citizenship, but it accepts it. All citizens, whether they are bi-nationals or not, enjoy the same rights.[341] French law however provides for the withdrawal of French citizenship for dual citizens who behave as ennemies of France (see below, answer under Question 1.2).

Recent developments: reduced access to French citizenship

With the rise of extreme-right wing parties, and riots in the French suburds, reforms took place in 2003 and 2011 under right-wing governments, which made it more difficult to acquire French citizenship through naturalization and marriage. They strengthened the condition of

[338] There is opposition from the government in 8% of the cases. On 57 opposition decrees issued in 2013, 43 were based on the ground that where the person has committed an act which make her unfit for French citizenship; see http://www.immigration.interieur.gouv.fr/Accueil-et-accompagnement/L-acces-a-la-nationalite-francaise/Les-conditions-et-modalites-de-l-acquisition-de-la-nationalite-francaise

[339] The residence requirement may be brought down to two years, for persons who have had an exceptional integration path (including civic, scientific, economic, cultural contribution), providing that she fulfils the other conditions. From 1961 to 2006, immigrants who came from a former colony or a French-speaking country had no required minimum period of residence they only had to reside in France at the time of application. This has however now changed.

[340] See Bertossi and Hajjat, *Report on citizenship in France*, updated in 2013, at http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=France.pdf.

[341] See webpage of the French public service 'Peut-on avoir plusieurs nationalités' at https://www.service-public.fr/particuliers/vosdroits/F334

integration and specifically targeted the foreign spouses of French citizens. As a reflection of the change of political mindset, in 2010, the procedure for naturalisation was transferred from the Ministry of Social Affairs to the Ministry of Interior. These substantive, procedural and institutional reforms led to a substantial decrease in the numbers of naturalization (minus 35-40%)

In 2012, the French Minister of the Interior of the newly elected left-wing government released a circular which sought to facilitate the acquisition of French nationality. It sought to return to pre-2010 figures to align naturalizations patterns and immigration trends. The circular relaxed, in particular, work-related criteria [342] and those applicable to foreign graduates (in particular in areas where there was a shortage of workers, such as the medical field). It also applied a presumption of assimilation to young foreigners under the age of 25 who, although born abroad, have lived in France for at least ten years and have been attending school continuously for five years. Finally, it re-established the five years lawful residence requirement required to apply for naturalisation, a period which had been de facto increased to ten years under the previous government. It however maintained linguistic criteria, as well as requirements related to knowledge of French history.[343]

1.2. Under which conditions can nationals of your country be deprived of their nationality? Is there a difference in whether a citizen has (i) only the nationality of your country, (ii) has the nationality of another Member State of the European Union and (iii) those citizens having the nationality of your country and the nationality of a third country?

The loss of French nationality can occur (i) at the request of the individual herself, on the condition that she resides in a foreign country and is a dual national, (ii) or at the request of the State, in exceptional circumstances, outlined below. Around thirty persons loose every year their French citizenship at the request of the state.[344]

Article 25 of the French *Code Civil* provides that, under certain circumstances, an individual who *acquired* French nationality may, by decree adopted after approval of the *Conseil d'Etat*, have his nationality forfeited (*déchu de sa nationalité*), except where such forfeiture would render that person stateless.[345] It applies in case that the French citizen has committed an 'ordinary or serious offence which constitutes an injury to the fundamental interests of the

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[342] For example, it is no longer necessary to have an indefinite employment contract; a fixed term contract is enough.

[343] **See the Valls Circulars on Naturalization, ie Circulaire No INTK 12071867 relative á la procedure d'accès à la nationalité, 16 October 2012 [circular relating to the procedure to access French citizenship]; Circulaire No INTV 1234487C relative aux taxes liées à l'immigration et à la mise en oeuvre des dispositions de l'article 42 de la loi de finances pour 2013, 31 December 2012 [circular concerning taxes relating to immigration]. For a commentary, see http://www.lemonde.fr/societe/article/2012/10/18/manuel-valls-veut-faciliter-l-acquisition-de-la-nationalite-francaise_1777161_3224.html.**

[344] Raphaëlle Besse Desmoulières, 'L'etat d'urgenge, une marge de manoeuvre bien trop large est offerte aux autorites' (entretien avec Marie-Laure Basilien-Gainche, law professor at Lyon III University), Le Monde, 19 November 2015, at http://www.lemonde.fr/politique/article/2015/11/19/etat-d-urgence-une-marge-de-man-uvre-bien-trop-large-est-offerte-aux-autorites_4813627_823448.html#xtor=RSS-3208.

[345] Loi No 98-170 relative à la nationalité, 16 March 1998 [Nationality Act], https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000754536&categorieLien=id.

Nation';[346] 'an act of terrorism'; [347] or an abuse of power or corruption (by a person exercising public functions);[348] failed to respect duties under the Code of National Service [ie military service]; or committed acts incompatible with the status of French citizen and detrimental to the interests of France for the benefit of a foreign State (eg treason).

Article 25-1 specifies that such withdrawal can only occur where the act took place within ten years of the acquisition of French citizenship, and the final decision forfeiting citizenship must be pronounced within ten years of the occurrence of the acts.

A French-Moroccan dual national, convicted in the UK for participation in a criminal association for the preparation of terrorist acts, invoked Article 20 TFEU and Article 20 and 21 CFR to challenge a ministerial order adopted under Articles 25 and 25-1 stripping him of his French nationality. The French Council of State considered that the loss of the nationality of a Member State which results in the loss of citizenship of the Union, to be consistent with EU law, must respond to reasons of public interest and be proportionate to the seriousness of the facts on which it is based, taking into account the time passed since the acquisition of nationality and the possibility for that person to obtain another nationality; it took the view that the Charter of Fundamental Rights did not preclude that the loss of nationality may depend on the mode or conditions of acquisition of nationality.[349]

Furthermore, under Article 23-7 of the *Code Civil*, which was introduced during the Spanish Civil War, a French citizen who 'behaves like the national of another state' can, where she has the nationality of that state, be declared as having lost her French citizenship, by decree adopted after approval by the *Conseil d'Etat*. This provision was activated for disloyal behavior, for example against collaborators in the aftermath of WWII, and in 1948 against Polish workers who caused social unrest. It has been activated three times since 1958, including once against a citizen who had the nationality of an EU member state: it concerned a French-German bi-national who behaved since 1939 'like a German national' and expressed overtly his hostility towards France (1970).[350]

Finally, under Article 23-8 of the *Code Civil*, a French citizen who occupies a position in an foreign army or public service, or in an international organization in which France is not party, or is participating in the activities of such organization, and has not resigned or stopped her participation despite an injunction from the French government to do so, could lose her citizenship by decree in *Conseil d'Etat* (within a delay which cannot be shorter that fifteen

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[346] Loi No 93-933 du 22 juillet 1993 réformant le droit de la nationalité, 22 July 1993 [Reform of Nationality Act], https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006082393.

[347] Loi No 96-647 du 22 juillet 1996 tendant à renforcer la répression du terrorisme et des atteintes aux personnes dépositaires de l'autorité publique ou chargées d'une mission de service public et comportant des dispositions relatives à la police judiciaire, 22 July 1996 [Anti-terrorism act], https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000367689&categorieLien=id.

[348] Loi No 93-933 du 22 juillet 1993 réformant le droit de la nationalité, 22 July 1993 [Reform of Nationality Act], https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006082393.

[349] Conseil d'Etat, Mr Q v France, No 383664, 11 May 2015.

[350] **REMY NOYON, 'DECHEANCE DE NATIONALITE : "CE QUE PROPOSE HOLLANDE EST DEJA DANS LE CODE CIVIL !"', 17 NOVEMBRE 2015, HTTP://RUE89.NOUVELOBS.COM/2015/11/17/DECHEANCE-NATIONALITE-PROPOSE-HOLLANDE-EST-DEJA-CODE-CIVIL-262156**

days and longer than two months). Where the *Conseil d'Etat* does not approve, the measure can only be adopted by a decree of the Council of Ministers.

1.3. What is the current political and legislative discussion in your member state with regard to acquiring and withdrawing nationality? (e.g. In the Netherlands there is a fierce debate whether the Dutch nationality can be withdrawn of persons, who are suspected to be part of a terroristic organisation).

There have been recurrent discussions about dual citizenship, focused on the problem of conflicting loyalties, but the right to dual-citizenship does not seem under threat in France. However, the possibility of withdrawing French citizenship from dual-citizens *born* French (and not just those who *acquired* French citizenship) resurfaced, following the 2015 terrorists attacks. A proposal is currently under discussion in the French Parliament; it would bring their legal situation in line with dual citizens who acquired French citizenship (see above).

Following the November 2015 attacks, the French President of the Republic F. Hollande announced that he would propose an amendment to the Constitution, which would allow for the withdrawal of French citizenship from persons who were born French, but have dual citizenship, when they have committed acts of terrorism. Even though rumor had it that, due to opposition with his own party ranks, Hollande would eventually drop the proposal, on 23 December 2015, a draft constitutional law on the protection of the Nation was presented to the (French) Council of Ministers, which set the parameters of the state of emergency framework,[351] and provided the constitutional basis for the removal of citizenship from dual-citizen born French. Its Article 2 would amend Article 34 of the Constitution to allow for the forfeiture of nationality from dual-citizen born French who have been 'sentenced for a crime constituting a serious interference with the life of the Nation' (*crime constituant une atteinte grave à la vie de la Nation*).[352] This withdrawal, which could only be decided following a judicial decision, should concern only the most serious crimes, listed in implementing legislation.[353] The draft constitutional law was approved by the *Assemblée Nationale* on 10 February by 317 votes against 1999, but still needs to be approved by the *Sénat*, and by the *Congrès* (congress) consisting of the *Assemblée Nationale* and *Sénat* sitting together.

The measure, approved by the *Conseil d'Etat*, is generally assessed as more symbolic than effective. [354] A number of scholars argue that French law as it currently stands already allows

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[351] Note that France declared the suspension of the application of the ECHR to all measures adopted as a result of the state of emergency legislation.

[352] Projet de loi constitutionnelle de protection de la Nation, 23 Decembre 2015, No 3381, : PRMX1529429L, [Constitutional Law for the Protection of the Nation] https://www.legifrance.gouv.fr/affichLoiPreparation.do?idDocument=JORFDOLE000031679624&type=general&typeLoi=proj&legislature=14

[353] Projet de loi constitutionnelle de protection de la Nation, 23 Decembre 2015, No 3381, : PRMX1529429L, [Constitutional Law for the Protection of the Nation] https://www.legifrance.gouv.fr/affichLoiPreparation.do?idDocument=JORFDOLE000031679624&type=general&typeLoi=proj&legislature=14

[354] DAVID REVAULT D'ALLONNES, 'REFORME CONSTITUTIONNELLE: FRANCOIS HOLLAND MAINTIENT LA DECHEANCE DE LA NATIONALITE', 23 DECEMBER 2015, HTTP://WWW.LEMONDE.FR/POLITIQUE/ARTICLE/2015/12/23/REFORME-CONSTITUTIONNELLE-FRANCOIS-HOLLANDE-MAINTIENT-LA-DECHEANCE-DE-NATIONALITE_4837002_823448.HTML;

the withdrawal of citizenship from French nationals born French. According to Weil, Article 23-7 of the *Code Civil* (see above) could already be relied on to withdraw French citizenship from dual-citizens who have committed acts of terrorism.[355] For Prats, it is Article 23-8 of the same Code which allows for the withdrawal of nationality for any French who occupies function in a foreign organization to which France is not a party or does not support (see above), that would offer the required legal basis to forfeit the French citizenship of any born-French citizen who joins Daesh/ISIS, even if that would make her stateless.[356]

The material consequence of the proposal would be that such individuals could be more easily expulsed. The authorities would still have to comply with EU citizenship rules, where those individuals also have the citizenship of another member state and have resided for a certain time in France (see below, answer under Question 5).

Theme II: Free movement rights of EU citizens

Question 2 - The right to free movement as a core citizenship right (Article 21 TFEU and the Citizens' Directive)

As a prelimimary remark, it is important to note that Directive 2004/38/EC applies to French overseas territories. On the whole, and save on a few issues outlined below (eg the introduction of the concept of abuse of right in French legislation), French laws and regulations are in line with EU law; however, ministerial instructions and administrative practices are problematic in various respects. Because of procedural deficiencies and practical reasons, unlawful administrative interpretations and practices are rarely challenged. When they are, courts, in particular higher courts, do not systematically adopt the most protective stance. As a result, poor EU citizens, in particular those who belong to the Roma minority, see their mobility and residency rigths, as well as the right to non-discrimination based on race or ethnicity, significantly curtailled in practice.[357]

2.1. What conditions are laid down for EU citizens with the nationality of another Member State to reside in your country for a maximum period of three months?

Legislation and regulations

In French law, an EU citizen who wishes to stay in France for less than three months only needs to hold a valid passport or a national identification (ID) card, without any further conditions. This right also extends to family members who come with him or her, or who join

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C. PARTS, 'RETIRER LA NATIONALITE FRANÇAISE AUX DJIHADISTES DE DAESH EN 15 JOURS. CHICHE ? QUE NOUS DIT LE DROIT AUJOURD'HUI ?', 6 JANUARY 2016, AT LA HTTP://WWW.DALLOZ-ACTUALITE.FR/CHRONIQUE/RETIRER-NATIONALITE-FRANCAISE-AUX-DJIHADISTES-DE-DAESH-EN-15-JOURS-CHICHE-QUE-NOUS-DIT-DRO#.VO5SHVLENPM

[355] E.g Patrick Weil (interview), Remy Noyon, 'Déchéance de nationalité : "Ce que propose Hollande est déjà dans le code civil !"', 17 Novembre 2015, http://rue89.nouvelobs.com/2015/11/17/decheance-nationalite-propose-hollande-est-deja-code-civil-262156

[356] C. PARTS, 'RETIRER LA NATIONALITE FRANÇAISE AUX DJIHADISTES DE DAESH EN 15 JOURS. CHICHE ? QUE NOUS DIT LE DROIT AUJOURD'HUI ?' 6 JANUARY 2016, AT LA HTTP://WWW.DALLOZ-ACTUALITE.FR/CHRONIQUE/RETIRER-NATIONALITE-FRANCAISE-AUX-DJIHADISTES-DE-DAESH-EN-15-JOURS-CHICHE-QUE-NOUS-DIT-DRO#.VO5SHVLENPM

[357] For a overview of the most problematic legal provisions and administrative practices with regard to EU citizens' mobility rights, see Petition by the AEDH, ASSFAM, CIMADE, ERRC, GISTI, LDH and Romeurope to the European Parliament, 25 February 2015, available at http://www.aedh.eu/plugins/fckeditor/userfiles/file/EN%20petition%20EN.pdf.

him or her, irrespective of their nationality. If family members are from a third country, they must present a valid passport and, where they are not exempted from it, a short stay visa. This visa must be issued within 'the briefest delays' (Article R. 121-1 Cedesa), and any refusal to issue such visa must be motivated (Article L.211-2 Cedesa).

The right to reside for less than three months is nonetheless subject to the requirement that the EU citizen 'does not become an unreasonable burden for the system of social assistance of the host state' (Article L. 121-4-1 CESEDA). This means that the state authorities may terminate, cancel or withdraw the right of residence of an EU citizen where she puts an unreasonable burden on the French welfare system. This provision has however little practical impact, since in France most social benefits are subject to a residence condition of at least three months in the case of non-active citizens. This residence condition also applies to non-active 'returning' French citizens, after they have resided in another member state (except in special circumstances, for example if they are on the minimum income (RMI)). The three months residence requirement applies to access to health insurance (c*ouverture maladie universelle de base,*[358] the active solidarity income (*revenu de solidarité active)*,[359] the old persons solidarity grant (*allocation de solidarité aux personnes âgées)*, [360] and adult disability allowances (*allocation supplémentaire d'invalidité, and disable adult allowance*).[361]

EU citizens may access, without conditions relating to the period of residence but still based on condition of 'habitual residence', certain social benefits such as social assistance for children (*aide sociale à l'enfance*), emergency shelter or access to urgent and vital health care.[362] Habitual residence means that the EU citizen must intend to take up residence in France and is not staying temporarily or in transit. EU citizens who come to establish their 'habitual residence' in France must register that intention at the mayor's office of their place of residence within three months of their arrival and they will be issued immediately with a certificate. If they fail to do so, they will be considered as having resided less than three months (Articles L.121-2 and R.121-5 Cedesa). However, this obligation to register is not yet in force as the measure providing for the template form had not been adopted.[363]

The right of EU citizen to stay in France for less than three months is further limited by various measures prohibiting access of foreigners to the French territory (see answer under question 8), as well as provisions allowing removal for abuse of rights (see answer under Question 6).

Ministerial instructions

An administrative circular of 17 June 2011 clarifies that using the system of social assistance does not, in itself, justify an automatic limitation of the right to reside; there should be a case-by-case analysis, which takes into account the difficulties encountered, their temporary or more permanent nature, the amount and type of benefit granted, the state of health of the

[358] Article L. 380-1 et R. 380-1 *Code de la sécurité sociale* [Social Security Code].
[359] Article L. 262-6 of the *Code de l'action sociale et des familles* [Code of social action and families].
[360] Article L.816-1 of the *Code de la sécurité sociale* [Social Security Code].
[361] Articles L. 816-1 and L.821-1 *Code de la sécurité sociale* [Social Security Code].
[362] Article L.254-1 *Code de l'action sociale et des familles* [Code of social action and families].
[363] GISTI, *Les droits des citoyens et des citoyennes de l'Union européenne et de leur famille* (GISTI, Les cahiers juridiques, 5th ed., October 2014)

interested person, his or her family situation, and any other element of personal or humanitarian nature. [364]

The much criticised circular of 10 September 2010 on the conditions of exercise of the right to reside of EU citizens specifies that the existence of an 'unreasonable burden' for the system of social assistance of the host state is established where the Prefect can show that there have been 'recurrent reliance on social assistance during short stays of less than three months' or 'where it has been clearly established that the only purpose of the short periods of stay was to benefit from French social assistance or benefits'. [365]

Administrative practices

Both the GISTI and the Commission reports that administrative authorities sometimes impose additional conditions on TCN family members of EU citizens, such as accommodation certificates, documentation establishing sufficient resources, or the presentation of a return flight, which are contrary to EU law, as they fail to distinguish the situation of TCN who are family members of EU citizens from other TCN.[366]

Case law

The Appeal Administrative Court of Bordeaux ruled that administrative authorities have discretion in assessing the notion of 'unreasonable burden', subject to judicial control.[367] In another case, it also ruled that the three-month delay within which the stay of an EU citizen is only subject to the requirement not to become an unreasonable burden can also apply to a minor person. Once the three months delays expires, further conditions may apply for maintaining residence. [368]

The expulsion or removal of EU citizens who stayed less that three months in France is addressed under Questions 5 and 6.

2.2. What conditions are laid down for EU citizens with the nationality of another Member State to reside in your country for a period longer than three months?

General considerations

Legislation and regulations

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[364] Circulaire No IOC/K/11/10771/C relative à l'entrée en vigueur de la loi relative à l'immigration, à l'intégration et à la nationalité, 17 June 2011 [circular relating to the coming into force of the law relating to immigration, integration and nationality].

[365] **CIRCULAIRE NO IMI/M/10/00116/C RELATIVE AUX CONDITIONS D'EXERCICE DU DROIT DE SEJOUR DES RESSORTISSANTS DE L'UNION EUROPEENNE, DES AUTRES ÉTATS PARTIES A L'ESPACE ECONOMIQUE EUROPEEN ET DE LA CONFEDERATION SUISSE, AINSI QUE DES MEMBRES DE LEUR FAMILLE, 10 SEPTEMBER 2010, [CIRCULAR RELATING TO THE CONDITIONS OF EXERCISE OF THE RIGHT OF RESIDENCE OF EU CITIZENS AND AFFILIATED] AT HTTP://CIRCULAIRE.LEGIFRANCE.GOUV.FR/PDF/2011/04/CIR_32884.PDF.**

[366] GISTI, *Les droits des citoyens et des citoyennes de l'Union européenne et de leur famille* (GISTI, Les cahiers juridiques, 5th ed., October 2014) p. 12; Commission report to the EP concerning the application of 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, 17 December 2008. COM (2008) 840 final.

[367] CAA Lyon, 30 May 2013, *Préfet du Rhône*, No 13LY00578 :

[368] CAA Bordeaux, 4 March 2014, *Mme Georgieva*, No 13BX02097.

In order to reside in France for more than three months, EU citizens do not need to have a residence permit (Article L. 121-2 Cedesa), except for nationals of states subject to a transitory period who would like to exercise a professional activity. TCN who are family members of EU citizens must hold a valid residence permit; it will be granted on the basis of the residence right of the EU family member.

An EU citizen has the right to reside in France for more than three months if she belongs to the following categories: worker (employee or self-employed), inactive (if possessing sufficient resource and health insurance), student (if possessing sufficient resource and health insurance). Family members of an EU citizen who falls under one of the previous categories have a derived right of residence.

Although an EU citizen does not need to possess a residence title, she may nonetheless request a residence certificate, free of charge (Article L. 121-2 Cedesa). The request will be examined according to criteria established under Articles R. 121-10 à R. 121-15 Cedesa without the need to provide for a proof of address (*justificatif de domicile*). The residence certificate (*carte de séjour*) is issued, which carries a European Union mention, together with a reference to a particular category (eg. *UE – toutes activités professionnelles* [EU- all professional activities], or *UE – non actif* [EU-non-active], or *UE – étudiant* [EU-student]). Its validity is limited in time by the duration of the work contract (for an employee) or other relevant documentation supporting their right of residence, for a maximum of five years. TCN who are family members of EU citizens and who entered in France without the required visa must apply for a regularization visa and pay a tax (340 EUR).[369]

As noted above, Article L. 121-2 CESEDA provides that an EU citizen who wishes to establish his or her habitual residence in France must register her presence at the mayor's office of the place of residence within the three months following his or her arrival, and she will be issued immediately with a certificate. The issuance of this certificate does however not establish a right to reside nor does it condition the exercise of a right or the fulfillment of any other administrative formality (Article R. 121-5 Cedesa). If she fails to register, the assumption will be that she has resided in France for less than three months. This obligation to register had however not come into force yet, since the administrative act establishing the template form has not yet been adopted.[370]

Ministerial instructions

Ministerial instructions provide that when national legislation offers a more advantageous position than EU law to TCN, as is the case in relation to the residence rights of spouse of a French citizen, the parents of French children, persons who have entered a civil partnership with a French person for more than one year, sick foreigners or victims of human trafficking

[369] Circulaire No IOCV1102492C relative aux taxes liées à l'immigration et à l'acquisition de la nationalité, 11 March 2011 [circular concerning taxes relating to immigration and the acquisition of nationality], at http://www.immigration.interieur.gouv.fr/Accueil-et-accompagnement/L-acces-a-la-nationalite-francaise/Les-taxes-liees-a-l-acquisition-de-la-nationalite

[370] Circulaire No IOCV1102492C relative aux taxes liées à l'immigration et à l'acquisition de la nationalité, 11 March 2011 [circular concerning taxes relating to immigration and the acquisition of nationality], at http://www.immigration.interieur.gouv.fr/Accueil-et-accompagnement/L-acces-a-la-nationalite-francaise/Les-taxes-liees-a-l-acquisition-de-la-nationalite

or sexual exploitation, the more favourable French rules should also apply to foreigners who are EU citizens.[371] It is however not a legal obligation.[372] The GISTI argues that human rights norms would require the systematic application of such more favourable rules (prohibition of inhuman and degrading treatment, right to private and family life, non-discrimination, etc.).[373]

The right of residence of EU citizens exercising an economic activity as workers, self-employed and service providers

Legislation and regulation

EU citizens who are 'workers' under the EU definition of the term, have the right to reside in France without further conditions. French rules transposing EU law into domestic law also guarantee the right of self-employed persons to establish themselves in another member states without having to prove that they have sufficient resources to provide for themselves or that the projected establishment will be sustainable. They enjoy a right to reside, even if their income is below the minimum income, and they can claim compensatory minimum income allowance (*revenu de solidarite active*).[374] EU citizens who 'exercise a professional activity' in France may request, when they have established their habitual residence in France since less than five years, a residence certificate carrying the mention 'EU-all professional activities'. These are delivered to employees, service providers and self-employed (Article L. 121-1, 1° Ceseda). The recognition of their right to reside is however not subject to having such certificate (Article R. 121-10 Ceseda). The validity of the residence certificate covers the duration of the work contract or for those who are not employed, to the envisaged activity. It cannot exceed five years. The applicant needs to provide a valid ID, and a declaration of employment from the employer, or an employment certificate, or any documentary evidence of a non-salaried activity. EU law, as transposed into French law, provides for the right of residence for providers of services.

Administrative practices

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[371] **CIRCULAIRE RELATIVE AUX CONDITIONS DE SEJOUR EN FRANCE DES RESSORTISSANTS DES ETATS MEMBRES DE L'UNION EUROPEENNE, 7 JUNE 1994 (ABROGATED BY CIRCULAIRE IMI/M/10/00116/C DU 10 SEPTEMBRE 2010), [CIRCULAR ON THE CONDITIONS OF RESIDENCE IN FRANCE OF EU CITIZENS], AT HTTP://WWW.GISTI.ORG/IMG/PDF/CIRC_1994-06-07-PDF.PDF; CIRCULAIRE RELATIVE AUX CONDITIONS D'ADMISSION AU SEJOUR DES ETRANGERS VICTIMES DE LA TRAITE DES ETRES HUMAINS OU DU PROXENETISME COOPERANT AVEC LES AUTORITES ADMINISTRATIVES ET JUDICIAIRES', IMI/M/09/00054C, 5 FEBRUARY 2009 [CIRCULAR RELATED TO HUMAN TRAFFICKING], HTTP://WWW.GISTI.ORG/SPIP.PHP?ARTICLE1379, AND 'CIRCULAIRE NO IMI/M/10/00116/C RELATIVE AUX CONDITIONS D'EXERCICE DU DROIT DE SEJOUR DES RESSORTISSANTS DE L'UNION EUROPEENNE, DES AUTRES ÉTATS PARTIES A L'ESPACE ECONOMIQUE EUROPEEN ET DE LA CONFEDERATION SUISSE, AINSI QUE DES MEMBRES DE LEUR FAMILLE', 10 SEPTEMBER 2010, [CIRCULAR RELATING TO THE CONDITIONS OF EXERCISE OF THE RIGHT OF RESIDENCE OF EU CITIZENS AND AFFILIATED] AT HTTP://CIRCULAIRE.LEGIFRANCE.GOUV.FR/PDF/2011/04/CIR_32884.PDF.**

[372] CE 22 June 2012, No 347545, M. Muntean.

[373] GISTI, *Les droits des citoyens et des citoyennes de l'Union européenne et de leur famille* (GISTI, Les cahiers juridiques, 5th ed., October 2014) p. 16.

[374] Note d'information du Ministre des Affaires Sociale, 28 June 2013 [information note from the Minister of Social Affairs].

NGO reports that social security services sometimes classify EU citizens who have a low income or a part-time job, as 'inactive' and therefore require them to fulfill additional requirements (e.g. resources, health insurance, etc), which is contrary to EU law.[375] These practices are particularly problematic for EU citizens who have a TCN spouse, who may be denied residency rights. There was for example the case of a German citizen who was a farmer and could not present pay slips or provide evidence of regular income. His TCN spouse was denied residence title because he did not have sufficient resouces. [376]

Case law

French courts confirmed that the administration could not control the sufficient nature of resources, [377] even when the self-employed applicant receives the minimum income allowance.[378]

Has been considered as exercising a professional activity under Article L. 121-1 Cedesa, a scrap collector, who declared himself as self-employed, had an establishment number (called SIRET number), was covered by the social security regime for micro-businesses and whose turnover was 848 EUR during his first year of activity.[379]

A street flower seller who, in support of his application, could not provide evidence that he was registered in the companies registry (SIRENE), or any further evidence 'which could justify that his activity was effective on the day at which the contested decision was taken', was not considered as exercising a professional activity under Article L.121-1 Cedesa.[380]

The Prefect could not refuse to issue an EU citizen the requested residence certificate (Article R.121-10 Cedesa) based on the modest nature of his income, where he had provided three invoices for clothes, jewellery and appliances, a handwritten copy of a receipt book, various fee receipts for market stands in different market places in the region, a certificate of registration at the Chamber of Commerce, and various term declarations of turnover at the social security regime for self-employement.[381]

<u>The maintenance of the right of residence for workers</u>

Legislation and regulation

Article R. 121-6 Ceseda provides that the right of residence is maintained under the 'worker' status 1) in case of temporary inability to work as a result of a disease or an accident; 2) involuntary unemployment, if the worker has been employed for more than a year and half and registered at *Pôle emploi* (unemployment office); and 3) professional training, provided that there is a connection between the prior professional activity and the training. The right to

[375] GISTI, *Les droits des citoyens et des citoyennes de l'Union européenne et de leur famille* (GISTI, Les cahiers juridiques, 5th ed., October 2014) p. 19; see also Interview with a lawyer from GISTI, Paris, 12 October 2015.
[376] Interview with a lawyer from GISTI, Paris, 12 October 2015.
[377] CAA Lyon 11 Febraury 2014, No 13LY01006)
[378] CAA Doai, 17 September 2012, No 13DA00415).
[379] CAA Bordeaux, 23 décembre 2011, n° 11BX01864.
[380] CAA Bordeaux, 18 octobre 2012, n° 12BX00523.
[381] CAA Douai, 17 septembre 2013, *M. Costache*, n° 13DA00415.

reside is maintained only for six month in case of involuntary unemployment which occurred either after the expiry of a fixed termed contract of less than one year, or during the first twelve months following the signature of a contract, and under the condition that the worker is registered with the unemployment office.

Ministerial instructions

Under a 2009 circular,[382] those who are on maternity leave, sick leave, vocational illness or accident leave or unemployed are classfified as 'assimilated' rather than as 'worker'. Although it does not have material consequent, such qualification does not seem in line with EU law.[383]

Administrative practices

The GISTI reports cases on EU citizens who became unemployed or were enrolled on professional training program being denied residency titles or access to benefit.[384]

Right of residence of job-seekers

Legislation and regulation

An EU citizen, and her family members, can reside in France under the condition that she can prove that she is actively looking for a job and that she has real chances of being employed (Article R. 121-4 Ceseda). [385] An EU citizen who entered the French territory to look for a job cannot be expulsed as long as she can prove that she continues to look for a job and that she has real chances of being employed (Article R. 121-4 para 5 Ceseda).

Social security coordination legislation may nonetheless have a deterrent effect on job-seekers mobility, in that they exclude access to various benefits, such as the universal health insurance, disability allowances, or minimum income allowances, beyond the first three months of residence.[386]

Ministerial instructions

The circular of 10 September 2010 imposes a maximum period of six month from the time of registration with the unemployment agency, and requires that the applicant provides evidence that she has a real chance of obtaining a job by 'possessing a qualification which is sought after on the job market, or by a promise of employment for a job within brief delays'.

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[382] Circulaire de la Caisse nationale des Allocations Familiales on the conditions de la régularité du séjour des ressortissants communautaires pour le bénéfice des prestations familiales, No 2009-022, 21 October 2009 [Circular related to the conditions of lawful residence of EU citizens in relation to access to family benefits], at http://www.droits-sociaux.fr/IMG/pdf/c_2009_022.pdf

[383] GISTI, *Les droits des citoyens et des citoyennes de l'Union européenne et de leur famille* (GISTI, Les cahiers juridiques, 5th ed., October 2014) p. 22.

[384] Interview with a lawyer from GISTI, Paris, 12 October 2015.

[385] GISTI, *Les droits des citoyens et des citoyennes de l'Union européenne et de leur famille* (GISTI, Les cahiers juridiques, 5th ed., October 2014) p. 17.)

[386] GISTI, *Les droits des citoyens et des citoyennes de l'Union européenne et de leur famille* (GISTI, Les cahiers juridiques, 5th ed., October 2014) p. 17.

Job-seekers may request a residence certificate, and will be issued a receipt carrying the mention 'EU – job-seekers' (*UE – demandeur d'emploi*), valid for three months, renewable.

The right of residence of students

Legislation and regulation

An EU student who is registered in a recognised institution in order to study, as a main activity, or within the framework of vocational training, and who certifies that she has sufficient resources and health insurance for herself and her family in order not to become a burden on the system of social assistance, has the right to reside for more than three months (Art. L. 121-1 3° Ceseda). The resource condition must be assessed, under Article R. 121-4 Cedesa, taking into account her personal situation. The amount required should not exceed the minimum income allowance or if she is above 65, the old-age solidarity income. A student may apply for a residence certificate, if she fulfils the above requirements. If she does, she will receive certificate bearing the mention *UE-Etudiants* (EU-student). Where a student seeks renewal of the residence certificate, she must provide the same documentation than for the first application (i.e. enrolment certificate, health insurance certificate, declaration of sufficient resources, or any other relevant document). EU students must not possess a work permit.

Ministerial instructions

A circular of 12 October 2007 specifies that students do not need to submit any documentation concerning the nature of their resources or their amount, and that the resource condition is deemed fulfilled by a 'declaration' or any other means guaranteeing that they have sufficient resources.[387] As for the condition on health insurance, there is no obligation as to the type of health insurance. It could be provided through membership of the student mandatory social security regime or another French social security regime, or a private insurance regime.

The circular of 10 September 2010 provides that the Prefect can enquire about 'the existence of an unreasonable burden on the social assistance system'. If there is evidence of 'lack of attendance of courses or manifest incoherence in the study path', coinciding with systematic applications for social assistance, the assumption will be that there is a situation of abuse of right and the conditions for lawful residence under EU law are deemed no longer fulfilled.[388]

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[387] Circulaire relative aux justificatifs exigibles des ressortissants de l'Union européenne et assimilés pour bénéficier, à leur demande, d'un titre de séjour', No IMID0768184C, 12 October 2007, [circular related to the documentation required from EU citizens and affiliated applying for a residence certificate], at http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000825113. See also, Circulaire No IMI/M/10/00116/C relative aux conditions d'exercice du droit de séjour des ressortissants de l'Union Européenne, des autres États parties à l'espace économique européen et de la Confédération suisse, ainsi que des membres de leur famille', 10 September 2010, [circular relating to the conditions of exercise of the right of residence of EU citizens and affiliated] at http://circulaire.legifrance.gouv.fr/pdf/2011/04/cir_32884.pdf (p. 21).

[388] Circulaire No IMI/M/10/00116/C relative aux conditions d'exercice du droit de séjour des ressortissants de l'Union Européenne, des autres États parties à l'espace économique européen et de la Confédération suisse, ainsi que des membres de leur famille', 10 September 2010, [circular relating to the conditions of exercise of

The right of residence of other categories of inactive EU citizens

Legislation and regulation

Those EU citizens who are retired or do not fall under any of the other categories can reside in France for more than three months if they have valid health insurance cover and sufficient resources for themselves and family members, so as not to become an unreasonable burden on the system of social assistance (Article L. 121-1 2° Ceseda).

- The condition of sufficient resources

Resources may be personal or provided by a third person, without having to prove any legal link between them which would commit that third person to provide for the EU citizen (Article L.121-1, 2). The 'sufficient character of resources should be assessed taking into account the personal situation of the person'; the required amount should not exceed the amount of the active solidarity income (*revenu de solidarite active*, RSA)[389] or, if the individual fulfils the age conditions, the amount of the old person solidarity allowance (*allocation de solidarité aux personnes âgées*). If the person concerned is retired or pensioner, 'she can present a document proving her entitlement to a pension, an invalidity person, an occupational accident allowance for a disability rate of more than 66% provided by the French regime of social security, an early retirement pension provided by France'.[390]

Where she requests it, an inactive EU citizen, if she fulfils the sufficient resources and health insurance conditions, must be issued with an optional residence certificate, carrying the mention *UE – non actif* (EU non-active), for a validity period assessed taking into account the sustainability of the resources and which cannot exceed five years (Article R. 121-11 Ceseda). After that, she would be entitled to a permanent right of residence.

- The condition related to health insurance

Neither EU nor national rules specify what type of health insurance it covers. It could be a private health insurance cover, that of a foreign social security system, or a French social security regime.

Ministerial instructions

A circular of 3 June 2009 requires social insurance bodies to check that the EU citizens applying for family benefits have an income equivalent to the relevant minimum income allowance for a period of at least six months and one day (which corresponds to the period required to fulfil the residence condition for access to various social benefits.) Individuals do

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the right of residence of EU citizens and affiliated] at http://circulaire.legifrance.gouv.fr/pdf/2011/04/cir_32884.pdf (p. 21).

389 This was set in 2015 at 524.16 EUR per month for a single person and 786,24 for a couple without children and no income.

390 GISTI, *Les droits des citoyens et des citoyennes de l'Union européenne et de leur famille* (GISTI, Les cahiers juridiques, 5th ed. October 2014) p. 27.

not need to have the amount already available at the beginning of the residence period but must be able to prove that they will have access to that sum.[391]

A circular of 10 September 2010 instructs social services that resources should be assessed in relation to the minimum income withouth recalling the need to proceed to an individual assessment.[392] This omission of the individual assessment requirement is not in line with EU law.

Moreover, the 10 September circular specifies that the amount of resources required must be adjusted to the number of family members, in line with the method for calculating the minimum income allowance and explains that evidence of resources can be provided by any convincing mean (moyen probant); however, it also insists that, in practice, it will be necessary to provide 'documentation of an administrative nature, which establishes with certainty the amount of resources which the applicant has, and which enables to assess their sustainability over time'.[393]

The 10 September 2010 circular also specifies that the conditions on which the right to reside are based (ie. sufficient resources and health insurance cover), may be verified during the five year of residence prior to the issuance of a permanent right of residence. [394]

Case law

French administrative courts have followed the CJEU (C-408/03), and ruled against a Prefect who had refused to grant a certificate of residence to a Polish citizen based on a lack of 'sufficient personal resources'. Indeed, it considered that the Prefect had added to article L. 121-1 a condition relating to the origin of resources, which was not required by the text and had therefore wrongly applied it. The judge considered that 'in order to assess the sufficient character of the said resources, the Prefect should take into account the whole of the

[391] Circulaire No DSS/2B//2009/146 relative au bénéfice des prestations familiales des ressortissants de l'Union Européenne, de l'Espace économique européen et de la Suisse en situation d'inactivité professionnelle sur le territoire français, 3 June 2009 [circular on access to family benefits for EU citizens having a professional activity on the French territory], http://circulaire.legifrance.gouv.fr/pdf/2009/06/cir_26482.pdf, p. 7

[392] Circulaire No IMI/M/10/00116/C relative aux conditions d'exercice du droit de séjour des ressortissants de l'Union Européenne, des autres États parties à l'espace économique européen et de la Confédération suisse, ainsi que des membres de leur famille', 10 September 2010, [circular relating to the conditions of exercise of the right of residence of EU citizens and affiliated] at http://circulaire.legifrance.gouv.fr/pdf/2011/04/cir_32884.pdf

[393] Circulaire No IMI/M/10/00116/C relative aux conditions d'exercice du droit de séjour des ressortissants de l'Union Européenne, des autres États parties à l'espace économique européen et de la Confédération suisse, ainsi que des membres de leur famille', 10 September 2010, [circular relating to the conditions of exercise of the right of residence of EU citizens and affiliated] at http://circulaire.legifrance.gouv.fr/pdf/2011/04/cir_32884.pdf, p. 18.

[394] Circulaire No IMI/M/10/00116/C relative aux conditions d'exercice du droit de séjour des ressortissants de l'Union Européenne, des autres États parties à l'espace économique européen et de la Confédération suisse, ainsi que des membres de leur famille', 10 September 2010, [circular relating to the conditions of exercise of the right of residence of EU citizens and affiliated] at http://circulaire.legifrance.gouv.fr/pdf/2011/04/cir_32884.pdf p. 30

resources which a foreigner who request the reight to reside in France has, whatever their source.[395]

On whether the non-fulfillment of the resources condition can justify expulsion, see answers under Question 5.

The right of permanent residence

Legislation and regulation

An EU citizen who has legally and without interruption resided in France for five years acquires a right of permanent residence (Article L. 122-1 Ceseda); and so do her family members who reside with her. An absence from the territory for more than two consecutive years results in the loss of the right to permanent residence (Article L. 122-2 Ceseda). It is possible to request a residence certificate of 20 years, carrying the mention *UE – séjour permanent – toutes activités professionnelles* ('UE – permanent residence – all professional activities') but the right to reside is not subject to holding this certificate (Article R. 122-1, implementing Art. L. 122-1). TCN family members of EU citizens must request the issuance of a residence certificate within the two months prior to the expiry of the five year lawful and uninterrupted residence. This residence certificate is valid for 10 years and its renewal must be requested within the two month prior to its expiry (Article R. 122-2 Ceseda).

An EU citizen may acquire a right of permanent residence before five years (Article R. 122-4 Ceseda), where:

- she has reached retirement age, under the condition that she has exercised a professional activity during the last 12 months and resided there for more than three years;
- following early retirement, under the condition that she has exercised a professional activity during the last 12 months and resided there for more than three years;
- following a permanent incapacity to work, under the condition to have resided in France for more than 2 years;
- following a permanent incapacity to work, under the condition to have resided in France for more than 2 years, and without condition of length of residence , where this incapacity results of an occupational accident or disease opening the right to a specific social security benefit;
- after three years of continuous and legal activity and residence in France, she exercises a professional activity in another member state, but maintain her residence in France, where she returns at least once a week.

Article L. 511-4 11 Ceseda provides that EU citizens and their family members who have acquired a right to permanent stay cannot be removed from the territory under a *Obligation de Quitter le Territoire Francais* (OQTF). EU citizens who have been residing in France for more than 10 years can be expulsed only if expulsion constitutes an imperious necessity for the security of the state or public security (Article L. 521-2 6 Ceseda). For further analysis, see answers under Question 5.

[395] CAA Douai, 2nd ch., 3 June 2008, No 07DA01750. See also, CE, 9 January 2009, No 312125, *Mme Khai*.

Conditions related to the length of residence or activity do not apply where the spouse of the EU worker is French or if she lost French nationality following a mariage with that EU worker.

Ministerial instructions

The circular of 10 September 2010 specifies administrative requirements, which must be fulfilled to acquire the right to permanent residence. The presentation of a certificate of residence is 'not a sufficient proof to establish effective and continuous residence', since changes may have occurred in the situation of the holder of the residence permit. The applicant would thus need to demonstrate her regular residence on the French territory through the production of various documents from public or private bodies. Evidence must be collected related to all the five years of residence, in line with the conditions for lawful residence of the relevant category of EU citizen (ie worker, student, inactive). Concerning students, the Prefect may actually check the existence and level of resources which had only been subject to a declaration, to verify that they did not constitute an unreasonable burden on the French system of social assistance.[396]

Administrative practices

NGOs report problematic practices with regard to recognising the permanent residence status and the rights to access benefits associated with it. A representative of GISTI cited the case of an EU citizen who had been resident for 18 years in France, and was thus permament resident. She was attending some training, after having worked for years in the entertainment industry with successive precarious contracts ('Intermittents du spectacle'). The authorities refused to recognise her permanent resident status and pay her a minimum solidarity income.

Case law

The Paris Administrative Appeal Court found that an EU citizen who held a residence certificate with a 'non-active EU citizen' mention from July 2007 to July 2012, and who was recipient since 2008 of the old-age solidarity allowance and the universal health insurance (ie non-contributory benefits) could not acquire the right to permanent residence, as she did not fulfil the conditions of lawful residence during five years.[397]

2.3. Are there any measures in your country that would prevent own nationals to use their right to free movement? (e.g. a prohibition to leave the country on ground of criminal proceedings)

French citizens, both minors and adults, may be prevented to leave the territory on a number of grounds, related to public order or security.

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[396] Circulaire No IMI/M/10/00116/C relative aux conditions d'exercice du droit de séjour des ressortissants de l'Union Européenne, des autres États parties à l'espace économique européen et de la Confédération suisse, ainsi que des membres de leur famille', 10 September 2010, [circular relating to the conditions of exercise of the right of residence of EU citizens and affiliated] at http://circulaire.legifrance.gouv.fr/pdf/2011/04/cir_32884.pdf

[397] CAA Paris, 3rd ch., 6 May 2015, No 14PA01799.

Rules applicable to minor EU citizens (under 18 years of age)

Until 2013, French minor could only travel abroad without their parents if they had an authorization, signed by the parents, to leave the territory. This requirement was removed in 2013. As the law currently stands, and until new legislation is adopted (see below), French children can travel in the EU with only their French ID card or passport. There are however two ways to prevent a minor from leaving the French territory, the 'prohibition to leave the territory' (*Prohibition de Sortie du Territoire),* and the 'opposition to leaving the territory' (*Opposition à la sortie du territoire*), which is of more temporary nature.

- Interdiction de Sortie du Territoire (IST)

A parent may apply for a 'prohibition to leave the territory' (In French, *Interdiction de Sortie du Territoire,* abbreviated as IST). It is usually requested within the framework of a divorce or separation procedure, but can also be used in other contexts. In case the child is in social care, the Juvenile Court (*Juge des enfants*) may also apply for such prohibition. If an IST is granted, the child cannot leave the territory without the agreement of both parents. The length of prohibition is determined by the judge, and may extend until she reaches 18 years of age. When an IST is issued in the context of proceedings for domestic violence, the IST is valid for a maximum of four months. Where the IST was requested by the Juvenile Court, it is limited to two years, and exit can be allowed by the judge.[398] The IST may be temporarily lifted, by application made at least five days in advance of the travel by one of the parents, or both, if the child travels without her parents (a shorter delay may apply in exceptional circumstances, such as the death of a relative). If the child travels without having made the declaration to the police, the child will remain on the 'Database of Wanted/Controlled Persons' (*Fichier des Personnes Recherchées*) in the Schengen Information System (SIS). She will thus not be able to leave the territory.

- Opposition à la sortie du territoire (OST)

One may also ask for an order opposing a child leaving the French territory (in French *opposition à la sortie du territoire,* abbreviated as OST). It can be requested, as an interim (ie temporary) measure, by the father, mother or any other entitled person, in case of conflicts between the holders of parental responsibility, to prevent a child who is located in France from exiting the French territory. The request must be made to the Prefect or her substitute, or in case of extreme emergency, the closest police or *gendarmerie* office. In case the parent is not in France but the child is, the parent can request such order from the competent office in the Justice Ministry. The applicant must provide documentation in support of the application. If granted, the child will be listed in the 'Database of Wanted/Controlled Persons' in SIS. The order would apply for a maximum of two weeks. Parents may request an OST in case they fear that their child may try to travel abroad to conflicts zone, for example to join ISIS/Daesh forces. Parents may report their child's disappearance to the police or

[398] See website of the French civil service, at https://www.service-public.fr/particuliers/vosdroits/F1774

gendarmerie, with the result that the child will be placed on the Register of Wanted Persons in SIS.[399]

- Recent developments towards greater control over minors' mobility

As it appeared that a significant number of French minors have left the territory in order to fight in Syria and Irak for ISIS, a legislative proposal is under examination by the Parliament which would reintroduced parental authorization for minors to leave the French territory.[400] The relevant information website of the French public service warns of the likelihood of forthcoming change.[401] The new law would insert a new provision in the *Code Civil* (new Article 371-6) which would reintroduce the parental authorization to leave the territory. Moreover, Article 375-5 of the Civil Code would be completed by a new provision, which, in case of emergency, would allow the State prosecutor to impose on a child a prohibition to leave the territory, where travelling would put the child in danger and the parents have not taken measures to protect him or her. The State prosecutor must refer the decision to the judge, who will decide whether to maintain or terminate it. The decision would be listed on the File of Wanted Persons in SIS.

Rules applicable to adult EU citizens – the special context of the fight against terrorism: *the* 'Interdiction Administrative de Sortie du Territoire' (IAST) *and* 'Assignation à résidence'

Until 2014, it was only possible to prevent French citizens from leaving the territory by refusing to withdraw or refusing to deliver or renew a passport. However, since an ID card is enough to travel in the EU, and given that many non-EU countries, notably Turkey, allow entry to French citizens based only on presentation of a French ID card, it was not effective in preventing French nationals travelling abroad to join ISIS. On 30 November 2014, the Parliament adopted a new Anti-terrorist legislation, which introduced a new administrative measure to stop French citizens from leaving the country. The Interior Minister may issue an administrative prohibition to leave the territory, in French an *Interdiction Administrative de Sortie du Territoire* (IAST), where there are 'serious reasons to believe' [based on sufficient and appropriate evidence] that [the person] is planning 'to travel abroad in order to participate in terrorists activities' or 'to sites in which terrorist groups are active, so that she may caused a threat on public security upon her return on the French territory'. Article L. 224-1 of the Internal Security Code (*Code de la sécurite intérieure*), as it results from the 2014 Law, specifies that the IAST concerns only French citizens. The possibility to extend it to all residents was concerned in parliamentary debates, but was rejected as it was felt that

[399] Décret No 2010-569 relatif au fichier des personnes recherchées, NO IOCC0918466D, 28 May 2010, [decree on the file of wanted persons] at https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000022276189

[400] Proposition de loi n° 296 visant à rétablir pour les mineurs l'autorisation de sortie du territoire, enregistrée à la présidence de l'Assemblée nationale le 8 juillet 2015; adopted by the National Assembly on 8 October 2015 (No 598) [draft law related to the reintroductio of the autorisation to exit the territory for minors]. Currently under examination by the Senate. For the full legislative history, see http://www.assemblee-nationale.fr/14/dossiers/retablissement_autorisation_sortie_territoire_mineurs.asp

[401] See http://www.assemblee-nationale.fr/14/ta/ta0598.asp.

for non-French residents, an expulsion measure would be more effective.[402] It is unclear to what extent such prohibition would be applicable to bi- or pluri-nationals.

In order to be effective, the decision, which must be written and reasoned, takes effect immediately, but is adversarial a posteriori (i.e. the person can present observations objecting to the measure, after it has been issued). It is imposed for a maximun of six months, but can be renewed if the conditions remain fulfilled for a maximum of two years. The measure should cease to be effective when the conditions are no longer fulfilled. In the Ministry, the handling of the procedure is entrusted to the 'Directorate for civil liberties and legal affairs'.

The IAST results in the automatic invalidation of the ID card and passport, and the individual concerned must return these documents to the police or gendarmerie office, or to the Prefect. In exchange, she receives a receipt of identity, which can be used as a proof of identity within the French territory. If an individual refuses to return his ID or travel documents, she can be condemned to a two-year jail sentence and 4500 EUR fine. If an individual subject to an IAST leaves or tries to leave the French territory, she can be sentenced to three years in jail and a 45000 EUR fine.

Individuals can appeal the IAST within two months before the first instance administrative court, which must decide within four month and before the expiry of the measure. Individuals may also avail themselves of *emergency procedures against such measures* (eg *référé-liberté*).

By 6 July 2015, more than a hundred such IST had been issued. Some affected individuals, including a young French woman who had recently converted to Islam and apparently planned a travel to Saudi Arabia to study theology, challenged these measures.[403] On 10 July 2015, the *Conseil d'Etat* under the new constitutional review procedure (*Question Prioritaire de Constitutionalité*) referred provisions of the Act to the *Conseil Constitutionnel* and expressed doubts as to its compatibility with constitutional freedoms and rights, such as the freedom of movement (*liberté d'aller et de venir)* and the right to an effective remedy.[404] The French *Conseil Constitutionnel* however declared them conform to the Constitution.[405] It considered that the restrictions to the freedom of movement were proportionate to the objective pursued and that judicial control over the measure was objective and effective.

Freedom of movement is also undermined when a person is placed under an '*assignation à résidence'*, a measure which requires someone to remain within a designated area, and to report regularly (i.e. up three times day) to the authorities, to stay within the confines of a designated residence for up to 12h per 24 hours (e.g. between 8.00 pm and 8.00 am), and to surrender passport or ID document to the authorities, and prevents them from contacting certain persons. Under Article 6 of the 1955 Law on the State of Emergency, as modified by

[402] See comment on the decision CC, No 2015-490 QPC of 14 October 2015 [Interdiction Adminisrative de Sortie du Territoire]., at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2015490QPC2015490qpc_ccc.pdf

[403] Elise Vincent, 'Interdits de sortie du territoire: trois jeunes ont désposé des recours devant la justice', Le Monde, 2 July 2015, at http://www.lemonde.fr/police-justice/article/2015/07/02/interdits-de-de-sortie-du-territoire-trois-jeunes-ont-depose-des-recours-devant-la-justice_4667534_1653578.html

[404] CE, Decision No 390642 of 10 July2015 [QPC].

[405] CC, Decision No 2015-490 QPC of 14 October 2015 [Interdiction Adminisrative de Sortie du Territoire]., at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2015490QPC2015490qpc_ccc.pdf

a 20 November 2015 law,[406] these measures can be imposed by decision of the Interior Minister, where there 'exists a serious risk to believe that the behaviour of an individual constitutes a threat for public security and order'.

Since the November 2015 atacks, hundreds of individuals are subject to such *assignation à résidence'.* One month after the attack, more than 350 such measures had been adopted against radical Muslims, imans, and activists (including environmental and political activitists).[407] Some of those who failed to comply with them have been subject to jail sentences. Many have challenged them through *emergency proceedings*. A groupe of environmental activitists, placed under *assignation à résidence*, challenged these measures through the *référé-liberté* (emergency procedure for the protection of fundamental rights and freedoms) and asked for a review of Article 6 of the 1955 law by the *Conseil Constitutionnel* under through a *Question Prioritaire de Constitutionality* (QPC) procedure. The *Conseil Constitutionnel* however confirmed the compatibility of these measures with the freedom of movement and freedom of assembly protected by the Constitution. [408] The parties envisaged to turn to the European Court of Human Rights, but France informed the Council of Europe that it suspends the application of the ECHR to measures adopted under the state of emergency legislation (that includes assignation a residence). [409]

Question 3 – The right to reside in the European Union (Article 20 TFEU and Directive 2004/38)

3.1. What is the current trend in case law in your country with regard to the applicability of Article 20 TFEU and references to the case *Ruiz Zambrano*? Are there specific issues noteworthy?

Case law

The *Zambrano* case law has been raised in a number of cases, and not always in a relevant manner. For example, it has been mentioned in cases concerning children of the nationality of another member state. Its application was, logically, rejected, as the following examples illustrate.

- The Administrative Appeal Court of Bordeaux, referring to *Zambrano*, rejected a challenge by a Ghanean woman, victim of domestic violence and in divorce proceedings with her Spanish husband and father of her Spanish child, against an expulsion order.[410] It considered that the child did not have the right of residence neither under the Directive as neither he or nor his parents had sufficient resources

[406] Loi No 2015-1501 prorogeant l'application de la loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence et renforçant l'efficacité de ses dispositions, 20 November 2015, [Extension of the State of Emergency Act] https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000031500831&categorieLien=id

[407] See wiki compiled by 'La quadrature du Net' for an updated overview. https://wiki.laquadrature.net/%C3%89tat_urgence/Recensement#Des_assign.C3.A9s_.C3.A0_r.C3.A9sidence_saisissent_la_justice

[408] **CC, DECISION NO 2015-527 QPC, 22 DECEMBER 2015, CÉDRIC D.**

[409] Note verbale de la Représentation Permanente de la France (verbal note), 24 November 2015, registered witj the Secrétariat Général on 24 November 2015, https://www.coe.int/fr/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=IRgBNXHj

[410] **CAA BORDEAUX, 5TH CH., 6 OCTOBER 2015, NO 15BX00880, UNPUBLISHED IN THE RECUEIL LEBON.**

and health insurance, nor under the Treaty (*Zambrano*), since nothing stopped the family to reconstitute itself in another member state, in particular in Spain.

- The Lyon Administative Court confirmed an expulsion order against a Moroccan father of a Spanish child whose parents did not have sufficient reources, declaring here too *Zambrano* inapplicable.[411]
- The application of *Zambrano* was also rejected in a case which concerned a Tunisian woman married to a Belgian who had Belgian children, and who, having recently arrived in France, sought to challenge the refusal of the French authorities to grant her a residence permit and the resulting order to leave the territory.[412]
- The *Conseil d'Etat,* in emergency proceedings, referred to Article 20 TFEU and *Zambrano* in a case concerning the right of residence of a mother who was a national from Cameroun, and had a Spanish child, over which she exercised exclusive parental responsibility. She fulfilled both the condition of having sufficient resources (she had an indefinite contract guaranteeing stable and regular income) and health insurance (entitlement to state medical insurance based on social insurance contributions which she and her employer had paid), and therefore had a right under the Directive, which rendered the reference to *Zambrano* redundant.[413]

When *Zambrano* was relied on by applicants to challenge expulsion orders against TCN parents of French children, French courts examined quite closely *the situation of dependence* of the French children on the TCN parent, as well as where the child's *habitual residence* was. They usually rejected the application of *Zambrano* when the TCN parent is not essential to the maintenance of the child on the French territory and where the child is not 'habitually resident' in France, as illustrated in the cases below.

- The Douai Administrative Court referred to *Zambrano* in a case in which a father from Cameroun of a French child challenged an expulsion order issued against him. [414] However, as the father could not establish that he had custody and was taking care of his daughter, the court found *Zambrano* inapplicable.
- The Marseille Administrative Court decided along the same line in a case concerning a Tunisian father of a French child, whose mother was French. [415]
- The Lyon Administrative Court rejected a challenge by an Algerian father of a French child placed in social care, as he could not prove that he was taking care of his child.[416]
- The Lyon Administrative Appeal Court considered that Zambrano was not applicable, in a case concerning the residency right of the mother of a French child who was from Ivory Coast, where the child had lived until the age of five, and where the Ivorian father still lived. The court payed particular attention to the fact that the daughter was born and resided in Ivory Coast, and was looked after by her father and paternal

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411 CAA Lyon, 20 February 2014, N° 13LY00616.

412 **CAA Lyon, 3rd ch., 24 January 2013, unpublished in the recueil Lebon.**

413 CE, réf., 9 December 2014, No 386029.

414 CAA Douai, 6 November 2014, N° 14DA00160.

415 **CAA Marseille, 4th ch., 26 November 2013, No 11MA03892, unpublished in the recueil Lebon.**

416 **CAA Lyon, 3rd ch., 4 October 2012, No 12LY00501, unpublished in the recueil Lebon.**

grand-mother, in particular since her mother had come to France, and that the mother had only brough the daughter over to France recently, when she had found out that she may be able to obtain a right of residence as a parent of a French child, a fact she had not disclosed in previous applications for asylum and residence in France. The court considered that *Zambrano* was not applicable, as the mother had not been providing for the child, her father was still residing in Ivory Coast, France was not the country of residence of the child, and the refusal to grant her residence would not deprive her from a right to live with her child.[417]

- The Lyon Administrative Court, similarly, dismissed a challenge against the denial of residence right to a mother from Benin with a French child, who although born in France, had move to Benin shortly after her birth and resided there for years, whilst the French father remained in France. Mother and child only came to France recently with a short stay visa. Referring to *Zambrano* and *Dereci*, the Court considered that France could not be considered the country of residence of the child, that the child in any case could stay in France with her father and that the mother could come back to France after applying and obtaining a long term visa.[418]

Zambrano was relied on, unsuccessfully, against expulsion orders addressed to spouse of French citizens (*Dereci* scenario).

- The Bordeaux administrative court relied on *Dereci* to rule that the expulsion order against a spouse of a French citizen was not contrary to EU law.[419] It found that given its temporary nature (ie the time required to apply for a long-term visa as a spouse of a French citizen), the measure would not result in her French spouse being obliged to leave the territory of the Union to maintain the unity of the family.

Note that many of the cases in which *Zambrano* was argued and rejected concerned expulsion order against TCN who, by reason of their links to a French national, should be able to apply for long-term visa and obtain rights of residence in France on such basis.

3.2. What is the relation between Article 21 and 20 TFEU in national case law? Do national courts assess the scope of applicability of both articles?

See answers under section 3.1 above.

3.3. According to Article 16 of Directive 2004/38 "Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there." Are there any additional conditions in your country for EU citizens to acquire a permanent residency status in your country?

See answer to Question 2.2, reproduced here.

Ministerial instructions

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[417] CAA Lyon, 19 Octobre 2011, *Mme T. B.*, No 11LY00762.
[418] CAA Lyon, 7 June 2012, 1rst ch., No 11LY01612.
[419] **CAA. 2ND CH., 26 FEBRUARY 2013, NO 12BX01270, UNPUBLISHED IN THE RECUEIL LEBON.**

The circular of 10 September 2010 specifies administrative requirements, which must be fulfilled to acquire the right to permanent residence. The presentation of a certificate of residence is 'not a sufficient proof to establish effective and continuous residence', since changes may have occurred in the situation of the holder of the residence permit. The applicant would thus need to demonstrate her regular residence on the French territory through the production of various documents from public or private bodies. Evidence must be collected related to all the five years of residence, in line with the conditions for lawful residence of the relevant category of EU citizen (ie worker, student, inactive). Concerning students, the Prefect may actually check the existence and level of resources which had only been subject to a declaration, to verify that they did not constitute an unreasonable burden on the French system of social assistance.[420]

Question 4 – Family life and free movement rights

4.1. Who are defined as family members of EU citizens in your country?

Legislation and regulation

The concept of family member is broader in EU law than in French law, at least at first sight. Article L.121-1 Cedesa (para 4 and 5) clarifies the notion of 'family member'. The right to reside as a family member is recognised to:

- the spouse of the EU citizen (even if they do not live together),[421] including same sex spouse;[422]
- the descendants of the EU citizen's and his/her spouse or registered partner who are under the age of 21 or under his charge: these include children and grandchildren; [423] adopted children and minors accompanied by their legal guardian.
- the ascendants of the EU citizen and his/her spouse or registered partner. Note that where the EU citizen is a student, she can only claim a right of residence for his or her own child or spouse. This definition applies to all family members, irrespective of their nationality.[424]

The Cedesa does not *explicitly* include registered and non-registered partners as family members, although it does not mean they are automatically excluded.

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[420] Circulaire No IMI/M/10/00116/C relative aux conditions d'exercice du droit de séjour des ressortissants de l'Union Européenne, des autres États parties à l'espace économique européen et de la Confédération suisse, ainsi que des membres de leur famille, 10 September 2010, [circular relating to the conditions of exercise of the right of residence of EU citizens and affiliated] at http://circulaire.legifrance.gouv.fr/pdf/2011/04/cir_32884.pdf.

[421] CAA Lyon, 24 January 2013, No 12LY00510.

[422] France allows same sex marriage since the Law No 2013-404 of 17 May 2013.

[423] CE, 22 February 1993, Ministry of the Interior v M. Cordeiro.

[424] Circulaire No IMI/M/10/00116/C relative aux conditions d'exercice du droit de séjour des ressortissants de l'Union Européenne, des autres États parties à l'espace économique européen et de la Confédération suisse, ainsi que des membres de leur famille, 10 September 2010, [circular relating to the conditions of exercise of the right of residence of EU citizens and affiliated] at http://circulaire.legifrance.gouv.fr/pdf/2011/04/cir_32884.pdf. p. 23

In relation to registered partner, the Cedesa did not transpose Article 2.2.b of the Directive 2004/38. The legislator may have taken the view that the *Pacte Civil de Solidarite* (PACS), the French civil partnership regime (created by the Law of 15 November 1999), did not confer rights equivalent to those resulting from marriage.

The Cedesa does not address the right of residence of the ascendants and descendants of the 'partner' of an EU citizen.

Ministerial instructions

A circular of 21 November 2011, which predates the legislative introduction of same sex marriage in France (2013), same sex spouse were not considered as 'family member' but as 'persons with whom the EU citizen certifies having lasting private and family links other than matrimonial' under French law.[425] Their right of residence thus had to be assessed by the Prefect, taking into account the right to privacy and family life.

A 10 September 2010 circular specifies that the 'durable nature of the partnership should be based on a minimum period of common life in France or in the previous state of residence amounting to one year'.[426] It also provides that in the case of non-registered partners, the minimal period of common life in France or in another state should be five years, except in exceptional circumstances. The relationship duration requirement may thus be applied flexibly, taking into account other relevant factors, such as for example a joint housing loan, or the birth of common children.

Case law

Courts consider PACS was a form of marital life, which should be protected as such. The Paris administrative court thus concluded that the registered partner of an EU citizen (under a PACS) enjoyed a right of residence as a 'family member'.[427]

4.2. Under which conditions can third country nationals have a (derived) residence right as a family member of (i) an EU citizen with the nationality of another Member State or as a family member of (ii) a citizen with the nationality of your country?

- Right of entry on the French territory of TCN family member of an EU citizen who has the nationality of another member state

[425] Circulaire du 21 novembre 2011 relative aux modalités d'application du décret n° 2011-1049 du 6 septembre 2011 pris pour l'application de la loi n° 2011-672 du 16 juin 2011 relative à l'immigration, l'intégration et la nationalité et relatif aux titres de séjour [circular related to the implementation of Decree No 2011-1049 implementing Act No 2011-672 related to immigration, integration and nationality], at http://circulaire.legifrance.gouv.fr/pdf/2011/11/cir_34068.pdf, Annexe 3.

[426] Circulaire No IMI/M/10/00116/C relative aux conditions d'exercice du droit de séjour des ressortissants de l'Union Européenne, des autres États parties à l'espace économique européen et de la Confédération suisse, ainsi que des membres de leur famille, 10 September 2010, [circular relating to the conditions of exercise of the right of residence of EU citizens and affiliated] at http://circulaire.legifrance.gouv.fr/pdf/2011/04/cir_32884.pdf. p. 28

[427] TA Paris, 12 November 2008, No 0811281.

According to Article R.121-1 Cedesa, in order to enter the French territory, TCN members of the family of an EU citizen who is a national of another member state, if they cannot present a certificate of residence from another member state of the EU carrying the mention 'Residence permit – family member of an EU citizen', must show a valid passport, a visa or if not required, a document establishing their family link. Their visa must be issued for free under briefest delay, using an accelerated procedure. Any refusal to issue a visa to a TCN family member of an EU citizen must be reasoned (Article L.211-2 Cedesa).

- Right of residence on the French territory for more than three months of TCN family member of a EU citizen who has the nationality of another member state

Legislation and regulation

Under Article L.121-3 Cedesa, TCN family members have a right to reside in France for more than three months (right derived from the right holder, the EU citizen), unless they constitute a threat on public order. These family members who are 18 years of age, or 16 when they seek to exercise a professional activity, must hold a residence permit. The length of validity of this permit corresponds to the envisaged duration of the residence of the EU citizen within a maximum of five years. The residence permit carries the mention 'Residence Permit – Family member of EU citizen'. However, the recognition of their right to reside is not conditioned by the possession of the residence permit.[428]

Under Article R. 121-14 Ceseda, the administrative authority may, in a random manner, check that the 'family member' whose link with the EU citizen has been broken following a divorce, the annulment of the marriage or the death of the EU citizen, comply as such with the requirements of the right of residence (under Article L. 121-1) in order to be recognised a right to reside in France (Articles R. 121-7 et 121-8 du Ceseda).[429]

The renewal of the right to reside is automatic where the EU citizen is a worker (employee or self-employed) or exercises his right to remain in France. If she is not active or a student, the renewal will be granted if the conditions that allowed its issuance are still fulfilled. [430]

The residence permit issued to a TCN family member of an EU citizen remains valid as long as the holder does not leave the territory for more than six months, or in case of longer period, if these absences are justified by the requirement to perform military duties or for absence of more than twelve months, by important reasons such as pregnancy, birth-giving, serious illness, studies, professional training or professional placement abroad (Art. R. 121-14 Ceseda).

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[428] Article R. 121-14 CESEDA et Circulaire du 21 novembre 2011 relative aux modalités d'application du décret n° 2011-1049 du 6 septembre 2011 pris pour l'application de la loi n° 2011-672 du 16 juin 2011 relative à l'immigration, l'intégration et la nationalité et relatif aux titres de séjour [circular related to the implementation of Decree No 2011-1049 implementing Act No 2011-672 related to immigration, integration and nationality], at http://circulaire.legifrance.gouv.fr/pdf/2011/11/cir_34068.pdf,, p. 19.

[429] Circulaire du 21 novembre 2011 relative aux modalités d'application du décret n° 2011-1049 du 6 septembre 2011 pris pour l'application de la loi n° 2011-672 du 16 juin 2011 relative à l'immigration, l'intégration et la nationalité et relatif aux titres de séjour [circular related to the implementation of Decree No 2011-1049 implementing Act No 2011-672 related to immigration, integration and nationality], at http://circulaire.legifrance.gouv.fr/pdf/2011/11/cir_34068.pdf, Annex 3, p. 2.

[430] Article R. 121-14 Ceseda.

The residence permit of the TCN family members of an EU citizen must be requested within three month of their entry on the French territory, based on their valid passport and documentation certifying their family relationship (Article R.121-14 Cedesa). If they apply after three months, the residence permit cannot be refused, but applicants will have to pay a fee ('droit de visa de regularisation', 340 EUR).[431] The renewal of the residence permit must be requested within two months before it is due to expires (Article R. 121-14 Ceseda.).

A receipt is issued to all TCN applying for the issuance or renewal of a residence permit: the issuance of the residence permit to the TCN family member of an EU citizen must occur within a maximum delay of 6 months from the date of submission of the application (Article R. 121-15 Ceseda).

When a EU citizen is a student, the validity of the residence permit issued to the family member is limited to the duration of the course or to one year, if the course lasts more than a year.

Where the EU citizen if a provider of services, the length of the validity of the residence permit corresponds to the duration of the provision of services.

According to Article R. 621- Ceseda, TCN family member of EU citizens who, without valid reason, omit to request within the legal delays the renewal or issuance of their residence permit will be sanctioned by the payment of a fine for minor offence (*contravention de cinquième classe*).

Ministerial instructions

The circular of 21 November 2011 specifies that TCN family members of EU citizen are not subject to the requirement of legal entry into the French territory.[432]

- Right of residence of TCN family members of French EU citizens.

Ministerial instructions

The TCN family member of a French EU citizen enjoys a right of residence and work, without having to go through checks concerning communal life, if she can prove her legal right of residence in another member state as family member of the French EU citizen. The TCN will

[431] Circulaire du 21 novembre 2011 relative aux modalités d'application du décret n° 2011-1049 du 6 septembre 2011 pris pour l'application de la loi n° 2011-672 du 16 juin 2011 relative à l'immigration, l'intégration et la nationalité et relatif aux titres de séjour [circular related to the implementation of Decree No 2011-1049 implementing Act No 2011-672 related to immigration, integration and nationality], at http://circulaire.legifrance.gouv.fr/pdf/2011/11/cir_34068.pdf, Annex 3 p. 2

[432] Circulaire du 21 novembre 2011 relative aux modalités d'application du décret n° 2011-1049 du 6 septembre 2011 pris pour l'application de la loi n° 2011-672 du 16 juin 2011 relative à l'immigration, l'intégration et la nationalité et relatif aux titres de séjour [circular related to the implementation of Decree No 2011-1049 implementing Act No 2011-672 related to immigration, integration and nationality], at http://circulaire.legifrance.gouv.fr/pdf/2011/11/cir_34068.pdf, Annex 3 p. 2

be issued with a residence permit holding the mention 'EU – Family member – all professional activities'. It is granted irrespective of the length of the marriage. [433]

See also answer to question 3.1 (application of *Zambrano*).

- On the maintenance of the right of residence of the family member in case of rupture of the family relation.

Legislation and regulation

Articles R. 121-7 to 121-9 Cedesa provide that the conditions in which family members may continue to reside in France, despite the rupture of the family relations. These conditions vary according to whether the family member is an EU citizen or not.

- Death or departure of an EU citizen

The righ to reside of family members who are EU citizen is not affected; however, if they want to acquire the right of permanent residence, they must fulfil the required residence condition (ie as a working professional, or if inactive, they must possess sufficient resources and health insurance).[434]

TCN family members will preserve their right of residence in case of the death of the EU citizen they had accompanied or joined, provided that they had established their residence in France as a family member for at least one year before her death.[435]

Children of an EU citizen who died or left the host EU member state, or the parent who has effective custody over the children, preserve their right of residence for as long as they reside in the host state and are registered in a school, until the end of their studies.[436]

- Divorce, annulment of the marriage or rupture of registered partnership

For family members who are EU citizens, their rights are the same as in the case of death or departure of the EU citizen.[437]

In relation to TCN family members, in case of divorce, annulment of the marriage or rupture of registered partnership, they will be able to continue to reside in France if the following (alternative) conditions are fulfilled.

- The marriage lasted at least three years before the start of the judicial divorce proceedings or the annulent of the marriage, including at least a year in France;

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[433] Circulaire No IMI/M/10/00116/C relative aux conditions d'exercice du droit de séjour des ressortissants de l'Union Européenne, des autres États parties à l'espace économique européen et de la Confédération suisse, ainsi que des membres de leur famille, 10 September 2010, [circular relating to the conditions of exercise of the right of residence of EU citizens and affiliated] at http://circulaire.legifrance.gouv.fr/pdf/2011/04/cir_32884.pdf. p. 23

[434] Article R.121-7.1 Cedesa

[435] Article R. 121-8, 1° Ceseda.

[436] Article R. 121-9 Ceseda.

[437] Article R.121-7, 2 Cedesa

- the custody of the children of the EU citizen has been entrusted to the spouse or partner who does not have EU citizenship, through common agreement between the spouses or partners or by judicial decisions;
- special circumstances require it (eg domestic violence);
- the spouse or partner enjoys, by common agreement between the spouse and partner or by judicial decision, the right to visit the minor child, on the condition that the judge considered that this right should be exercised in France and only for the duration of the exercise of that right.[438]

The TCN 'derived' right of residence does not confer any residence right to their new spouse or their children under the age of 21, or their new spouse's children under the age of 21.

After five years of legal residence required, TCN family members may obtain a permanent residence right.[439]

Ministerial instructions

In case the Prefect finds that a family member cannot benefit from the maintenance of the right to reside, she must explore the possibility of a change of status before denying the right to reside.[440]

4.3. What are obstacles for EU citizens in your country with regard to family life with a third country national and or an EU citizen?

Case law

Concerning the right of residence of a TCN spouse, the Appeal Administrative Court of Lyon ruled that the right of residence of the TCN spouse is maintained, even when the couple is de facto separated and started divorce proceedings.[441] The Douai Appeal Administrative Court confirmed the right of residence of the spouse of a worker from another EU member state, who was effectively looking after the children of the couple who were attending school in the host state, even though on the date her application for residence was rejected by the French authorities, her EU citizen husband was no longer employed. Applying the *Teixeira* case law (C-480/08), the court considered that she had a right to stay, despite the lack of sufficient resources of her EU spouse, from the moment that the children came to the host member states whilst the father was a worker, and are attending school. The court reasoned that if she was denied the right to stay, the children would be deprived of the right to continue

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[438] Article. R. 121-8, 2° Ceseda.

[439] Article R. 121-7 Cedesa: A TCN must fall on an individual basis under one of the categories outlined in Art. L. 121-1 Ceseda in order to acquire a right of permanent residence (ie as a worker, student or someone with sufficient resources and health insurance).

[440] Circulaire No IMI/M/10/00116/C relative aux conditions d'exercice du droit de séjour des ressortissants de l'Union Européenne, des autres États parties à l'espace économique européen et de la Confédération suisse, ainsi que des membres de leur famille, 10 September 2010, [circular relating to the conditions of exercise of the right of residence of EU citizens and affiliated] at http://circulaire.legifrance.gouv.fr/pdf/2011/04/cir_32884.pdf., p. 26-27 de la circulaire du 10 septembre 2010.

[441] CAA Lyon, 3rd ch., 24 January 2013, No 12LY00510.

their education in the host member states in a way which would undermine their right to family life. [442]

The Bordeaux Appeal Administrative Court was however less forthcoming, in a case concerned the Algerian husband of a Polish woman. The TCN husband was effectively looking after their child, who was attending kindergarten in France. The Court found that the Algerian father could not rely on the child's school attendance to claim a right of residence in France under EU law. [443] It argued that smaller *kindergarten* classes, where the educative mission consists in a first approach to basic tools of knowledge, and preparing children to the fundamental skills taught at elementary school and the principles of life in society, did not qualify as general education or vocational training under Art. 10 of Regulation 492/2011).[444]

This solution appears at odds with the spirit of the CJEU case law (Texeira, Ibrahim, etc.), and may also reveal gender bias.

THEME III: LIMITATIONS TO CORE CITIZENSHIP RIGHTS

QUESTION 5 – EXPULSION

5.1. Please explain how the grounds of expulsion of Article 27 and 28 of Directive 2004/38 are used by national authorities and how they are referred to in national case law.

Under French law, state authorities may remove EU citizens using two types of administrative procedure: the common law expulsion procedure on public order grounds, regulated by Article L.521-1 Cedesa and the obligation to leave the French territory, in French *Obligation de Quitter le Territoire Francais* (OQTF), introduced by the Law of 16 June 2011,[445] and regulated by a revised Article L. 511-3-1 Cedesa, which provides for removal of EU citizen for irregular stay, abuse of right or where her personal behaviour constitutes a genuine, present and sufficiently serious threat against the fundamental interest of the French society' (during the first three months of her stay). These options are detailed on the

[442] CAA Douai, 1st ch., 13 November 2013, No 13DA00515.
[443] CAA Bordeaux, 6th ch., 17 February 2014, No 13BX01544.
[444] This ruling appears at odds with a 2010 decision by the *Conseil d'Etat*, in which it considered that 'depriving a child from the possibility to enjoy school education, according to the legislative frameworks implementing the constitutional requirement which guarantees equal access to education, may constitute a serious and manifestly illegal violation of a fundamental freedom. CE, réf., 15 December 2010, No 344729.
[445] Loi No 2011-672 relative à l'immigration, à l'intégration et à la nationalité, 16 June 2011 [Act related to immigration, integration and nationality], at https://www.legifrance.gouv.fr/affichTexte.do?categorieLien=id&cidTexte=JORFTEXT000024191380

French Public Service website.[446] Note that a new law is being prepared, to facilitate the expulsion of foreigners, including EU citizens, on grounds of terrorist threat.[447]

In this section, we will examine the application of the common law expulsion procedure (A), as well as the use of OQTF (removal orders) on public order grounds (B). The application of OQTF for irregular stay or abuse of rights will be examined in section 5.2 and 6, respectively. The removal of EU citizens usually takes place under the OQPT framework, rather than common law expulsion. Paradoxically, it results in weaker procedural guarantees for EU citizens against removals than for third-country nationals.

A) Common law expulsion order for threat to public order (Article L.511-1 Cedesa)

Legislation and regulation

Under Article L.521-1 Cedesa, EU citizens and their family members, like any foreigners, may be subject to common law expulsion measures, if they constitute a 'serious threat to public order' (*menace grave a l'ordre public*). The expulsion procedure must also comply with Article 27-2 of the 2004 Directive, in that it must be based on the 'personal conduct of the individual… representing genuine, present and sufficiently serious threat of the fundamental interests of society'.

However, parents of French children (who do live in poligamy and contribute to the effective maintenance and education of their child since her birth or for at least a year), spouse of French citizens who can justify of at least 3 years of common life, foreigners who reside in France for more than 10 years (although not under a student residence title), foreigners who are recipient of a French benefit for work-related disability or occupational disease and *EU citizens who have been residing in France for more than ten years* can be expulsed *only in case of imperious necessity for the security of the state or public security or if they have been condemned to a sentence of at least 5 years* (Article L. 521-2 Ceseda). Minors cannot be expulsed (Article L.521-4 Cedesa)

Although these requirement appear generally in line with conditions under the Directive, it is doubtful whether the 'five year sentence ground' would satisfy EU law requirement of 'imperative ground of public security'.

It is important to note that, under Article 521-3 Cedesa, French law affords further protection against expulsion to certain categories of foreigners. This provisions supersedes Article L.521-4. These are thus important to outline, since EU citizens may find themselves in such position, and thus benefit from additional protection under French law. Can only be expulsed in case of 'behaviour likely to undermine the fundamental interests of the State or related to activities of terroriste nature, or which constitutes explicit and deliberate incitement to discriminate, to hatred or to violence against a identified'

[446] See website of the French public service, at https://www.service-public.fr/particuliers/vosdroits/F13517
[447] See French public service website at https://www.service-public.fr/particuliers/vosdroits/F11891

(1) A foreigner who can justify by any means having regularly lived in France since the age of 13; (2) a foreigner regularly residing in France for at least 20 years (2);

(3) a foreigners regularly residing in France for more than ten years and married for at least four years with a French citizen or with a foreigner falling under (1);

(4) a foreigner regularly residing in France for more than ten years and, not living in polygamy, are parents of a minor French citizen living in France, provided that she effectively contribute to the effective maintenance and education of their child since her birth or for at least a year;

(5) a foreigner regularly residing in France and who necessitates medical care the lack of which would result in exceptionally serious consequences, unless she can benefit from approapriate treatment in the country to which she would be returned, person or a group of person.'[448]

In line with Article 28(1) of the 2004 Directive, before adopting the expulsion order (*arrêté d'expulsion*), the competent authority, the Prefect (or in case of emergency or protected foreigners, the Ministry) must take into account all the circumstances related to their situation, in particular the length of their state in France, their age, their state of health, their family and economic situation, their social and cultural integration in France, and the intensity of their link with the country of origin.

An individual who has been issued with an expulsion order will be forcingly removed to the country of destination. The common law expulsion procedure however provides for procedural guarantees.[449] The individual concerned by an expulsion order must receive a special notification by 'bulletin', notified at least 15 days before the meeting of a special Expulsion Committee (*Commission d'expulsion,* abbreviated as COMEX in French). The individual must be informed of the facts on which the expulsion procedure is based, of her right to attend and be represented at the hearing and to be heard with an interpreter at the hearing, to request legal aid, to ask for the postponing of the hearing based on legitimate grounds, to be communicated her file and to submit a brief in defense, and to be informed about the modalities for challenging the expulsion order.The COMEX must hear the individual against which an expulsion procedure has been started and release an opinion within a month. Its opinion must be duly motivated

Administrative practices

Very few expulsion order are issued against EU citizens. Authorities prefer to rely on the more flexibile and less demanding OQTF procedure, detailed below.[450]

Case law

[448] Note that (3) and (4) are not applicable where the acts on which expulsion is based were targeting the foreigner's spouse, children or children of which she is the guardian.

[449] See website of the French public service, https://www.service-public.fr/particuliers/vosdroits/F11891

[450] See GISTI, *Les droits des citoyens et des citoyennes de l'Union européenne et de leur famille* (GISTI, Les cahiers juridiques, 5th ed. October 2014), p. 40.

The possibility to impose expulsion orders against EU citizens was confirmed by administrative courts.[451]

Individuals who have been issued expulsion order can challenge them before an administrative court.

Courts will review compliance with procedural requirements and respect of substantive rights. They have confirmed that if the COMEX opinion[452] or the expulsion order, taken by the Ministry or the Prefect based on the opinion of the COMEX, [453] are not reasoned, the expulsion order will be annuled (even in emergency proceedings). They also encure that where a foreigner subject to an expulsion order is placed in administrative detention, she receives legal assistance in compliance with the requirement of confidentiality between lawyers and client.[454] The judicial review court must also assess the proportionality of the expulsion order in light of Article 8 ECHR, and balance the seriousness of the interference with the right to family life with the defense of public order. [455]

The intensity of judicial control vary depending on whether expulsion orders concern EU citizens and their family members, or other foreigners. Administrative courts usually carry out a limited control (*contrôle restreint*) over expulsion order against regular TCN,[456] as well as over administrative decisions refusing to withdraw such expulsion orders.[457] However, in expulsion order concerning EU citizens, national courts exercise full control (*contrôle normal*), the French equivalent to strict scrutiny.[458]

French courts have exercised close scrutiny over, notably, the 'current' nature of the threat. In 1990, an administrative court annulled an expulsion order against an EU citizen who had received criminal sentences for breach of trust, dine and dash, scam, non-sufficient fund cheque, and illegal work, which had been committed three to ten years before the order was taken.[459] In 2007, the Douai administrative court considered that the fact that someone had been charged with stocking and transporting highly taxes goods of a value above 770 EUR without justification as to the origin and in breach of legal and regulatory provisions, could not on its own justify 'the persistence of a threat to public order.'[460]

On case law related to removal order on the ground of threat to public order see question 5.3 below.

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[451] TA Marseille, 2 May 2001, No 99-2822.
[452] CE, 24 July 1981, X, No 31488.
[453] CE, 13 January 1988, X, No 65856.
[454] CE, 30 July 2003, Syndicat des avocats de France, No 236016.
[455] CE, 13 March 1992, X, No 124255.
[456] CE, 3 Febuary 1975, Ministre de l'intérieur c/ X, No 94108.
[457] CE, 16 March 1984, Ministre d'État, ministre de l'intérieur et de la décentralisation c/ X, No 48570.
[458] CE, 19 November 1990, X, No 9423
[459] TA 29 November 1990, Gantier.
[460] CAA Douai. 18 October 2007, No 07DA01151.

B) The 'obligation to leave the French territory'against EU citizens for real, actual and sufficiently serious threat against the fundamental interest of the French society' (first three months of residence)

Legislation and regulation

Law No 2001-672 of 16 June 2011 was adopted after the controversial mass expulsion of Romanian and Bulgarian Romas in summer 2010 which received significant media and political attention.[461] The European Commission expressed concerns, and criticised France for not having properly implemented the 2004 Directive as concerns the protection against removal and expulsion of EU citizens (Article 28). The 16 June 2011 Law amended Article L. 511-3-1 Cedesa, which creates an additional mechanism for removing from the French territory 'undesirable' EU citizens and their family members.

Under Article L. 511-3-1 Cedesa, a removal order, called *'obligation de quitter le territoire francais'* (OQTF), can be issued against EU citizens and their families in the following situations.

- in case of irregular stay (i.e. where the EU citizen does not fulfil the condition of exercise of the right of residence);
- in case of abuse of right;
- in case, during the first three months of her stay, her personal behaviour constitutes a real, actual and sufficiently serious threat against the fundamental interest of the French society'.

Article L.511-4 speficies that EU citizens and their family members who are permanent residents cannot be subject to an OQTF ; neither can the various categories of foreigners who are also protected against expulsion. These are

(ie (1) minors under 18 ;
(2) foreigneers justifying by all means to have regularly resided in France since the age of 13 ;
(4) foreigners who regularly residing in France for more than ten years (unless that was under a student resident title) ;
(5) foreigners regularly residing in France for more than twenty years ;
(6) foreigners regularly residing in France for more than ten years and, not living in polygamy, are parents of a minor French citizen living in France, provided that she effectively contribute to the effective maintenance and education of their child since her birth or for at least a year ;
(7) foreigners married for at least three years with a French national, on the condition that communal life has not ceased since the wedding and that the spouse has retained French citizenship;

[461] Loi No 2011-672 relative à l'immigration, à l'intégration et à la nationalité, 16 June 2011 [Act related to immigration, integration and nationality], at https://www.legifrance.gouv.fr/affichTexte.do?categorieLien=id&cidTexte=JORFTEXT000024191380

(8) foreigner regularly residing in France and who, not living in polygamy, is married for at least three years with a foreigner who falls under (2), on the condition that communal life has not ceased since the wedding;
(9) foreigners who is recipient of a French benefit for work-related disability or occupational disease and who has a disability rate of at least 20%;
(10) foreigner regularly residing in France and who necessitates medical care the lack of which would result in exceptionally serious consequences, unless she can benefit from approapriate treatment in the country to which she would be returned).

To the extent that they fall under one of the category (eg spouse of a French citizen), an EU citizen could not be subject to an OQTF.

When issuing an OQTF, administrative authorities must take into account all circumstances related to the situation of the person concerned, in particular the length of the residence in France, her age, her state of health, her family and economic situation, her social and cultural integration in France, and the intensity of her link with her country of origin.

Under EU law, an EU citizen or family member must be given a delay of at least thirty days from notification to leave the territory. In exceptional circumstances, the state authorities may issue a further extension of the delay to allow voluntary return. [462]

Foreigners may issued an OQTF with or without delay. In case they have been issued with an OQTF with delay, they must leave the French territory with the delay (one month). They may receive financial assistance towards it. If they do not leave as requested, they can be forcibly expulsed anytime from the expiry of the delay and be subject to criminal charges. In case they are issued with an OQTF without delay, they must leave immediately.

Individuals can challenge the removal (OQTF) decisions, together with the refusal to recognise a right of residence, before administrative courts within one month from the notification of the order. The application for judicial review has suspensory effect.[463] If they fulfil the conditions, they may receive legal assistance and aid to challenge the order. If the foreigner has been placed in administrative detention, the court must decide within 72h; if she is free, the court must decide within three months.[464]

Administrative practices

NGOs denounce the widespread practice by French Prefects to issue OQTF against EU citizens where it is not established that they pose a 'genuine, current and sufficiently serious threat against the fundamental interests of the French society'. They identified such removal orders being issued based on a 'mere assertion of an alleged threat to public orders' without any details being provided, 'facts that are not punishable under criminal law' (eg precarious

[462] Article L. 511-3-1 Cedesa.
[463] Note however that a request to the authorities to revise the decision (*recours gracieux*) does not stop the clock; it is therefore crucial to bring an action for annulment as soon as possible following the OQTF notification.
[464] For details on the procedure, see http://www.legavox.fr/blog/maitre-haddad-sabine/oqtf-presentation-recours-mesure-eloignement-16802.htm#.VsMvOub9wbU

living conditions, homelessness), 'suspicion of commission of offenses' without criminal prosecutions (e.g. reliance on police reports or questioning) and 'event leading to minor criminal convictions, without the authorities demonstrating that the person's conduct constitutes a 'current, genuine and serious threat affecting the fundamental interests of society'(e.g. theft, handling of stolen goods, begging, repeated mino offences, etc.).[465]

It is common practice for the state authorities to expulse Romanian and Bulgarian Roma for simple theft, begging or just exiting a dump! The authorities usually apply the emergency procedure (OQTP withouth delay), which is in breach of EU law which requires a one month delay. They also routinely place EU citizens of Roma background in administrative detention centers (for further analysis, see answer under Question 8). Too often, the victims do not know their rights or are eager to leave the retention center, and they do not challenge those expulsion and retention measures. [466]

Recently, the 2015 terrorist attacks triggered a series of expulsion or OQTF procedure against EU citizens, most likely of foreign descent or Muslim. A special observatory has been set up by the GISTI, which collects data on OQTF procedure against EU citizens.[467] It reports that a few Belgian nationals were issued with OQTF without delay for posing a 'real, actual and sufficiently serious threat for participation in a prohibited demonstration, although they did not appear to have acted with violence.[468] A British citizen was also issued with an OQTF for 'real, actual and sufficiently serious threat', for not having respected a prohibition to enter the French territory.[469]

Case law

The *Conseil d'Etat* recalled that when assessing the threat, the Prefect cannot rely solely on the existence of a criminal act, but must take into account all the circumstances of the case and the individual situation of the person, in particular the period of residence in France, her economic and family situation and her integration. It nonetheless confirmed the expulsion order against a female Romanian citizen, without resources and mother of four children, including one in her charge, and who had been 'identified', although not charged or

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[465] Petition by the AEDH, ASSFAM, CIMADE, ERRC, GISTI, LDH and Romeurope to the European Parliament, 25 February 2015, available at http://www.aedh.eu/plugins/fckeditor/userfiles/file/EN%20petition%20EN.pdf, p. 14-16.

[466] CIMADE, Report 'Migrations. Etat des lieux 2014', (May 2014), available at http://cimade-production.s3.amazonaws.com/publications/documents/88/original/EDL2014.pdf?1399968037 , p. 67.

[467] **GISTI, 'WEB-DOSSIER –L'ETAT D'URGENCE ET SES D'EGATS COLLATERAUX', SECTION II DECISIONS PRISES DANS LA CADRE DE L'ETAT D'URGENCE', SUBSECTION 'ETAT D'URGENCE : OQTF OU REMISE PRISES CONTRE DES RESSORTISSANTS EUROPEENS' AVAILABLE AT** http://www.gisti.org/spip.php?article5120.

[468] GISTI, 'Web-dossier –L'Etat d'urgence et ses d'egâts collatéraux', section II Decisions prises dans la cadre de l'état d'urgence', subsection 'Etat d'urgence : OQTF ou remise prises contre des ressortissants européens', documents under http://www.gisti.org/IMG/pdf/decision_oqtf_belge_2015-11-30.pdf, http://www.gisti.org/IMG/pdf/decision_oqtf_belge1_2015-11-30.pdf , http://www.gisti.org/IMG/pdf/decision_oqtf_belge2_2015-12-01.pdf

[469] GISTI, 'Web-dossier –L'Etat d'urgence et ses d'egâts collatéraux', section II Decisions prises dans la cadre de l'état d'urgence', subsection 'Etat d'urgence : OQTF ou remise prises contre des ressortissants européens', documents under http://www.gisti.org/IMG/pdf/decision_oqtf_britannique_2015-11-22.pdf

sentenced, for fraudulent begging.[470] This decision does not appear in line with the EU law requirement that an EU citizen's conduct must constitute a genuine, current and sufficiently serious threat against the fundamental interest of the society'.

The practice of lower courts had, until then, been mixed, with some courts applying higher or lower threshold. Courts confirmed OQTF against EU citizens sentenced for shoplifting,[471] social security fraud;[472] theft or attempted theft;[473] repeated thefts,[474] collective theft,[475] 'abuse of public charity',[476] aggravated theft and abuse of elderly persons.[477] They also qualified as a threat justifying expulsion the participation in a collective burglary on the public way (even where there was no criminal sentence),[478] or in a case of contested mobile phone theft and collective theft charges.[479] Courts however refused to uphold OQTF issued for acts of prostitution,[480] illegal occupation,[481] possession and use of drugs (without criminal charges),[482] soliciting,[483] organized cigarets or alcohol smuggling,[484] or attempted theft.[485]

Although there is variations across courts, they generally seem to adopt relatively expansive interpretation of the nature of the threat.[486] The fact that expulsion could be ordered based only on charges, and not criminal sentences, as well as for crimes which are not that serious, or which constitute isolated incidents, raises the question of the compatibility of French judicial decisions with the Directive's requirement as interpreted in the CJEU case law that there should be a 'genuine, current and sufficiently serious threat'. The inclusion of acts such as abuse of public charity (fraudulent begging) suggests that the grounds for expulsion procedure are specifically tailored to target Roma communities.

Although the question is not asked, there have been discussions and judicial decisions addressing issues of procedural guarantees, which are not the same under the OQTF and

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[470] CE, 1 October 2014, No 365054, ECLI:FR:CESSR:2014:365054.20141001.
[471] CAA Lyon 3 October 2008, No 08LY00585; TA Nantes 7 September 2007 No 07914; TA Lyon 2 February 2007, No 0700541.
[472] CAA Versailles, 27 June 2012, No 11VE03012.
[473] CAA Lyon, 10 June 2010, No 09LY02615.
[474] CAA Lyon, 10 June 2010, *Préfet du Rhône c. Lukanov*, No 09LY02615.; CAA Lyon, 3 October 2008, *Préfet de la Drôme c. Balan*, No 08LY00585.
[475] CAA Versailles, 5th ch., 26 June 2012, *Préfet d'Eure-et-Loir*, No 11VE03012.
[476] CAA Versailles, 5th ch., 26 June 2012, *Préfet d'Eure-et-Loir*, No 11VE03012.
[477] TA Rennes 15 April 2008 No 0801692.
[478] CAA Lyon, 8 July 2008, *Préfet de l'Ain c. Alexandru*, No 07LY01551.
[479] CAA Lyon, 27 September 2009, *Préfet du Jura*, No 09LY00111.
[480] CAA Lyon, 9 July 2008 No 08LY00411 *Préfet de Saône-et-Loire c. Hassemeyer*; TA Nantes 6 June 2007 Mica No 073176,
[481] CAA Versailles, 28 April 2009, *Préfet du Val d'Oise c. Mihai*, No 08VE02978 ; CAA Versailles, 15 July 2009, No 09VE01053 ; CAA Versailles, 24 September 2009, No 09VE00384 ; TA Lille, 27 August 2010, No 1005249.
[482] CAA Douai, 2nd ch., 31 December 2014, No 14DA00395.
[483] TA Nantes, 7 June 2007, *Mica*, No 073176.
[484] CAA Douai, 18 October 2007, *M. W.*, No 07DA01151.
[485] CAA Douai, 30 July 2009, *Préfet de la Somme c/ Horvat*, req. n° 09DA00377 (attempted theft of a bottle of alcohol in a shop).
[486] See GISTI, *Les droits des citoyens et des citoyennes de l'Union européenne et de leur famille* (GISTI, Les cahiers juridiques, 5th ed. October 2014), p. 39-40.

expulsion.[487] Indeed, in the case of OQTF, which are usually issued together with a refusal to recognise a residence right, EU citizens do not have the right to address observations specifically on the removal (OQTF) decision, because it is assumed they have already been heard in the context of the application for residence procedure.[488] This undermines the adversarial nature of the OQTF procedure (for further analysis, see answer under Question 8).[489]

5.2. Is there evidence in decisions of the national authorities and case law that not fulfilling the conditions laid down in Article 7 (1) (b) Directive 2004/38 for the right to reside in another Member State (having a comprehensive healthcare insurance and sufficient means) leads to expulsion?

Where an EU citizen's right of residence in France is based on the dual condition of having sufficient resources and health insurance (see answers under question 2), and these are not fulfilled, the authorities can issue a removal order (OQTF), which as noted above is procedurally different from an expulsion order (refer to answers under question 5.1 above, and 5.3 below).[490] We review here the legal framework and practices related to the issuance of removal orders (OQTF) for illegal residence. On the issuance of OQTF for abuse of right, see answer under question 6.

Legislation and regulation

Under Article L. 511-3-1 Cedesa, a removal order, called *'obligation de quitter le territoire francais'* (OQTF), can be issued against EU citizens and their families for irregular stay (ie where the EU citizen does not fulfil the condition of exercise of the right of residence). During the first three months of residence, an EU citizen could be issued with a removal order in case she would constitute an unreasonable burden on the welfare system (unlikely, since most social benefits in France are subject to three months residency requirements); after three months, in case she is not an economically active EU citizens, she could be issued with a removal order for lack of resources and/or lack of health insurance cover (for a detailed analysis of the residency requirements for different categories of EU citizens, see answers under question 2.1 and 2.2. The determination of the length of residence is crucial in determining the conditions applicable to the right to reside in another member state under EU law. However, this is problematic where, as already noted, there is no (yet) any mandatory requirement to register one's arrival in a member state under EU or national law.

Administrative practices

When issuing OQTF, the Prefect bases its decision on police reports and questioning. These follow either from hearings, residency checks or arrests. In the context of mass camp evuacation, police officers, shortly before, ask the camp residents questions on how long and

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[487] See Dalloz.fr, case law notes under Article L. 511-3-1 Ceseda; see also GISTI, *Les droits des citoyens et des citoyennes de l'Union européenne et de leur famille* (GISTI, Les cahiers juridiques, 5th ed. October 2014), p. 43-44.

[488] **CE, Opinion, 26 November 2008, No 315441, Silidor; CE, 4 June 2014, No 370515.**

[489] GISTI, *Les droits des citoyens et des citoyennes de l'Union européenne et de leur famille* (GISTI, Les cahiers juridiques, 5th ed., October 2014) p. 44.

[490] Article L. 511-3-1 Cedesa.

how often they have been in France or whether they receive any benefits. The answers then serve as a basis for the OQTF[491]

NGOs report practices of 'sorting out' Roma EU citizens through questioning for the purpose of issuing OQTF. For example, when law enforcement authorities evacuate Roma camps, they ask individuals when they arrived in France and how long they have been around. They usually do not inform them of their right to remain silent, and interpreters are not systematically available. If individuals reply they have been in France more than three months, they are issued with an OQTF for residence over three months without fulfilling the residency conditions (resources and health insurance). If the individuals answer that they have been around for less than three months, and have never been in France before, they are issued with an OQTF for residence over three months without fulfilling the conditions (as they cannot proof that they have been on the territory for less than three months). If the individuals answer that they have been around for less than three months, but have been in France before, they are issued with an OQTF for 'repeated stay' (on this point, see below, answer under Article 6 Abuse).[492]

Case law

In 2008, the Lyon Administrative Appeal Court ruled that a Prefect could not adopt a deportation order (*arrêté de reconduite à la frontière*) against an EU citizen for 'illegal stay' but that he could issue an OQTF. [493] In 2010, the *Conseil d'Etat* confirmed that, independently of any threat on public order, an EU citizen could be issued a removal order (OQTF) for irregular stay.[494]

In the first years following the implementation of the Directive, administrative courts often imposed the burden of proof of the length of residence on EU citizens. [495] Eight NGOs sent a complaint to the Commission in July 2008 on this point, citing other cases.[496] In a 2008 opinion which addressed the issue of the determination of the length of residence, and the burden of proof, the *Conseil d'Etat* considered that it was for administrative authorities to bring evidence that the EU citizen or family member had resided in France for more than three months and for the EU citizen or family member to bring forward any element that can contradict the administration's claim.[497] This judicial stance appears in line with EU law (C-408/03).[498]

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[491] See Roms – Accès au droit: 'Mesures d'eloignement des Roumains et Bulgares', at http://www.droitsdesroms.org/Les-mesures-d-eloignement-des

[492] See 'Roms – Accès au droit: 'Mesures d'eloignement des Roumains et Bulgares', at http://www.droitsdesroms.org/Les-mesures-d-eloignement-des

[493] CAA Lyon, 8 juillet 2008, No 07LY01448,*Préfet* du Rhône c/ Boanca.

[494] CE, 7 avril 2010, No 314756., Min. immigration c. M. Baranga.

[495] TA Paris, 18 October 2007, Mlle Viorica Morar ; No 0712249/5-2 ; TA Paris, 28 November 2007, Mlle Vera Muntean, No 0713072/3/2 ; TA Paris, 8 January 2008, Mme MIRON, No 0715766 ; TA Paris, 20 March 2008, Mme MATEI, No 0720728/5, annexe 41.

[496] Cited in the Complaint by the GISTI to the president of the European Commission, 31 July 2008, available at http://www.stranieriinitalia.it/briguglio/immigrazione-e-asilo/2010/settembre/gisti-barrot-rom-fr-2008.html

[497] CE, opinion, 26 November 2008 Silidor No 315441; see also Circulaire IMIM0900064C Étrangers - Obligations de quitter le territoire français prises à l'encontre des ressortissants des États membres de l'Union européenne, des États parties à l'accord sur l'Espace économique européen et de la Confédération Suisse, 19

French courts, including the *Conseil d'Etat*, confirmed that authorities can issue an OQTF against an EU citizen who has been residing in France for over six months, even when she did not receive any social assistance. [499] An administrative court relied on the illegal residence ground to confirm the validity of a refusal by the Prefect to recognise a residence right, which de facto amounts to an obligation to leave the territory, of a Romanian national, arrested for begging, without needed to enquire whether he was a burden of the social assistance system.[500] However, in a case concerning a Portuguese citizen who had to stop her professional activity as a result of a traffic accident and who was recipient of an allowance for disabled adults, housing and family benefits (non-contributory benefits), the court found that she did not constitute an unreasonable burden on the system of social assistance, and thus confirmed her residence right.[501]

5.3. Is there evidence that in decisions of national authorities or case law a different (lower) standard of public order than prescribed by Directive 2004/38 and the case law of the CJEU is used with regard to expulsion grounds? (e.g. In the Netherlands there seems to be a tendency to ground expulsion orders on a national ground of public order, which has a lower threshold than the EU ground for public order)

As already exposed, EU citizens may be subject to either an OQTF (with or without delay) or a traditional expulsion order, depending on the circumstances. In practice however, French authorities remove EU citizens based on removal orders (OQTF). The practice of French authorities, sometimes condoned by French courts, appears problematic in a number of regards (for a detailed analysis, see answer under Question 5.1)

Question 6 – Abuse

Could you provide information on how abuse of EU free movement rules for EU citizens is interpreted and applied by national authorities and in national case law?

Legislation and regulations

In 2011, the legislator introduced a new ground for the removal of EU citizens.[502] It was presented as a response to the European Commission concerned about the abusive mass

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May 2009, [circular on the obligation to leave the territory adopted against EU citizens and affiliated], www.gisti.org/IMG/pdf/norimim0900064c.pdf.

[498] GISTI, *Les droits des citoyens et des citoyennes de l'Union européenne et de leur famille* (GISTI, Les cahiers juridiques, 5th ed., October 2014), p. 41

[499] CE, Opinion, 26 November 2008, No 315441, Silidor. For more recent decisions, see CAA Lyon, 30 May 2013, *Préfet du Rhône*, No 13LY00578; CAA Lyon, 8 October 2009, *Iancovici*, No 09LY01119; CAA Versailles, 4th ch., 14 December 2010, No 10VE01177, and *Conseil d'Etat*, 24 April 2013, N° 351460 ECLI:FR:CESSR:2013:351460.20130424.

[500] TA Paris, 28 November 2007, Mlle Vera Muntean, No 0713072/3/2.

[501] CAA Nantes, 8 April 2011, *M. Haci Koroglu*, No 10NT00410.

[502] Loi No 2011-672 relative à l'immigration, à l'intégration et à la nationalité, 16 June 2011 [Act related to immigration, integration and nationality], at https://www.legifrance.gouv.fr/affichTexte.do?categorieLien=id&cidTexte=JORFTEXT000024191380

expulsion of Romanian and Bulgarian citizens in summer 2010. In reality, it was introduced to facilitate the removal from the French territory of EU citizens who stay for less than three months.[503]

Under Article L. 511-3-1 Cedesa, a removal order (OQTF), can be issued against EU citizens and their families in case of abuse of right.

The legislator has defined relatively limitatively the notion of abuse of right and the conditions for establishing such abuse. It consists in the renewal of short stay (ie less that three months stay) in order to remain on the territory whilst the conditions for residence beyond three months are not fulfilled, and stay for the purpose of benefiting from the social insurance system.

Ministerial instructions

The circular of 21 November 2011 specifies that Prefect must examine situations on a case-by-case basis, taking into account the difficulties encountered, their temporary character, the amount and nature of assistance provided, the state of health of the person concerned, her family situation, and any other element of personal or humanitarian nature.[504]

Administrative practices

The notion of abuse of rights, provided for by the Directive and transposed in French law, is used by French administrative authorities to 'expulse' (OQTF) EU citizens from Romania and Bulgaria, who belong to the Roma community.[505] NGOs working with foreigners consider that the Directive fails to include sufficient safeguard to prevent administrative abuses of the concept of abuse of right. [506] Still, OQTF for abuse of rights are not so frequent, compared to those issued on grounds of insufficient resources, lack of medical insurance, unreasonable burden or threat on public order. These 'abusive' practices are rarely challenged in courts.

Case law

When OQTF for abuse of rights have been challenged, courts have displayed contradictory approaches as to what constitutes abuse of right and an unreasonable burden on the social security system. Most would not consider the mere fact of repeated stay as constituting an abuse of right, and would impose higher evidential requirements, including proof of an intention to fraudulently use EU law to enjoy particular benefits.

The administrative court of Lyon considered that a Prefect could not issue a removal order for abuse of right against an EU citizen who had made previous trips and lived in precarious

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[503] Petition by the AEDH, ASSFAM, CIMADE, ERRC, GISTI, LDH and Romeurope to the European Parliament, 25 February 2015, available at http://www.aedh.eu/plugins/fckeditor/userfiles/file/EN%20petition%20EN.pdf, p. 22.

[504] Circulaire du 21 novembre 2011 relative aux modalités d'application du décret n° 2011-1049 du 6 septembre 2011 pris pour l'application de la loi n° 2011-672 du 16 juin 2011 relative à l'immigration, l'intégration et la nationalité et relatif aux titres de séjour [circular related to the implementation of Decree No 2011-1049 implementing Act No 2011-672 related to immigration, integration and nationality], p. 6. Available at http://circulaire.legifrance.gouv.fr/pdf/2011/11/cir_34068.pdf,

[505] Interview with a lawyer from GISTI, Paris, 12 October 2015.

[506] Interview with a lawyer from GISTI, Paris, 12 October 2015.

conditions, without providing of evidence of abuse of social assistance.[507] The Administrative Appeal Court of Douai ruled that the fact that someone made trips between his own state and France was not 'sufficient to establish that [the individual] organised these short stays and trips in order to remain illegally on the French territory without the conditions of a residence of over three months being fulfilled.'[508] The Bordeaux Administrative Appeal Court considered that for abuse of right to be established, it was not sufficient to just multiple short stay and trips in order to retain a right of residence, but necessary to show that the purpose was to receive social security benefits. The 'repeated and frequent short stay of less than three months in France must reveal the desire of an EU citizen which did not fulfil the conditions required for residence over three months to benefit from the advantages granted to long term resident and in particular the French social assistance and health care. [509] The Bordeaux Administrative Court ruled that someone cannot become an unreasonable burden on the social security system, and thus abuse her free movement right, if she does not receive any social assistance, and this even if she lives on begging and caritative assistance. It considered that such burden must be established taking into account the amount of non-contributory benefits received, which in this case the person did not receive.[510]

In contrast, the Lyon Administrative Court, in a case concerning a Romanian citizen who multiplied stays of less than three months on the French territory, considered that there was abuse of right as he was not actively looking for a job or having any real chance of being employed, and did not have sufficient resources and health insurance for himself and his family so as not to be a burder on the system of social assistance.[511] The same court also considered as constituting abuse of right the fact that an EU citizen was provided with emergency shelter six months following an OQTF measure, whilst the costs of such shelter range between 20 and 34 EUR for herself, her husband and her child.[512]

Note also that a draft law is currently under examination which would prevent those 'expulsed' for abuse of right to return on the French territory for up to thee years (see answer under Question 8).

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[507] TA Lyon, 2 May 2012, No 1200668, M.D; TA Lyon, 16 May 2012 No 1, 201,114, M.M.

[508] CAA Douai, 1st ch., 25 October 2012, *M. Fanica*, No 12DA00853 et CAA Douai, 1st ch., 4 April 2013, No 12DA01700.

[509] CAA Bordeaux, 30 October 2012, *M. Yankov*, n° 12BX00601.

[510] CAA Bordeaux, 17 October 2013, n° 13BX0934.

[511] CAA Lyon, 6th ch., 29 November 2012, *Préfet du Rhône c/ M. Dimitru*, No 12LY00483.

[512] CAA Lyon, 1è ch., 30 mai 2013, *Préfet du Rhône c/ Mme A.*, n° 12LY02929. For a review of cases on abuse of rights, see GISTI, *Les droits des citoyens et des citoyennes de l'Union européenne et de leur famille* (GISTI, Les cahiers juridiques, 5th ed., October 2014), p. 42-43.

Theme IV: EU citizenship core rights in practice

Question 7 – Barriers from an empirical perspective: actual barriers to core citizenship rights

What are barriers to core citizenship rights (the rights to nationality, the right to reside, the right to family life) according to legal professionals working in the field of migration law?

(Please ask a lawyer, legal officer of the national migration services for information on what the actual barriers are in your country in their perspective.)

Practical barriers e.g. (costs, lack of information, lack of legal assistance, abusive administrative practices, administrative detention, lack of access to interpreter, etc.) have been exposed in a relatively systematic way under the relevant sections. In this section, we present relevant figures which reveal the scale of the problem and outline the role of civil society organizations in overcoming legal and practical barriers.

There are no official expulsion figures,[513] but NGOs claim that in 2012, 12 000 Roma from Romania and Bulgaria were expulsed or ordered to leave the territory, and 10 659 were expulsed under a return assistance scheme (50 EUR). [514] Matters have not seem to improve with the change of government from a right-wind to left-wing government. In 2014, 13483 persons were evacuated or evicted from 138 different sites, mainly slums (70-80% of Roma camps population were evacuated in 2014).[515] The figures are quite similar for 2015: the ERRC reports 216 weekly evictions, for a total of 11128 evictions. [516] These forced evacuations are usually accompanied by OQTFs. [517] They concern essentially poor Romanian and Bulgarian nationals, most of them Roma.

In 2014, 3332 EU citizens had been removed or expulsed. 1713 EU citizens were expulsed from administrative detention camps, 84% of these were Romanian. Other EU citizens were expulsed without prior detentioon. Most removals and expulsions (55.5%) were to other EU member states. 80% of those concerning EU member states are actually enforced, compared to 34% of those which concerned expulsion to non-EU states. In 2014, the share of EU citizens amongst expulsed persons was 15.3 %. [518]

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[513] **See Laurent Ribadeau Dumas, 'Union europeenne: l'expulsion de citoyens modestes non-roms est-elle la regle?', 23 January 2014, at http://geopolis.francetvinfo.fr/union-europeenne-lexpulsion-de-citoyens-modestes-non-roms-est-elle-la-regle-29089.**

[514] CIMADE, Report 'Migrations. Etat des lieux 2014', (May 2014), available at http://cimade-production.s3.amazonaws.com/publications/documents/88/original/EDL2014.pdf?1399968037, p. 65.

[515] LDH & ERRC, ' Census: Forced evictions of migrant Roma in France', 3 Febraury 2015, available at http://www.errc.org/cms/upload/file/report%20forced%20evictions%20-%20final%20en.pdf. These evacuations concerned 8455 persons in 2011, 9404 in 2012, and 19380 in 2013.

[516] **ERRC, More than 11.000 Roma migrants forcefully evicted in France in 2015, 12 January 2016,** http://www.errc.org/article/more-than-11000-roma-migrants-forcefully-evicted-in-france-in-2015/4442

[517] Elise Vincent, 'Les évacuations de Roms ont presque doublé en 2013', *Le Monde*, 14 January 2014, at http://www.lemonde.fr/societe/article/2014/01/14/deux-fois-plus-d-expulsions-de-roms-en-2013-qu-en-2012_4347670_3224.html.

[518] ASSFAM, Forum Réfugiés – Cosi, France Terre d'asile, La Cimade, Ordre de Malte France, 'Centre et locaux de rétention administrative' (report, 2014), p. 12. Available at http://cimade-

Expulsion of EU citizens are usually carried out very rapidly (5.4 days as a average compared to 14.9 days for expulsion towards non EU-countries). Few decisions have been successfully challenged in court. Only 4.5% of EU citizens have been freed following judicial decisions, compared to 21% for non-EU citizens. [519]

Civil society mobilization and assistance

NGOs concerned with foreigners and Roma rights have been particularly active, at both national and EU level. However, whilst they have been able to assist individual EU citizens by offering information about their rights, and supporting successful judicial challenges against abusive administrative decisions, their advocacy and litigation activities have not resulted in any substantial change administrative instructions and practices. The scale of violations also means that they can only reach out to, and directly help, a very limited number of affected individuals.

A number of NGOs provide extensive information on their websites[520] and a few others, such as GISTI,[521] CIMADE,[522] Romeurope, COMEDE, Secours Catholique or the Ligue des Droits de l'Homme.[523] Most also provide information directly to affected individuals, in particular about their rights and the procedure for challenging restrictive measures, as well as and practical and legal assistance. These organizations also carry out empirical studies and monitor relevant judicial and administrative practices. They are actively engaged in EU and national level advocacy (i.e. complaint to the Commission, petition to the EP, engagement with national authorities, etc.) and litigation strategies to support the full application of EU mobility and residence rights.

It is important to note that assistance to illegal immigrants is not systematically penalised, for that would undermine the activities of those who provide assistance and support to migrants. For example, legal advice, as well as the provision of food, accommodation and medical care to foreigners which aimed to ensore conditions of a dignified and decent life to a foreigner, and to protect his or her dignity and physical integrity, are not considered crimes.[524]

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production.s3.amazonaws.com/publications/documents/102/original/Rapport_Retention_2014.pdf?1435654711

[519] ASSFAM, Forum Réfugiés – Cosi, France Terre d'asile, La Cimade, Ordre de Malte France, 'Centre et locaux de rétention administrative' (report, 2014), p. 12. Available at http://cimade-production.s3.amazonaws.com/publications/documents/102/original/Rapport_Retention_2014.pdf?1435654711

[520] See for example, http://www.info-droits-etrangers.org/index.php?page=2-5-1

[521] Website: http://www.gisti.org/

[522] Website: http://www.lacimade.org/

[523] Website: http://www.ldh-france.org/

[524] **Loi No 2012-1560 relative a la retenue pour verification du droit au sejour et modifiant le delit d'aide au sejour irregulier pour en exclure les actions humanitaires et desinteressees, 31 December 2012 [Act related to retention for verification of the right of residence and modifying the crime of assistance to irregular residence to exclude humanitarian and free assistance], at https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000026871211&categorieLien=id ; Circulaire relative a l'entree en vigueur des dispositions de la loi n° 2012-1560 du 31 decembre 2012 relative a la retenue pour verification du droit au sejour et modifiant le delit d'aide au sejour irregulier pour en exclure les actions humanitaires et desinteressees, INT/K/13/00159/C, 18 janvier 2013, available at http://www.gisti.org/spip.php?article3007 .**

Complaints to the Commission

A group of NGOS have submitted complaints to the Commission in 2008 and 2010 against violations of the mobility and residency rights of EU citizens, as they result from judicial or administrative practices.[525] They denounced, in particular, failures to proceed to an individual examination in matters of residence or expulsion/OQTF, deficient and vague reasoning, the lack of effective remedy (legal aid unavailable or ineffective), the abusive interpretation of the concept of public order by French authorities (including courts), the lack of procedural guarantees (non-adversarial procedures), the burden of proof imposed on individuals on the question of the length of residence, and the denial of the right of residence of inactive EU citizens,

The Commission thanked those organizations for their report; it issued a letter of formal notice against France on 10 September 2010, but eventually dropped the case following assurances given by the French government.

Petition to the European Parliament

Following Commission's inaction, on January 2015, a group of NGOs, including GISTI, LDH, CIMADE, ERRC, ASSFAM, AEDH, and Romeurope, petitioned the European Parliament and denouced the problematic implementation of EU citizenship rights in France, in particular the extensive administrative interpretation of the concept of 'abuse of right' and of the notion of threat to public order that is 'genuine, present and sufficiently serious that is affecting a fundamental interest of society ', which leads to the unlawful removal of many EU citizens, notably Roma from Romania and Bulgarian [526]

Summary: Highlights of most significant practical problems

To sum up, NGOs have collected evidence of abusive practices by public authorities, in particular the denial of residency rights to TCN spouse of EU citizens who have precarious jobs and limited resources, and the mass issuance, without proper individual assessments, of removal orders (OQTF) against Romas from Romania and Bulgaria, as well as abusive administrative detention practices. These practices remain largely unchallenged. The complexity of immigration rules, residency rigths and various expulsions and detention measures makes it difficult for EU citizens and their families to know their rigths, and seek help. Lawyers and social workers assisting them are often not sufficiently knowledgeable about their rights, and thus not able to effectively assist them.

Lawyers are also not always encouraging legal challenges, at times suggesting to their clients that it is pointless to challenge measures adopted based on public order.[527] NGOs

[525] 'Plainte contre la France pour violation du droit communautaire en matière de libre circulation des personnes (mise à jour de la Plainte du 31 juillet 2008) [complaint against France for breach of EU law on the free movement of persons, update on the 31 July 2008 Complaint], 22 October 2010, available at http://www.gisti.org/IMG/pdf/cedh_plainte-roms_2010-10-22.pdf

[526] Petition by the AEDH, ASSFAM, CIMADE, ERRC, GISTI, LDH and Romeurope to the European Parliament, 25 February 2015, available at http://www.aedh.eu/plugins/fckeditor/userfiles/file/EN%20petition%20EN.pdf.

[527] Interview with a lawyer from GISTI, Paris, 12 October 2015.

reports that courts have dissuaded lawyers from requesting clarifications from the CJEU through preliminary rulings.[528] Access to legal aid appears problematic and aleatory, but NGOs, such as GISTI, provide legal advice and assistance to EU citizens whose mobility or residence rights have been infringed, including litigation support. Still, very few EU citizens, including those from a Roma background, litigate to enforce their rights. They leave or are removed, and often come back later. This phenomenon has led to the government now adopting legislation to prevent the return of those 'undesirable' EU citizens.

Question 8 – Systematic or notorious deficiencies in the country under study?

Please, discuss here in detail any 'revealing' cases of weaknesses in the effective exercise of core citizenship rights in your country.

Please refer to the answers to the relevant questions, which often address not only legal but also practical difficulties (restrictive administrative or judicial applications of EU and national legal norms, lack of awareness, costs, absence of legal assistance, etc.) which create barriers to the exercise of EU mobility and residence rights.

We mention in this section only further challenges, which may significantly undermine EU free movement rights, and which were notfully addressed under the previous questions.

Restrictions on entry into the French territory for EU citizens

One salient issue, not addressed under the previous questions, concerns access to the French territory for foreigners. State authorities may take a number of measures prohibiting access to the territory for foreigners, including EU citizens.

First of all, foreigners who have committed certain crimes (e.g. marriage of convenience or fraudulent declaration of children, serious violation of labor law, drug traficcking, money laundering, spying, etc) can be subject to a 'judicial prohibition to enter the territory'. The decision is made by a criminal judge.[529] The application of such measure must comply with public order objective and proportionality requirements under Article 27 and 28 of the 2004 Directive; moreover, public authorities must assess the current and genuine nature of the threat (Article 33 (2) of the 2004 Directive).

Second, since a new 2014 anti-terrorist act, an EU citizen, who is not ordinarily resident in France and is not present on the national territory, may be subject to an 'administrative prohibition to enter the French territory', where her presence would pose a 'genuine, current and serious threat to the fundamental interest of society'. This should be assessed based on her personal conduct following an individual examination of the case, and from the point of view of public order and security (Article L.214-1 Cedesa).[530] Given the relatively low threshold for a 'genuine, current and serious threat to the fundamental interests of society'

[528] Petition by the AEDH, ASSFAM, CIMADE, ERRC, GISTI, LDH and Romeurope to the European Parliament, 25 February 2015, available at http://www.aedh.eu/plugins/fckeditor/userfiles/file/EN%20petition%20EN.pdf. p.4.

[529] Article L.541- to 4 Cedesa.

[530] Loi No 2014-1353 renforçant les dispositions relatives à la lutte contre le terrorisme, 13 Novembre 2014, [Anti-terrorism Act] , available on http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029754374

applied by French courts, and confirmed in the 2014 decision of the *Conseil d'Etat* (in which it also refused to refer the question of the definition of a 'genuine, current and serious threat to the fundamental interest of society' to the CJEU),[531] state authorities could impose such prohibition on EU citizens convicted for theft, aggressive begging or public charity fraud.[532] Moreover, this administrative procedure, like the OQTF, is not adversarial; indeed, the administrative authority (here the Ministry of the Interior) issuing the administrative prohibition does not have to hear the argument of the individual subject to the measure.[533]

Third, the administrative authority (here the Prefect) can impose a prohibition to return on the French territory on foreigners, who has been issued with an OQTF or expulsed; currently, this mesure is not applicable to EU citizens.[534] It may however change soon. A draft law related to the right of foreigners in France, presented on 23 July 2014, and still under examination, would make it possible to impose a temporary (up to three years) 'prohibition of circulation on the French territory' on EU citizens who have been issued with an OQTF for real, actual and serious threat to the fundamental interests of society or of abuse of rights (Article 15)[535] and abuse of rights. [536]

The weakness of procedural guarantees and the absence of adversarial procedure in administrative proceedings leading to removal

As noted on various occasions in this report, French law does not always provide for adversarial procedures in the context of administrative measures which restrict EU citizen mobility and residency rights. Under French common law, the adversarial principle must be respected, except when a decision follows a request from the applicant, since in such case the applicant could present her views at the application stage.[537]

As EU citizens do not have an obligation to register in order to enjoy a right of residence, many do not do so. When EU citizens are intercepted by the authorities (for example when these evacuate a Roma camp), and the authorities consider that those individuals do not have a right to reside under EU law, they will be issued an OQTF. However, the OQTF

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[531] CE, 1 October 2014, No 365054, ECLI:FR:CESSR:2014:365054.20141001.

[532] Petition by the AEDH, ASSFAM, CIMADE, ERRC, GISTI, LDH and Romeurope to the European Parliament, 25 February 2015, available at http://www.aedh.eu/plugins/fckeditor/userfiles/file/EN%20petition%20EN.pdf, p. 3.

[533] Loi No 2014-1353 renforçant les dispositions relatives à la lutte contre le terrorisme, 13 Novembre 2014, [Anti-terrorism Act] , available on http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029754374.

[534] See French public service website, at https://www.service-public.fr/particuliers/vosdroits/F2782

[535] There were disagreement between the National Assembly and the Senate, as well as within the Conciliation Committee, on the draft aw. The National Assembly adopted the draft on 26 January 2016, but the Senate refused to do so on 16 February 2016, but the text continues is progress through the legislative procedure. Projet de Loi relative au droit des etrangers en France, No 2183; Projet de Loi relative au droit des etrangers en France, Texte submitted to the Naionale Assembly on 26 january 2016, No 664, available at http://www.vie-publique.fr/actualite/panorama/texte-discussion/projet-loi-relatif-au-droit-etrangers-france.html

[536] / ASSFAM, Forum Réfugiés – Cosi, France Terre d'asile, La Cimade, Ordre de Malte France, 'Centre et locaux de rétention administrative' (report, 2014), p. 18. Avai;able at http://cimade-production.s3.amazonaws.com/publications/documents/102/original/Rapport_Retention_2014.pdf?1435654711

[537] Article 24 of the Loi n° 2000-321 **relative aux droits des citoyens dans leurs relations avec les administrations,** 12 April 2000 [Act on the relations between citizens and administrations].

procedure, which is an administrative measure, does not provide for the right to present written or oral observations prior to a decision. This results in EU citizens being expulsed without having been able to submit observations supporting their right to reside and/or not to be expulsed. As a consequence, EU citizens have weaker guarantees than third-country nationals, as these would have had the opportunity to submit observations in their application for residence.

Aware of this deficiency, some administrative courts started to impose on Prefect the obligation to hear foreigners, including EU citizens, prior to issuing a removal order (OQTF), as resulting from the general principle of EU law protecting the rigths of the defence,[538] and a preliminary reference on the matter was made to the CJEU.[539] However, other administrative courts were unwilling to follow suit. One ruled, controversially, that general principles of EU law only apply to situations which are fully regulated by EU law, which is not the case for OQTF procedural modalities.[540] Another, whilst considering that both general principles as well as the Charter provisions were applicable, ruled that the right to be heard did not include the right to be invited to present, prior to an administrative (and not judicial) decision, written or oral observations, and that guarantees applicable to the administrative procedure sufficiently ensured the respect for the rights of the defense under the EU Charter.[541] The *Conseil d'Etat*, asked for an opinion, considered that French common law on the right to be heard was not applicable to an OQTF administrative procedure, since the legislator has provided for a special procedure in relation to OQTF.[542] The *Conseil d'Etat* ruled that the right to be heard did not require the administrative authorities to give the third-country national the opportunity to present his own observations on the removal order (OQTF) at stake, insofar that he was able to be heard before the adoption of the decision refusing him a residence permit.[543] As noted by the GISTI, this position is problematic, as EU citizens are not required to apply for residency titles and may therefore never have been heard on the matter of their residency rights.

In November 2014, the CJEU endorsed the more restrictive French judicial approach. [544] Although it confirmed that 'observance of the rights of the defence [was] a fundamental principle of EU law, in which the right to be heard in all proceedings [was] inherent' (*Mukarubega*, para 42, *Boudjlida*, para 30,) and that 'such a right is … inherent in respect for

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[538] TA Lyon, 28 February 2013, No 1208055, Mme Ancuta D.

[539] TA Melun, 3 March 2013, No 1301686Sophie M.(C-166/13); see ee also TA de Pau, 30 April 2013, M. Khaled Boudjlida, No 1300264 (C-249/13).

[540] TA Montreuil, 14 March 2013, No 1210341-1210332, M et Mme R.,

[541] CAA Lyon, 14 March 2013, No 12LY0273, *Préfet* de l'Ain c/ Luc B.G.,

[542] CE Opinion 28 Nov 2007, No 307999.

[543] CE 4 June 2014, No 370515 'dans le casprévu au 3° du I de l'article L. 511-1 du code de l'entrée et du séjour des étrangers et du droit d'asile, où la decision faisant obligation de quitter le territoire françaisest prise concomitamment au refus de délivrance d'un titre de séjour, l'obligation de quitter le territoire français découle nécessairement du refus de titre de séjour; que le droit d'être entendun'impliquealors pas que l'administration ait l'obligation de metre l'intéressé à même de presenter ses observations de façon spécifique sur la décisionl'obligeant à quitter le territoirefrançais, dès lorsqu'il a pu être entendu avant que n'intervienne la decision refusant de lui délivrer un titre de séjour (para 7).

[544] *Cases C-166/13 Sophie Mukarubega v Prefet de police and Prefet de la Seine-Saint-Denis ECLI:EU:C:2014:2336; C-249/13 Khaled Boudjlida v Prefet des Pyrenees-Atlantiques ECLI:EU:C:2014:2431.*

the rights of the defence, which is a general principle of EU law' (*Mukarubega*, para 45; *Boudjlida*, para 34), it nonetheless defined its scope narrowly and ruled that the failure by national authorities 'to hear a third-country national specifically on the subject of a return decision where, after that authority has determined that the third-country national is staying illegally in the national territory on the conclusion of a procedure which fully respected that person's right to be heard, it is contemplating the adoption of such a decision in respect of that person, whether or not that return decision is the result of refusal of a residence permit' (*Mukarubega*, para 82) was not contrary to the Return Directive, because this 'would needlessly prolong the administrative procedure, without adding to the legal protection of the person concerned' (decision, *Mukarubega* case, para 70). It is important to note however that the applicant had only been heard in relation to her (failed) application for asylum, and not in relation to her right to reside or the removal order. Some commentator argued that the Court failed to understand and properly assess the compatibility of the French procedure with the right to be heard and more generally the rights of the defense.[545] Remains to be seen what implications arise in relation to removal orders concerning EU citizens, and the opportunity to be heard on all matters (i.e. denial of residency rights, expulsion, detention, prohibition to enter the territory)

Mass 'expulsion' practices

Collective expulsion are prohibited under EU law.

As already noted on various occasions in this report, NGOs reports the widespread practices of 'mass issuances' of OQTF; these are distributed directly to people living in slums, usually when these are been forcefully evacuated, without case-by-case examination of individual situations. They target principally Romanian and Bulgarian citizens belonging to the Roma minority. The authorities have been accused of using OQTF to 'harass poor EU citizens', in particular Romas from Central and Easter Europe, and to put pressure on them to accept return subsidies (ie a sum of money for those who 'volunteer' to go back to their home country). [546]

The number, frequency and lack of details of OQTF decisions released against citizens from those countries provide evidence that the residency status of these EU citizens is not assessed individually.[547] The arrival to power of the left-wing government did not seem to put a stop to these practices, which do not only violate EU citizens' mobility rights, but also EU

[545] *For a commentary of the cases, see blogpost by Marie-Laure Basilien-Gainché , Removal orders and the right to be heard: the CJEU fails to understand the dysfunctional French asylum system, 12 december 2014, at* http://eulawanalysis.blogspot.hu/2014/12/removal-orders-and-right-to-be-heard.html

[546] CIMADE, Report 'Migrations. Etat des lieux 2014', (may 2014), available at http://cimade-production.s3.amazonaws.com/publications/documents/88/original/EDL2014.pdf?1399968037>, p. 68.

[547] See 'Roms – Acces au droit: 'Mesures d'eloignement des Roumains et Bulgares', at http://www.droitsdesroms.org/Les-mesures-d-eloignement-des

non-discrimination legislation, as there is strong evidence that this practices target specifically Roma people.[548]

'Voluntary return'

Alongside forced return, EU citizens may also leave 'voluntarily'. In such case, they may receive financial assistance. However, since January 2013, these are minimal (payment of transport costs plus 50 EUR/adult; 30 EUR/minor child) for EU citizens.[549] Although receiving such assistance does not prevent an EU citizen from coming back to France, it would affect the merits of any future application for a residence certificate. There have been NGOs reports that the authorities try to bully Roms to return home, notably by holding their ID and travel documents until they agree to leave 'voluntarily'. [550]

Detention practices

The 2004 Directive does not explicitly permit or prohibits detention. It may however be justified on grounds of public order, public security or public health under Article 8.[551] As an exception to the principle of mobility of EU citizen, it shoud be apply restrictively. Article 30 of the Directive provides that individuals subject to expulsion measures must be given a one month delay to leave the country, except in case of emergency.

French legislation and regulation do not contain any specific provisions for the detention of EU citizens. The common law applicable to foreigners (Article L.551-1 Cedesa) provides:

> unless she is under house arrest…, a foreigner who cannot immediately leave the French territory can be detained by the administrative authority in premises not managed by the prison administration for a period of five days, when the foreigner (1) must be remanded to the competent authority of a Member State of the EU under Article L.531.1 and L.531-2 (TCN); (2) is subject to a deportation order; (3) must de deported from the territory pursuant to a judicial expulsion order under the second paragraph od Artiicle 131-30 of the Criminal Code; (4) is the subject of an alert for the purpose of refusing entry to the territory or an enforceable expulsion order referred to in Article L.531-3 [Cedesa]; (5) is the subject of a deportation order issued less than three years ao under Article L..533-1; (6) *Is under an OQTF taken less than a year before and for which the delay to leave the country has expired or was not granted*; (7) must be forcingly taken to the border for the enforcement of a ban on return; (8) having been the subject of a detention order under 1 to 7, did not comply with an expulsion measure within seven days of the term of her previous detention or, having

[548] Petition by the AEDH, ASSFAM, CIMADE, ERRC, GISTI, LDH and Romeurope to the European Parliament, 25 February 2015, available at http://www.aedh.eu/plugins/fckeditor/userfiles/file/EN%20petition%20EN.pdf. p. 3

[549] Arrêté INTV1300844A relative a l' Aide au retour [return assistance], 16 January 2013, at https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000026954657&dateTexte=&categorieLien=id .

[550] See 'Roms – Acces au droit: 'Mesures d'eloignement des Roumains et Bulgares', at http://www.droitsdesroms.org/Les-mesures-d-eloignement-des

[551] C-215/03 Oulane [2005] *ECLI*:EU:C:2005:95.

complied wuth an expulsion measure, has returned to France whilst thise measure was still enforceable.

As reported by NGOs, France engages in a practice of extensive administrative detention of foreigners, following OQTF (6). [552] Administrative detention is order for five days and may be extended by special judicial decisions for two periods of 10 days, up to a total of 45 days.

In 2015, 50000 foreigners were kept in administrative detention facilities, many of those being Romanian nationals. Administrative detention is often used prior to expulsion. [553] Many of those EU expulsions concern people who may have left on their own, and their administrative detention may thus be abusive.[554]

According to a study carried out by the Cimade in an administrative retention camp over a period of six months in 2013, 204 persons (13%) out of the 1596 occupants were EU citizens. Most of them (95%) of those EU citizens were from Romania (165) or Bulgaria (29) and claimed claimed to be Roma Only two were from Western Europe. 91% of the Romanian and 71% of the Bulgarian were expulsed, either through the regular expulsion procedure or through an OQTF. 80% were issued with an OQTF without delay for voluntary departure, on the day they were placed in administrative detention. The grounds invoked were threats to a fundamental interest of the French society (for acts such theft in a baker in a drunken state, or theft in a dump or road offenses), burden on the social assistance system (where those persons were not entitled to any assistance) or abuse of the right. Over the period of the study, 90.8% of Romanian, 71.4% of Bulgarians and 70% of the other EU citizens detained were removed, whilst only 27.07% of TCN were expelled.[555]

There are weak procedural guarantees. Once a foreigner has been placed in such detention, she can be expulsed any time, except if she challenges the removal order within 48 h before the administrative court. The challenge has suspensive effect. The court must decide with 72h. If the expulsion order is annulled, the person must be freed. To give an idea of the frequency of such challenges and thir outcomes, only persons had been free following review by the administrative court over the period covered by the CIMDA study.[556] Romanian and Bulgarian usually do not appeal, as it extends their retention, and they want to get out. They usually agree and are removed before any judicial oversight can occur. Indeed the average length of detention is four days, whilst the specialist review by a court of the detention order

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[552] Petition by the AEDH, ASSFAM, CIMADE, ERRC, GISTI, LDH and Romeurope to the European Parliament, 25 February 2015, available at http://www.aedh.eu/plugins/fckeditor/userfiles/file/EN%20petition%20EN.pdf, p. 28

[553] ASSFAM, Forum Réfugiés – Cosi, France Terre d'asile, La Cimade, Ordre de Malte France, 'Centre et locaux de rétention administrative' (report, 2014) Available at http://cimade-production.s3.amazonaws.com/publications/documents/102/original/Rapport_Retention_2014.pdf?1435654711.

[554] ASSFAM, Forum Réfugiés – Cosi, France Terre d'asile, La Cimade, Ordre de Malte France, 'Centre et locaux de rétention administrative' (report, 2014), p. 12 . Available at http://cimade-production.s3.amazonaws.com/publications/documents/102/original/Rapport_Retention_2014.pdf?1435654711

[555] CIMADE, Report 'Migrations. Etat des lieux 2014', (May 2014), p. 65 and 68. Available at http://cimade-production.s3.amazonaws.com/publications/documents/88/original/EDL2014.pdf?1399968037.

[556] CIMADE, Report 'Migrations. Etat des lieux 2014', (May 2014), p. 65 and 68. Available at http://cimade-production.s3.amazonaws.com/publications/documents/88/original/EDL2014.pdf?1399968037.

occur first after five days (unless the expulsion has been challenged, as noted above). During that period, they may be subject to illegal passport seizures, may not be notified of their rights, may not have appropriate access to an interpreter or legal or medical assistance, and may be abusively deprived of liberty.[557]

Moreover, detentions are often based on removal order which are more than one year old. In principle, in such case, the Prefect should make a new decision. However, they usually do not, and require the EU citizen to prove that they have carried out the removal order, ie that they have left the country, which is very difficult to prove when they left by land and there are no border checks. The administration accepts transport tickets as sufficient evidence, but not proof of renewableof ID document, medical prescription or a bill from the country of origin. [558] As noted in the 2015 petition, this appears contrary to the Commission's instructions, which places the burden of proof on the administration.[559]

Identification of EU citizens in hotels

French legal provisions adopted in implementation of the Schengen Convention (Article 45) requires that hotel owners have their foreign customers fill and sign, upon arrival to the hotel, an individual police form, and present their ID document (Art. R. 611-42 Ceseda).[560] This requirement, imposed only on foreigners and not French nationals, is justified by public order objectives, but it may weel constitute a disproportionate interference with mobility right and the principle of non-discrimination based on nationality.

Question 9 – Good practices

Please highlight any other legal norms, policies, instruments or practical tools which facilitate the exercise core citizenship rights in the country under study.

Amongst good practices which are noteworthy it the principle of the application of more favourable French rules. Indeed, certains categories of persons, which are identified and enjoy rights under general French immigration rules, are not explicitly identified in Article 121-1 Cedesa. These are EU citizens who are victim of human trafficking,[561] sick foreigners,

[557] Petition by the AEDH, ASSFAM, CIMADE, ERRC, GISTI, LDH and Romeurope to the European Parliament, 25 February 2015, available at http://www.aedh.eu/plugins/fckeditor/userfiles/file/EN%20petition%20EN.pdf, p. 29-30.

[558] Petition by the AEDH, ASSFAM, CIMADE, ERRC, GISTI, LDH and Romeurope to the European Parliament, 25 February 2015, available at http://www.aedh.eu/plugins/fckeditor/userfiles/file/EN%20petition%20EN.pdf, p. 30-31.

[559] 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 of 2 July 2009)

[560] On public order considerations, see ministerial response to the French parliament. Rép.min. No 71794 JOAN 27 April 2010 p. 4759.

[561] On this see 'Circulaire relative aux conditions d'admission au séjour des étrangers victimes de la traite des êtres humains ou du proxénétisme coopérant avec les autorités administratives et judiciaires', IMI/M/09/00054C, 5 February 2009 [circular related to human trafficking], http://www.gisti.org/spip.php?article1379, point 4.1.

spouse of a French citizen, parents of French citizens, and persons who have entered into a civil partnership agreement with a French citizen, for example.
In order to ensure that such EU citizens are not treated less favourable than TCN, there is a procedural obligation imposed on state authorities to combine the application of Article 121-1 Cedesa with French common law rules. [562]
Concerning he spouse of French citizens, after verification of the matrimonial link with the French spouse, they must be issued with a residence card 'EU – all professional activities' valid for the period of time required to apply for permanent citizenship, and without having to request a work permit or fulfil length of marriage. The same goes for the parent of a French child, after verification of the condition of contribution to the maintenance and education of the child. For a EU citizen who has entered into a civil partnership agreement with a French citizen, after verification of common live (at least one year), a residence certificate 'EU- all professional activitie's should be issued, valid one year. If they can provide for an employment promise of more than a year, the validity of the certificate should be extended accordingly. Finally, concerning a EU citizen who seek medical treatment in France, she should provide evidence of having sufficient resources or a professional activity and a certificate from the doctor that she must imperatively follow a medical treatment in France. She will be issued with a residence certification valid for the duration of the treatment.
I

Annexes

✓ National provisions

✓ Bibliography

Please provide a list of what you consider the most relevant recent bibliographic sources with respect to your country. You can also suggest references to books or articles which in your view should be included in the bibliography concerning relevant EU law (limit your suggestions to a maximum of 5 references). Please mention the title in the original language and include a translation in English, in brackets.

For the bibliography only, rather than stating the foreign language title in italics, please use single quotation marks so as to distinguish it from the title of the journal.

[562] 'Circulaire relative aux conditions d'admission au séjour des étrangers victimes de la traite des êtres humains ou du proxénétisme coopérant avec les autorités administratives et judiciaires', IMI/M/09/00054C, 5 February 2009 [circular related to human trafficking], http://www.gisti.org/spip.php?article1379; Circulaire No IMI/M/10/00116/C relative aux conditions d'exercice du droit de séjour des ressortissants de l'Union Européenne, des autres États parties à l'espace économique européen et de la Confédération suisse, ainsi que des membres de leur famille, 10 September 2010, [circular relating to the conditions of exercise of the right of residence of EU citizens and affiliated] at http://circulaire.legifrance.gouv.fr/pdf/2011/04/cir_32884.pdf.

ANNEX V – COUNTRY REPORT HUNGARY

CASE-STUDY D 7.3:

Exploring obstacles in exercising core citizenship rights

WP 7 CIVIL RIGHTS

UTRECHT UNIVERSITY

RAPPORTEURS: SYBE DE VRIES, HANNEKE VAN EIJKEN

Universiteit Utrecht
Utrecht University School of Law

Questionnaire Deliverable 7.3: Case study 'Core citizenship rights'

Extract from the DoW:

(i) A case study exploring obstacles that citizens face in trying to enjoy their core citizenship rights (e.g. right of residence in the EU). The analysis will focus on the following obstacles:

- Acquiring, keeping and regaining EU citizenship in the light of diverse national nationality/citizenship laws (e.g. limitations on dual citizenship; the granting of national citizenship to 'nationals' of a Member State living in another Member State/third country, effects of deception in application for citizenships, etc.);

- Obtaining residency rights for family members who are third-country nationals, even when the EU citizen has not exercised his or her right to free movement (in the light of national immigration rules and family laws).

INTRODUCTION

The objective of WP7 is to study, from the perspective of EU citizenship, specific problems EU citizens face in exercising civil rights and liberties in areas which fall within the scope of EU law, but also in areas beyond the scope of EU law. In the EU legal context, fundamental rights, including civil rights, have gained not only visibility but also, arguably, significance, now that the Lisbon Treaty has made the Charter of Fundamental Rights legally binding.

This case study will focus specifically on actual and potential barriers to core citizenship rights. These core citizenship rights entail, for the purpose of this deliverable, access and lose of nationality (and thereby also acquire and lose of EU citizenship status), the right to reside in a host Member State and in the Member State of nationality, the right to family life and family reunification in a Member State for EU

citizens, the right to free movement of EU citizens and the derogations to those rights: expulsion measures and abuse situations. The questionnaire is built on these themes.

PRACTICAL INFORMATION AND GUIDELINES

Task leaders: Sybe de Vries, Hanneke van Eijken

Please structure the country report based on the questionnaire below (including headings).

Make sure to include precise references to constitutional, legislative and regulatory provisions, cases and other relevant policy and legal documents. We also encourage you to look for and identify relevant empirical evidence of specific obstacles to civil rights implementation and enforcement in the EU (NGO reports, statistics, press extracts, testimonies, interviews, surveys, etc)

Please note that there may be some overlap with answers given in the context of the first and second tasks (country reports for Deliverable 7.1 and 7.2), and those sought this questionnaire. In such case, we kindly ask you incorporate relevant points into this country report, using appropriate cross-referencing.

The country report should be written in English. The text of country reports should give a general overview, and should be clear, easily accessible and easy to read. If certain concepts or notions do not translate well in English, we recommend that you use both the original language as well as the most appropriate English translation the first time a concept is referred to. Later mention may be in either language. Language editing is the responsibility of each author.

Please use the Kluwer author guidelines for references and citations: http://www.kluwerlawonline.com/files/COLA/COLAHOUSERUL2013.pdf.

Deadline for the report: 31 December 2015

Please, be reminded that the deadline is a very strict one. In case of delay, we will not be able to submit the deliverable on time.

BACKGROUND INFORMATION

The FIDE Congress of 2014 (Copenhagen) focussed, as one of the three main themes, on EU citizenship. In the general report (Union Citizenship: Development, Impact and Challenges) written by Jo Shaw and Niamh Nic Suibhne and the national reports the core citizenship rights and their transposition in the national context were analysed. The general report as well as the national reports serve as a starting point of this present questionnaire, in order to build up on the research that has been carried out by the FIDE reports. Even though the FIDE report included a wider range of topics (e.g. political rights), the information of the general report and of the national report (which were submitted in September 2013) may serve as a good starting point of analysis.

The general report can be found:
http://www.research.ed.ac.uk/portal/files/15442767/Topic_2_on_Union_Citizenship_Edit.pdf.

See also the volume with national reports: http://fide2014.eu/post-congress-materials/.

ANOTHER USEFUL SOURCE FOR INFORMATION IS THE WEBSITE OF EUDOCITIZENSHIP, ON WHICH YOU CAN CONSULT DATA WITH REGARD TO NATIONALITY LAWS. SEE: HTTP://EUDO-CITIZENSHIP.EU/DATABASES.

RELEVANT EU LEGAL INSTRUMENTS

DIRECTIVE 2004/38/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC

Treaty of the Functioning of the European Union: Article 18, Article 20, Article 21.

EU Charter: Article 7, Article 20, Article 21, Article 45.

Relevant case law:

CJEU case law on Article 20 TFEU:

C-34/09, *Ruiz Zambrano,* ECLI:EU:C:2011:124
C-434/09, *McCarthy,* ECLI:EU:C:2011:277
C-256/11, *Dereci and Others* ECLI:EU:C:2011:734
C-40/11, *Iida*, ECLI:EU:C:2012:691
C-87/12, *Ymeraga*, ECLI:EU:C:2013:291

CJEU case law on nationality:

C-369/90, *Micheletti*, ECLI:EU:C:1992:295

C-135/08, *Rottmann,* ECLI:EU:C:2010:104.

CJEU case law on EU citizenship and family life:

C-127/08, *Metock* [2008] ECR I-06241, ECLI:EU:C:2008:449
C-34/09, *Ruiz Zambrano,* ECLI:EU:C:2011:124
C-256/11, *Dereci and Others* ECLI:EU:C:2011:734
C-40/11, *Iida*, ECLI:EU:C:2012:691
C-457/12, *S. en G.*, ECLI:EU:C:2014:136
C-456/12, *O. en B.*, ECLI:EU:C:2014:135

QUESTIONNAIRE

Theme I: Access and loss of nationality and EU citizenship status

QUESTION 1 – ACCESS TO EU CITIZENSHIP: NATIONALITY

1.1. WHAT ARE THE NATIONAL CONDITIONS TO ACQUIRE NATIONALITY OF YOUR COUNTRY? ARE THERE SPECIFIC RULES WITH REGARD TO PERSONS, WHO ARE THREATENED TO BECOME STATELESS? ARE THE CONDITIONS OF ACQUIRING NATIONALITY CHANGED UNDER THE INFLUENCE OF THE JUDGMENT *RUIZ ZAMBRANO* OF THE CJEU?

Act LV of 1993, (not fully updated) English translation available:

http://www.mfa.gov.hu/NR/rdonlyres/93F5CE78-6F49-4FBB-9360-D99B09BBB6D0/0/ActLVof1993onHungarianCitizenship.pdf

The judgment *Ruiz Zambrano* of the CJEU did not influence legislation, because the Hungarian law already was consonant with the judgment.

1. *CONCEPTION OF HUNGARIAN CITIZENSHIP*

Act LV of 1993 on Citizenship, Article 3: mainly ius sanguinis, ius soli only to prevent statelessness:

> (1) A child of a Hungarian citizen shall become Hungarian citizen by descent as of his or her birth.
>
> (2) Hungarian citizenship of a child of a non-Hungarian citizen parent shall be conceived with retroactive effect to the date of birth, if his or her other parent is a Hungarian citizen on the basis of an acknowledgement of paternity with full

effect, subsequent marriage, or the establishment by a judge of fatherhood or motherhood.

(3) **Until proven otherwise** the following persons **shall be regarded as Hungarian citizens**:

a) children born in Hungary to stateless persons residing in Hungary;

b) children born to unknown parents and found in Hungary.

2. Acquisition of Hungarian citizenship (Naturalization)

General rules

Article 4

(1) On his or her request a non-Hungarian citizen may be naturalized if:

a) he or she has been residing in Hungary for **eight consecutive years** prior to the date of submission of the application;

b) under Hungarian law he or she has a **clean criminal record**, and at the time of the assessment of the application there are no ongoing criminal proceedings against him or her before a Hungarian court;

c) his or her **livelihood and residence are assured** in Hungary;

d) his or her naturalization **does not violate the public security and national security** of the Hungary; and

e) he or she provides proof that he or she has passed the **exam in basic constitutional studies in Hungarian language, or that he or she is exempted** therefrom by virtue of this Act.

Preferential naturalization of relatives: three years residence

Art. 4 ctnd:

(2) A non-Hungarian citizen may be naturalized **on preferential terms** if he or she has been residing in Hungary for at least **three consecutive years** prior to the date of submission of his or her application and if the conditions set out in points b) to e) of paragraph (1) are met, provided that:

a) he or she has been living in **a valid marriage with a Hungarian citizen for at least three years, or his or her marriage has been terminated with the spouse's death**;

b) his or her minor **child** is a Hungarian citizen;

c) he or she was **adopted by** a Hungarian citizen, or

d) he or she was **recognized as a refugee** by a Hungarian authority.

Preferential naturalization of ethnic Hungarians (aimed originally at Hungarians who stuck outside the new borders after the Trianon treaties)

No requirement of residence, assured livelihood, and knowledge of constitutional issues:[563]

Art. 4. (3) of the Citizenship Act:

In the case of meeting the conditions set out in points b) (clean criminal record) and d) (no violation of public security and national security) of paragraph (1) a non-Hungarian citizen **whose ascendant** was a Hungarian citizen, or **who demonstrates the plausibility** of his or her descent from Hungary and **provides proof of his or her knowledge of the Hungarian language** may – on his or her request – be naturalized on preferential terms.

Shortened residency requirement and other relaxations:

Art. 4. (4) of the Citizenship Act:

A non-Hungarian citizen may be naturalized on preferential terms if he or she has been residing in Hungary for at least **five consecutive years** prior to the date of submission of the application and if the conditions set out in points b) to e) of paragraph (1) are met provided that:

a) he or she was born in the territory of Hungary;

b) he or she established residence in Hungary before reaching the legal age;

c) he or she is **stateless**.

(5) The condition of **continuous residence** in Hungary for a period of time set out in paragraphs (1), (2) and (4) **may be waived** in the case of **a minor if his or her application for naturalization is submitted together with that of his or her parent or if his or her parent acquired Hungarian citizenship.**

(6) A child of minor age who was **adopted** by a Hungarian citizen **may be naturalized irrespective of his or her residence.**

(7) On the basis of a proposal by the Minister responsible for citizenship issues (hereinafter referred to as the "Minister") **the President of the Republic may grant an exemption from the condition of**

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563 In more detail, and the repercussions such a regulation caused in the neighbouring states see *Ganczer, Mónika: Hungarians outside Hungary – the twisted story of dual citizenship in Central and Eastern Europe, VerfBlog, 2014/10/08, http://www.verfassungsblog.de/hungarians-outside-hungary-twisted-story-dual-citizenship-central-eastern-europe/*

continuous residence in Hungary for a period of time set out in paragraphs (1), (2) and (4) and from the conditions set out in points c) and e) of paragraph (1) if the applicant's naturalization is in the **overriding interest of the Hungary**.

(8) The condition of providing **proof of knowledge of the Hungarian language may be waived** in the case of persons with **no legal capacity or with limited legal capacity**

1.2. Deprivation from nationality: Under which conditions can nationals of your country be deprived of their nationality? Is there a difference in whether a citizen has (i) only the nationality of your country, (ii) has the nationality of another Member State of the European Union and (iii) those citizens having the nationality of your country and the nationality of a third country?

Deprivation in general

Art G of the Fundamental Law ("constitution") proclaims that

(3) No one shall be deprived of Hungarian citizenship established by birth or acquired in a lawful manner.

Another general limit is that according to the Citizenship Act (Art I (2), "No one shall be deprived on an arbitrary basis of his or her citizenship or of the right to change his or her citizenship."

(i) Only-Hungarian citizens

Renunciation for would-be citizens of another country:

> Article 8
>
> (1) A Hungarian citizen residing abroad may renounce his or her Hungarian citizenship in a declaration addressed to the President of the Republic if
>
> a) he or she has a foreign citizenship as well, or is able to demonstrate the plausibility of acquiring one.
>
> (2) If the conditions established in paragraph (1) are met, the Minister shall submit a proposal to the President of the Republic on the acceptance of the renunciation. The President of the Republic shall issue a certificate attesting the termination of Hungarian citizenship through renunciation. The Hungarian citizenship shall cease on the date of issuance of the certificate.
>
> (3) The Minister shall establish in a decision the lack of meeting the conditions necessary for the acceptance of the renunciation. The Metropolitan Court can be requested to review that decision.

(4) Within one year of the date of acceptance of the renunciation the person concerned may seek from the President of the Republic the restitution of his or her Hungarian citizenship if he or she has not acquired a foreign citizenship.

(II) HUNGARIAN AND ANOTHER EU MS-CITIZENS

RENUNCIATION:

Article 8

(1) A Hungarian citizen residing abroad may renounce his or her Hungarian citizenship in a declaration addressed to the President of the Republic if a) he or she has a foreign citizenship as well, or is able to demonstrate the plausibility of acquiring one.

(2) If the conditions established in paragraph (1) are met, the Minister shall submit a proposal to the President of the Republic on the acceptance of the renunciation. The President of the Republic shall issue a certificate attesting the termination of Hungarian citizenship through renunciation. The Hungarian citizenship shall cease on the date of issuance of the certificate.

(3) The Minister shall establish in a decision the lack of meeting the conditions necessary for the acceptance of the renunciation. The Metropolitan Court can be requested to review that decision.

(4) Within one year of the date of acceptance of the renunciation the person concerned may seek from the President of the Republic the restitution of his or her Hungarian citizenship if he or she has not acquired a foreign citizenship.

WITHDRAWAL

Withdrawal of Hungarian citizenship

Article 9

(1) Hungarian citizenship may be withdrawn from a person who acquired his or her Hungarian citizenship by breaching the law, in particular, by communicating false data, or concealing data or facts, and thereby misleading the authorities. There shall be no withdrawal more than ten years after the date of acquisition of the Hungarian citizenship.

(2) The Minister shall establish in a decision the existence of any facts justifying the withdrawal of citizenship. The Metropolitan Court can be requested to review that decision.

(3) The President of the Republic shall – on a proposal submitted by the Minister – decide on the termination of Hungarian citizenship by withdrawal.

(4) The decision on the withdrawal of Hungarian citizenship shall be published in the Hungarian Gazette/Official Journal (Magyar Közlöny). Hungarian citizenship shall cease on the date of publication of the decision.

iii) HUNGARIAN AND THIRD-COUNTRY NATIONALS: SAME RULES AS FOR HU-EU CITIZENS

RENUNCIATION: SEE ARTICLE 8 ABOVE

WITHDRAWAL: SEE ARTICLE 9 ABOVE

1.3. WHAT IS THE CURRENT POLITICAL AND LEGISLATIVE DISCUSSION IN YOUR MEMBER STATE WITH REGARD TO ACQUIRING AND WITHDRAWING NATIONALITY? (E.G. IN THE NETHERLANDS THERE IS A FIERCE DEBATE WHETHER THE DUTCH NATIONALITY CAN BE WITHDRAWN OF PERSONS, WHO ARE SUSPECTED TO BE PART OF A TERRORISTIC ORGANISATION).

There is no major public debate in these terms as we do not have any significant immigration, neither terrorism. The government however used the refugee crisis as an occasion to create an impression that refugees ("illegal immigrants") are a threat to security, and to our culture, etc.

In addition, a new phenomenon emerges with regard to withdrawal, facilitated by the government's new policy to offer citizenship to ethnic Hungarians living outside the borders on preferential terms. From 1993 till 2013 no single case of withdrawal happened. Since then, around 20-30 persons had their citizenship revoked because of fraudulent acquisition. These are new citizens from Ukraine who make use/abuse of the very relaxed rules of preferential acquisition for ethnic Hungarians, clearly in order to gain EU citizenship. There is a whole business sector which came to existence as a result of this legislation so important for the right-wing government politically, whereby whole family trees are created and falsely documented. This issue was raised in parliament also by an opposition MP in the form of question to the government.

Apart from this recent phenomenon, formal withdrawal is generally very rare in Hungary.

However, one can also lose citizenship when authorities later figure out that it was given by mistake or that everybody assumed one had it, but in fact one did not ("quasi-loss"). An expert reported on a case where a judge who grew up in the belief – shared by all authorities and public institutions, eg schools around her -- of being a Hungarian citizen, later asked for a certificate of citizenship, which was denied. So the judge had to apply for naturalisation, which was given (for the future), since she lived in Hungary for a very long time. That the lack of citizenship has arguably affected the validity of all earlier judgments handed down by her (as not fulfilling the requirement of being a citizen as a judge….), was of no concern to the authorities.

The opposite happens too, i.e. someone applies for naturalization, and it turns out he or she already is a Hungarian citizen.

In general terms, the administrative system of citizenship is not very well functioning.

A further problem was also pointed out by the interviewee: traditionally, it was the Office of Immigration and Nationality (BÁH) which performed the registration of birth for children born to emigrant

Hungarians. However, since the emigration increased and since the preferential naturalisation drastically increased the number of Hungarian citizens (around 1 million new citizens), the regulation was modified in that the Budapest Capital Government Office became responsible.[564] While the deadline for the registration of birth is 40 days in general, and 8 days in specific cases (i.e. all the documents are available, or when both parents' birth and marriage was duly registered in Hungary – i.e. the majority of cases),[565] but different Hungarian consular services' homepages remind the applicants that in fact it takes a minimum of 2-4 months, because the Office of Registry is so extremely overwhelmed.

In general, foreigners going through the process of nationalization and integration in Hungary feel it is unfair that ethnic Hungarians get nationalized without residence.

THEME II: FREE MOVEMENT RIGHTS OF EU CITIZENS

QUESTION 2 - THE RIGHT TO FREE MOVEMENT AS A CORE CITIZENSHIP RIGHT (ARTICLE 21 TFEU AND THE CITIZENS' DIRECTIVE)

2.1. WHAT CONDITIONS ARE LAID DOWN FOR EU CITIZENS WITH THE NATIONALITY OF ANOTHER MEMBER STATE TO RESIDE IN YOUR COUNTRY FOR A MAXIMUM PERIOD OF THREE MONTHS?

According to Section 3. (1) of Act I of 2007, as modified by Act LXVIII of 2013 (right of Entry and Residence for a Planned Period Not Exceeding 90 days within a 180 days period)[566], EEA nationals may enter the territory of the Hungary with a valid travel document or a personal identification document, or within a scope determined by international treaty, an expired travel document or an expired personal identification document or other document recognized for entry.

According to section 5 of Act I of 2007, EEA nationals holding a valid travel document or an identity card, or in cases defined by an international treaty, an expired travel document, ID card or other document recognized for the purposes of entry are entitled to a planned stay not longer than 90 days as long as their residence does not result in an unreasonable burden for the social assistance system of Hungary.

2.2. WHAT CONDITIONS ARE LAID DOWN FOR EU CITIZENS EU CITIZENS WITH THE NATIONALITY OF ANOTHER MEMBER STATE TO RESIDE IN YOUR COUNTRY FOR A PERIOD LONGER THAN THREE MONTHS?

According to Section 6. (1) of Act I of 2007:

All EEA nationals shall have the right of residence for a period of longer 90 days within 180 days if they:

a) intend to engage in gainful employment;

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[564] SECTION 1, 32/2014. (V. 19.) KIM RENDELET.

[565] Act I/2010, Section 67 on Registration (of Birth, Death, Marriage, Registered Partnership).

[566] Original translation available: http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4979ca2e2, but it was updated, because this one did not reflect some legislative changes.

b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of Hungary during their period of residence, and have comprehensive sickness insurance cover for health-care services as prescribed in specific other legislation, or if they assure that they have sufficient resources for themselves and their family for such services as required by statutory provisions;

or

c) are enrolled at an educational institution governed by the act on public education or the act on higher education, for the principal purpose of following a course of study, including vocational training and adult education if offering an accredited curriculum, and they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of Hungary during their period of residence, and have comprehensive sickness insurance cover for health-care services as prescribed in specific other legislation, or if they assure that they have sufficient resources for themselves and their family members for such services as required by statutory provisions.

If you reside in Hungary for more than three months, you are required to register your residence.[567] While this seems to be a reasonable rule, in practice it is in fact not very generous: Hungarian property owners are notoriously unwilling to allow their tenants to register their address, because they are afraid of not being able to get rid of the tenants later, or that they will be caught by the tax authority for not paying taxes after the income they draw from the rent. These are both pretty problematic and largely unjustified fears, but still they hold on very strongly. As a reaction, there is a regular practice that one allows their foreigner friends (typically student colleagues) to register at one's address as ex gratia flat inhabitants – but for that one needs property-owning and risk-taker friends.

The sufficiency requirement is seen as problematic:

"In Hungary, however, there continues to be a requirement of a minimum monthly income, which must exceed the lawful monthly minimum pension per capita in the family amounting to approximately EUR 105, or proof of assets, real estate or other sources of income taking into account the size of the family so that the EU citizen concerned will not be deemed an unreasonable burden on the social assistance system."[568]

"In Hungary, EU job-seekers need to supply as proof a document that they are seeking work, if they have been placed by the competent labour centre."[569]

RETAINMENT OF RESIDENCE

According to Section 9 (1) of the Free Movement Act, an EEA national who is no longer engaged in any gainful employment as defined in c) of Section 2 shall retain his/her right of residence obtained in accordance with (1)a) of Section 6 in the following circumstances:

a) he/she is temporarily unable to work as the result of an illness or accident requiring medical treatment;

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[567] EUROPEAN REPORT on the Free Movement of Workers in Europe in 2012-2013, Rapporteurs: Prof. Kees Groenendijk, Prof. Elspeth Guild, Dr. Ryszard Cholewinski, Dr. Helen Oosterom-Staples, Dr. Paul Minderhoud, Sandra Mantu and Bjarney Fridriksdottir, p. 23

[568] Id.

[569] Id.

b) he/she has registered as a job-seeker as prescribed in specific legislation following the termination of his/her gainful employment; or

c) he/she embarks on vocational training with a view to improve his/her professional aptitude, provided that he/she obtained the experience prescribed for vocational training during the previous gainful employment.

(2) The EEA nationals referred to in Paragraph b) of Para. (1) shall retain their right of residence on the grounds of gainful employment for unlimited period of time if he or she had engaged in gainful employment for more than a year.

(3) The EEA nationals referred to in Paragraph b) of Para. (1) shall retain their right of residence on the grounds of gainful employment for the period of granting the job-seeking assistance as specified in specific legislation, but at least for six months.

2.3. ARE THERE ANY MEASURES IN YOUR COUNTRY THAT WOULD PREVENT OWN NATIONALS TO USE THEIR RIGHT TO FREE MOVEMENT? (E.G. A PROHIBITION TO LEAVE THE COUNTRY ON GROUND OF CRIMINAL PROCEEDINGS)

Yes, in criminal procedure and, clearly, as a result of a conviction, free movement rights might be restricted.

Section 16 of Chapter 3 of Act XII/1998 on travelling abroad spells out a ban on travelling abroad for people who are in different kinds of preliminary detention (pretrial detention, extradition detention, temporary extradition detention, surrender detention, temporary surrender detention, temporary executive detention or under temporary detention for coercive treatment, house arrest) (sec. 16, a)-b)). Secondly, a further category of travel ban applies to persons under some sort of punishment deprivatory of liberty, including prison term, coercive treatment, juvenile's corrective institution sec. 16, c)-e)). Finally, also those cannot travel abroad who is banned from leaving the territory of Hungary on the basis of the law on mutual cooperation in criminal matters (sec. 16, f)).

What is maybe more interesting and has been subject to debate is the way university studies are "subsidized". Notably, in the last years, non-paying students in higher education institutions have to sign a so-called "student contract" which obliges them to stay in Hungary for a period twice as long as their studies, or else they have to repay the costs of their studies.

This was so controversial that the rule was inserted in the constitution itself by the infamous Fourth Amendment (see report on D7.1),[570] in order to pre-empt possible annulment by the Constitutional Court.

While the Commission launched a pilot project in 2012, it is not possible to figure out what happened to it. [571]

The government argued that the student contracts are necessary in order to stop the brain drain of Hungarian intelligentsia and professionals, especially in the medical field, by mainly Western Europe. It is

[570] Accordingly, Art XI of the Fundamental Law was added a paragraph:

(3) An Act of Parliament may set as a condition for receiving financial aid at a higher educational institution the participation in, for a defined period, employment or enterprise that is regulated by Hungarian law.

[571] http://www.esu-online.org/news/article/6001/Waiting-for-EU-action-on-student-contracts/

true that Hungarian hospitals face severe problems resulting from the insufficient number of doctors, nurses and other medical professionals since wages are so much higher and working conditions so much better elsewhere. Many feel on the other hand why doctors in Sweden or the UK should be trained on Hungarian taxpayers' money when in the meantime the health care system in Hungary is collapsing.

However, what happens so far is that students simply enrol in decreasing numbers to Hungarian universities, and go instead to Austria, Germany or elsewhere, likely not coming back later either. This is otherwise – ie except for medical personnel and engineers -- fully in line with the cuts in the number of university places in general, and the government's regularly popularized idea to create instead a large technical workforce (the ideal appears to be the semi-skilled worker for German car companies located in Hungary).

Question 3 – The right to reside in the European Union (Article 20 TFEU and Directive 2004/38)

3.1. What is the current trend in case law in your country with regard to the applicability of Article 20 TFEU and references to the case *Ruiz Zambrano*? Are there specific issues noteworthy? (e.g. in the Dutch case law the question whether one or both parents of dependent children should be granted a derived residence right under Article 20 TFEU remains an important question).

There is no such debate. The database on judicial decisions does not yield any search result for the Zambrano reference in any variation.

3.2. What is the relation between Article 21 and 20 TFEU in national case law? Do national courts assess the scope of applicability of both articles?

N.a.

3.3. According to Article 16 of Directive 2004/38 "Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there." Are there any additional conditions in your country for EU citizens to acquire a permanent residency status in your country?

No. Art. 16 of Act I/2007 spells out the continuous five year residence as the sole condition.

Question 4 – Family Life and free movement rights

4.1. Who are defined as family members of EU citizens in your country?

Family members of EU citizens

'family member' according to Section 2 (b) of Act I/2007:

ba) the spouse of an European Economic Area (EEA) national;

bb) the spouse of a Hungarian national;

bc) the direct descendants of an EEA national and those of the spouse of an EEA national who are under the age of 21 or are dependents;

bd) the direct descendants of a Hungarian national and those of the spouse of a Hungarian national who are under the age of 21 or are dependents;

be) unless otherwise prescribed in this Act, the dependent direct relatives in the ascending line of an EEA national and those of the spouse of an EEA national;

bf) the direct relatives in the ascending line of a Hungarian national and those of the spouse of a Hungarian national;

bg) the person having parental custody over a minor child who is a Hungarian national;

bh) any person whose entry and stay has been authorized by the competent authority on grounds of family reunification;

bi) an EEA national's partner from a third country provided that a registered partnership was established before an authority in Hungary or another Member State of the European Union;

bj) a Hungarian national's partner from a third country provided that a registered partnership was established before an authority in Hungary or another Member State of the European Union.

4.2. UNDER WHICH CONDITIONS CAN THIRD COUNTRY NATIONALS HAVE A (DERIVED) RESIDENCE RIGHT AS A FAMILY MEMBER OF (I) AN EU CITIZEN WITH THE NATIONALITY OF ANOTHER MEMBER STATE OR AS A FAMILY MEMBER OF (II) A CITIZEN WITH THE NATIONALITY OF YOUR COUNTRY?

At the level of legislation, the status of TCNs is equalized whether they accompany/join a Hungarian or another EU MS citizen. "In order to avoid reverse discrimination with regard to third-country national family members of Hungarian nationals not having exercised their right of free movement yet, Hungarian law has upgraded their legal status to that of family members of EEA nationals. In other words, Hungarian nationals' third-country national family members living in Hungary are on equal footing with Union citizens' family members in terms of the rights and entitlements related to free movement and residence under EU law."[572]

STAYS NOT EXCEEDING 90 DAYS WITHIN 180 DAYS

[572] Éva Lukács, Tamás Molnár: Hungary in 2014 FIDE Report on Citizenship, eds Ulla Neergard, Catherine Jacqueson and Nina Holst-Cristensen, The XXVI FIDE Congress in Copenhagen, 2014 Congress Publications Vol. 2, DJØF Publishing Copenhagen 2014, 604.

As mentioned above, Section 3 of the Free Movement Act stipulates regarding stays not exceeding 90 days within 180 days in para (1) that EEA nationals have the right to enter the territory of the Hungary with a valid travel document or an identity card, or in cases defined by an international treaty, an expired travel document, ID card or other document recognized for the purposes of entry.

According to para. (2) of the same section, third-country nationals accompanying an EEA national or a Hungarian citizen or joining an EEA national or a Hungarian citizen who reside in the territory of Hungary, who are family members, have the right to enter the territory of Hungary with a travel document valid for at least three months from the planned date of leave, and which was issued within the preceding ten years, and - unless otherwise prescribed by any directly applicable Community legislation or an international agreement - with a visa valid for a planned residence of 90 days within 180 days.

According to para. (3), third-country nationals also have the right to enter the territory of Hungary as family members with a travel document valid for at least three months from the planned date of leave, and which was issued within the preceding ten years, and - unless otherwise prescribed by any directly applicable Community, who:

a) are dependants or for a period of at least one year have been members of the household of a Hungarian citizen, or who are personally cared for by a Hungarian citizen for reasons of serious health condition; or

b) had been dependants or had been members of the household of an EEA national in the country from which they are arriving, or who were personally cared for reasons of serious health condition by the EEA national.

According to para (4), the persons referred to in paras. (2) and (3) may enter the territory of Hungary without a visa, provided that they hold a document specified in the same act certifying the right of residence, or a residence card issued by States who are parties to the Agreement on the European Economic Area to third-country national family members of EEA nationals.

The "Schengen Borders Code" shall also apply to the entry.

(6) In cases defined by the minister for alien police and asylum or the minister for foreign affairs or the minister responsible for civilian national security services – for the protection of public security or national security – the visa authorizing a stay of 90 days within 180 days can only be issued with the consent of the central visa authority.

(7) Prior to consenting to the issuance of the visa valid for 90 days of planned stay within 180 days the central visa authority is obliged to liaise with the central authorities of those Schengen countries which request it.

Section 4 spells out that the visa authorizing the stay of maximum 90 days within 180 days shall be issued according to the procedures and conditions laid down in the Visa Code. Fraudulous acquisition was also added to this section in that according to para (1a) if the applicant for such a visa established the family relationship in order to get the authorization of entry, the benefits regulated in this act and its executing ordinance are inapplicable.

According to para. (2), third-country national family members holding a valid visa are entitled to multiple entry and three months stay in any six months period following the day of the first entry.

Section 5, as mentioned above, stipulates that EEA nationals holding a valid travel document or an identity card, or in cases defined by an international treaty, an expired travel document, ID card or other document recognized for the purposes of entry (for as long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of Hungary).

In contrast, as to family members the rule is less beneficial: legally entered third-country national family members who are holding a *valid travel document* shall have the right of residence not exceeding 90 days from the date of entry for as long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of Hungary.

STAYS EXCEEDING 90 DAYS WITHIN 180 DAYS:

Workers, jobseekers' and self-financing EEA national's family members

According to para (2) of Section 6 of the Free Movement Act, *the family members* of those EEA nationals who satisfy the requirements set out in para a) (workers and work-seekers) or b) (sufficiency and health insurance coverage of themselves and their family members) of Para. (1) of Section 6 shall have the right of residence.

Students' family members

According to para (3) of Section 6 of the Free Movement Act, the spouse and dependent children of any EEA national who satisfies the requirements set out in Paragraph c) of Para. (1) of Section 3 shall have the right of residence: i.e. students can only bring their spouse and dependent children with them, and the sufficiency (and no unreasonable burden on the social assistance system) and comprehensive health insurance coverage also apply.

Hungarian national's family members

According to section 7 para. (1) the family member of a Hungarian citizen who engages in gainful employment is entitled to a stay exceeding 90 days within 180 days.

In addition, para (2) adds that such entitlement also applies to such a family member who or with regard to whom the Hungarian citizen:

a) has sufficient means to assure that his or her stay will not result in an unreasonable burden on the social assistance system of Hungary, *and*

b) according to specific legislation, within an insurance contract, is entitled to use health insurance services or him-or herself covers the fee of such services on his or her own in accordance with applicable legal provisions.

(3) The right of residence for a period exceeding three months *may* be granted to a person who exercises parental custody of a minor child who is a Hungarian citizen in the absence of the requirements set out in Para. (2).

Serious health condition – personal care

Section 8 (1) The competent authority *may* grant the right of residence to persons as family member, who:

a) are dependants or for a period of at least one year have been members of the household of a Hungarian citizen, or who, for serious health reasons, are personally cared for by the Hungarian citizen;
b) had been dependants or for a period of at least one year had been members of the household of an EEA national - who satisfies the requirements set out in para. (1) of Section 6, (worker, jobseeker or has sufficient means) - in the country from which they are arriving, or who were personally cared for reasons of serious health condition by the EEA national.

Note here that the one-year criterion is an additional condition compared with Art 3 of the Directive.[573]

(2) The right of residence of the person referred to in para. (1) shall terminate when their family life is terminated.

(3) The person referred to in para. (1) shall have the same legal status as the family member during their period of lawful residence, with the exception that such right of residence may not be retained on these grounds:

a) in the event of the Hungarian citizen's death or if his/her citizenship is terminated;

b) in the event of the EEA national's death or if his/her right of residence is terminated, or if the EEA national no longer exercises the right of residence.

Stateless/unaccompanied minor dependent on a Hungarian citizen

Section 8/A. The competent authority, at the initiation of the guardianship authority authorizes the stay of the minor child living with a Hungarian citizen who takes care of him or her, who was born in Hungary, but whose nationality is unknown and does not have any parent who had custody right.

Retention of residence right of family members who are themselves EEA nationals

There is a difference between residual residence rights of family members depending on whether they had been family member of an EEA or an EEA family member of a Hungarian national.

The EEA family member of an EEA national who died or abandoned the right of residence retains the right to reside according to Section 10:

(1) The right of residence referred to in para. (1) of Section 6 shall be retained, subject to the conditions defined therein, by the family member of an EEA national:

a) in the event of the EEA national's death or

b) if the EEA national no longer exercises the right of residence.

EEA national who is a family member of a Hungarian citizen however only retains the residence right in case of death – and not in case of abandonment, since Hungarian citizens always have a right to reside in the territory of Hungary:

[573] Similarly, General Report to the 2014 FIDE Report, pp. 76-79.

Section 10 (2): The right of residence of an EEA national who is a family member of a Hungarian citizen shall be retained according to Para. (1), in the case specified in a) of Para. (1).

Divorce or annulment of marriage does not terminate the residence right of the EEA spouse of EEA national:

Section 10 para. (3): The right of residence of the spouse of an EEA national shall be retained according to Para. (1), if the marriage was dissolved or annulled by the court.

(4) The right of residence of an EEA national shall be retained as family member if he/she is a family member of a Hungarian citizen or a family member of an EEA national who satisfies the conditions set out in Para. (1) of Section 6.

Retention of TCN's residence right as family member of EEA or Hungarian national

Section 11 (1) The right of residence of third-country national family members of EEA nationals and Hungarian citizens shall be retained as family member in the event of the death of the EEA national or Hungarian citizen if:

a) they are engaged in gainful employment;

b) they have sufficient resources for themselves and their family members not to become an unreasonable burden on the social assistance system of Hungary and according to specific legislation, within an insurance contract, are entitled to use health insurance services or themselves cover the fee of such services on their own in accordance with applicable legal provisions;

c) they exercise the right of residence as family members of a person who satisfies the requirements set out in a) or b) (gainful employment or sufficient means and insurance coverage).

Divorce or annulment of marriage of the TCN spouse of EEA national:

(2) The right of residence of a third-country national spouse shall be retained as family member in the event of divorce or annulment of marriage where:

a) prior to the non-appealable divorce or annulment of marriage the marriage has lasted at least two years, and the former spouse has resided at least one year in Hungary during the marriage as a family member of the EEA national or Hungarian citizen;

b) by court order the former spouse has parental custody of the child of an EEA national who resides in the territory of Hungary, or by agreement between the spouses has the right of access to a minor child;

c) this is warranted by particularly difficult circumstances, such as having been a victim of any willful criminal conduct by the spouse who is an EEA national or a Hungarian citizen while the marriage was subsisting, or if having the resident status prior to contracting marriage; or

d) by agreement between the spouses or by court order, the former spouse has the right of access to the minor child, provided that the court has ruled that such access must be in the territory of Hungary.

(3) In the case defined in para. (2) the right of residence of a third-country national family member shall be subject to his/her compliance with the requirement set out in a), b) or c) of para. (1). (ie. gainful employment, or sufficient means, or family member of another EEA or Hungarian national)

(4) By way of derogation from paras (1) and (3) the right of residence of a third-country national spouse of a Hungarian citizen shall be retained unconditionally if the spouse also has parental custody of the child who was born during their marriage (i.e. in such cases the requirements of gainful employment, sufficient means, or being a family member of another EEA or Hungarian national do not need to be met.)

Retention of residence right of the child of an EEA national and his or her other parent: pursuit of studies

According to Section 12 Free Movement Act, in the event of the EEA national's death or if his/her right of residence is terminated, or if the EEA national no longer exercises the right of residence the right of residence of his/her child shall be retained - irrespective of age - for the period of the pursuit of studies, if already and continuously engaged in such studies. The right of residence of the other parent who has parental custody of the child shall be retained until the completion of the studies of the minor child.

Registration

If you reside in Hungary for more than three months, you are required to register your residence.[574] While this seems to be a reasonable rule, in practice it is in fact not very generous: Hungarian property owners are notoriously unwilling to allow their tenants to register their address, because they are afraid of not being able to get rid of the tenants later, or that they will be caught by the tax authority for not paying taxes after the income they draw from the rent. These are both pretty problematic and largely unjustified fears, but still they hold on very strongly. As a reaction, there is a regular practice that one allows their foreigner friends (typically student colleagues) to register at one's address as ex gratia flat inhabitants – but for that one needs property-owning and risk-taker friends.

The sufficiency requirement is seen as problematic:

"In Hungary, however, there continues to be a requirement of a minimum monthly income, which must exceed the lawful monthly minimum pension per capita in the family amounting to approximately EUR 105, or proof of assets, real estate or other sources of income taking into account the size of the family so that the EU citizen concerned will not be deemed an unreasonable burden on the social assistance system."[575]

"In Hungary, EU job-seekers need to supply as proof a document that they are seeking work, if they have been placed by the competent labour centre."[576]

HIV infection is considered a disease endangering public health, potentially excluding residence of EEA nationals in Hungary, in violation of international norms.[577]

4.3. WHAT ARE OBSTACLES FOR EU CITIZENS IN YOUR COUNTRY WITH REGARD TO FAMILY LIFE WITH A THIRD COUNTRY NATIONAL AND OR AN EU CITIZEN?

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[574] EUROPEAN REPORT on the Free Movement of Workers in Europe in 2012-2013, Rapporteurs: Prof. Kees Groenendijk, Prof. Elspeth Guild, Dr. Ryszard Cholewinski, Dr. Helen Oosterom-Staples, Dr. Paul Minderhoud, Sandra Mantu and Bjarney Fridriksdottir, p. 23

[575] Id.

[576] Id.

[577] Id. 29.

In practice, contrary to CJEU practice, family is understood very rigidly according to the expert interview. For instance, if a couple have not had a common residence (with common *registered* address) or common bank account, then authorities will not accept their family status. Therefore, in this regard, the family status is established not in a sociological, but in an administrative manner.

Also, if the union citizen goes to work in another country, then authorities take that his or her family member lost their residence right.

EEA family members are required to submit different documents than Hungarian citizen's family members in some cases.

Generally, it is a problem of Hungarian official documentation that they require such weird data which the applicant cannot necessarily prove, for instance, mother's maiden name is a classic requirement for every official procedure, and often for public and social services – this is a requirement many foreigners simply cannot fulfil as they do not have an official document containing their mother's maiden name.

According to our expert, authorities are systematically biased against some TCNs, for instance, from China and Russia.

On the other hand, these are the countries from which the most "investor residents" come to Hungary, i.e. people who buy government bonds in exchange of eased residence right (half a year of residence entitles to permanent residence, which is normally only acquired after five years of residence). [578]

THEME III: LIMITATIONS TO CORE CITIZENSHIP RIGHTS

QUESTION 5 – EXPULSION

5.1. PLEASE EXPLAIN HOW THE GROUNDS OF EXPULSION OF ARTICLE 27 AND 28 OF DIRECTIVE 2004/38 ARE USED BY NATIONAL AUTHORITIES AND HOW THEY ARE REFERRED TO IN NATIONAL CASE LAW.

The relevant provisions firstly recount the text of the directive, as translated on the website of the Consular Services,[579] updated where necessary:

> *GENERAL PRINCIPLES: PROPORTIONALITY, INDIVIDUALIZATION, GENUINE, PRESENT AND SUFFICIENTLY SERIOUS THREAT*

According to Section 33: the right of free movement and residence of the persons to whom this Act applies may be restricted in compliance with the principle of proportionality and based exclusively on the personal conduct of the individual concerned, where such personal conduct represents a genuine, present and sufficiently serious threat affecting public policy, public security or public health.

> *NON-REFOULEMENT*

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[578] Act II/2007. See also Sergio Carrera, How much does EU citizenship cost? The Maltese citizenship-for-sale affair: A breakthrough for sincere cooperation in citizenship of the union? CEPS Papers in Liberty and Security in Europe, No. 64/April 2014, https://www.ceps.eu/system/files/LSE%20No%2064%20Price%20of%20EU%20Citizenship%20final2.pdf.

[579] http://konzuliszolgalat.kormany.hu/download/6/f9/20000/EN2007_Itrv_szabad_mozgas_tart_jog.pdf

Section 34. spells out the principle of non-refoulement in the following way:

(1) Foreign nationals may not be turned back or expelled to the territory of a country that fails to satisfy the criteria of safe country of origin or safe third country regarding the person in question, in particular where the foreign national is likely to be subjected to persecution on the grounds of his race, religion, nationality, social affiliation or political conviction, nor to the territory or the frontier of a country where there is substantial reason to believe that the expelled foreign national is likely to be subjected to torture or any other form of cruel, inhuman or degrading treatment or capital punishment (non-refoulement).

(2) Any foreign national whose application for refugee status is pending may be turned back or expelled only if his or her application is refused by final and executable decision of the refugee authority.

Recall that people coming over the fence on the Southern borders of Hungary are returned to Serbia for its being a safe third country.

EXPULSION

Grounds for expulsion: danger to public health, danger to national security

According to Section 40. para. (1): The competent authority may - at the request of the public health authority - expel any EEA national or any family member for public health reasons who suffers from any infectious disease or contagious parasitic disease as specified in specific other legislation and considered to constitute a threat to public health, and who refuses to submit to the appropriate compulsory medical treatment, with the exception if the infectious disease or contagious parasitic disease is contracted after three months following the date of entry.

In this regard, it has to be noted that HIV infection is considered a disease endangering public health, potentially excluding residence of EEA nationals in Hungary, in violation of international norms.[580]

para. (2) Section 40 adds to this that: The competent authority may expel an EEA national or his/her family member who:

a) refuses to comply with an order to leave the territory of Hungary within the prescribed time limit;

b) does not have the right of residence, and who has provided false or misleading information to the competent authority to verify his/her right of residence,

c) whose entry to or residence in Hungary presents a real, direct and serious danger to the national security of Hungary.

According to para. (4), the national security danger in point c) cannot be considered established solely for reasons of a criminal conviction (just as in general, Section 43 determines that in any case, an alien

[580] EUROPEAN REPORT on the Free Movement of Workers in Europe in 2012-2013, Rapporteurs: Prof. Kees Groenendijk, Prof. Elspeth Guild, Dr. Ryszard Cholewinski, Dr. Helen Oosterom-Staples, Dr. Paul Minderhoud, Sandra Mantu and Bjarney Fridriksdottir, p. 29.

policing expulsion in case of criminal conviction cannot be ordered unless the court ordered expulsion as a criminal sanction, too).[581]

According to para. (5) section 40, EEA nationals and their family members who had acquired the right to permanent residence may not be expulsed from Hungary, except if they fall under point c), i.e. if they present a real, direct and serious danger to the national security.

Section 42. (1) An expulsion measure may not be ordered against an EEA national or his/her family member who:

a) has resided in the territory of Hungary for more than ten years; or

b) is a minor, except if the expulsion is necessary for the best interests of the child.

Considerations to be balanced:

Section 44 of Act I of 2007 lists the criteria to be considered when deciding about an expulsion:

a) the nature and gravity of the crime committed;

b) the age and health condition of the person affected;

c) the family situation of the person in question, duration of the family relationship;

d) number of children of the person in question and the ages of the children, relations with the children including visitation rights;

e) if there is another State where there are no legal obstacles for exercising the right to family reunification, the difficulties which the family members are likely to face if they had no other choice but to take up residence in this country;

f) the financial situation of the person affected;

g) the duration of residence in Hungary of the person in question;

h) the social and cultural integration of the person in question, and the extent of his/her links with the country of origin.

As you see, the transposition is detailed and adequate.

Case law

[581] "An expulsion measure may not be imposed in connection with a criminal offense where the court sentence did not include expulsion." Section 43, Act I of 2007.

There is very little case law on the subject. The search engine of Hungarian courts yields only a few matches for the sections on expulsion.

An illustrative case might be that of a Chinese citizen, who submitted a declaration of paternity, but never lived with the child (a Hungarian citizen). The mother and grandmother of the child died, and the Guardianship Authority suggested that custody rights of the child should be given to the maternal aunt. The Chinese citizen was placed under expulsion since he no longer had the right to reside in Hungary according to Act *II* of 2007, i.e. the act on third country nationals. He however claimed that as being the father of the child, should count as family member according to Act *I* of 2007 (the Free Movement Act), and should thus be entitled to residence. The court denied this reasoning that such residence right only applies to those who live in one common residence with a Hungarian/EEA national, and that the paternity declaration in this case was only used to gain the residence right.[582] Note that no authority claimed that he was not actually the father, but agreed that as he has not lived with the child, he does not qualify as joining or accompanying the child, independent of the fact that he was financially supportive of the child. Other Hungarian courts, including the Supreme Court, also gave such an interpretation in general, although not consistently.

While this was obviously a misinterpretation of the Directive, it required legislative intervention and modification of Act I of 2007 in 2012 to achieve that paternity establishes family membership for the purposes of the residence right.[583] However, no case law from after the modification is to be found.

5.2. Is there evidence in decisions of the national authorities and case law that not fulfilling the conditions laid down in Article 7 (1) (b) Directive 2004/38 for the right to reside in another Member State (having a comprehensive healthcare insurance and sufficient means) leads to expulsion?

As to case law, it seems that there has been no case where someone was expulsed for this reason.[584]

According to the interview, howa general problem is that one cannot have a legal income if one does not have a tax number. However, you cannot have a tax number if you do not have a residence permit, thus, for many cases, the logic is circular.

5.3. Is there evidence that in decisions of national authorities or case law a different (lower) standard of public order than prescribed by Directive 2004/38 and the case law of the CJEU is used with regard to expulsion grounds? (e.g. In the Netherlands there seems to be a tendency to ground expulsion orders on a national ground of public order, which has a lower threshold than the EU ground for public order)

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[582] Debrecen Court, 9. K 30.774/2011/5, January 3, 2012.

[583] See on this the Opinion of the Group of Case Law Analysis of the Kúria on alien police law: http://www.lb.hu/sites/default/files/joggyak/idegenrendeszeti_osszefoglalo_velemeny_kuria.pdf , p. 91.

[584] Cf also Lukács & Molnár, FIDE Report for Hungary, op. cit., p. 625.

In the practice of the authority, there is likely a too wide understanding of expulsion grounds. It seems that the court rectifies the often overbroad interpretation of the Office of Immigration and Nationality. For instance, previous – even rather serious -- criminality, especially that it was a series of drug crimes, following which the applicant underwent anti-addiction treatment, was not sufficient for the expulsion of a father of three, as his children's interest mandated his right to stay.[585] Of course, this only works if the affected person turns to court – according to the experts I talked to, this is relatively rarely the case, and the Office is rather strict in expulsing as many people as possible.

Most often, authorities will dispute whether there is any entitlement to stay at all (e.g. if they are registered at different addresses – which is very often the case with also Hungarian-Hungarian couples, too --, they might not qualify as a family). There is also not much flexibility and equity in the system. For instance, a third-country national husband was denied the prolongation of residence card, because the Hungarian wife left the country to work abroad and even though they remained married, they have not had contact for two years. The husband has lived almost ten years in Hungary, works here, and speaks the language, etc. But the Office of Immigration and Nationality and the reviewing court considered that this case does not fall under the public order grounds of the Directive, as he was simply not entitled to stay in the first place – so his expulsion is not based on assessment of the threat to public order (i.e. Art 27 and Art 28 of the Directive do not apply),[586] and, therefore, there is no need to apply a proportionality test either.

QUESTION 6 – ABUSE

According to the case law of the CJEU citizens may not benefit from abusing EU law. In the case *G and S* the CJEU ruled that "Proof of such an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the European Union rules, the purpose of those rules has not been achieved, and, secondly, a subjective element consisting in the intention to obtain an advantage from the European Union rules by artificially creating the conditions laid down for obtaining it."

Could you provide information on how abuse of EU free movement rules for EU citizens is interpreted and applied by national authorities and in national case law?

There are indications that Hungarians sometimes recognize the paternity of a child, born to a third-country national mother, in order for the child to acquire Hungarian citizenship, which would then secure the mother's right of residence.[587] Hungarian courts do appear to be quite strict in this regard.

As the 2014 FIDE Country Report on Hungary put it: „the Supreme Court (Kúria) has expressed in several judgments that in line with Article 3(2) of the Directive, the competent authorities need to thoroughly

[585] 20.K.28.718/2013/19. Fővárosi Közigazgatási és Munkaügyi Bíróság, 20.02.2014.

[586] Fővárosi Közigazgatási és Munkaügyi Bíróság (Metropolitan Court for Administrative and Labour Matters), 20. K.30503/2013/15, 12.12.2013.

[587] See *European Report on the Free Movement of Workers*, supra fn 567 at p 56 and http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/family-reunification/hu_20120606_familyreunification_en_version_final_en.pdf.

investigate the existence of the elements contained in the definition of 'beneficiaries'. According to our national law it is needed to verify in details if the EEA national and the family members (including third-country national family members) have been living together in one household for a year, as the same registered address is not a proof in itself. Furthermore, the Supreme Court has stated many times that not only should the simple declaration of the support by the EEA national be checked, but it should also be verified whether there are such strong economic and physical ties between the third-country national and its sponsor EEA national, which provides reasonable ground for placing the third-country national beneficiary under the personal scope of the Freedom of Movement Act. Furthermore, in 2012 the Supreme Court held that basing residence rights on a family relationship with a Hungarian national gained as a result of declaration of paternity by the Hungarian national, which relationship, however, has no real substantive elements, is incompatible with the primary purposes of EU law and national law."[588]

That this is not so unequivocal within the EU law expert community is hinted by the General Report in the same volume.[589] The author of this report, for reasons of certainly being less of an expert than both the authors of the FIDE country report, let alone those of the general report, refrains from delivering a final verdict on this question.

Theme IV: EU citizenship core rights in practice

Question 7 – Barriers from an empirical perspective: actual barriers to core citizenship rights

What are barriers to core citizenship rights (the rights to nationality, the right to reside, the right to family life) according to legal professionals working in the field of migration law?

(Please ask a lawyer, legal officer of the national migration services for information on what the actual barriers are in your country in their perspective.)

Authorities sometimes deny the residency right to persons living together for somewhat absurd reasons, such as a too big difference in age between the partners.

A further structural hurdle arises from the fact that Hungarian flat owners typically do not like to allow their tenants to register the flat rented as their address, because they want to avoid having to declare the income from the rent and paying taxes. But one needs a registered address for a lot of legal relationships, i.e. a mailing address is not sufficient. Thus, one needs to find someone (such as a friend) who is not afraid of authorities and is willing to allow the person to register at their place (where obviously the person do not in fact live).

On the other hand, there are regulations which prohibit owners to rent out their flat for too many foreigners (i.e. as prohibition on overcrowding) – this could be all right, except that it does not apply to Hungarian tenants.

Question 8 – Systematic or notorious deficiencies in the country under study?

Please, discuss here in detail any 'revealing' cases of weaknesses in the effective exercise of core citizenship rights in your country.

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[588] Supreme Court (Kúria) Kfv.II.37.566/2011/6 as cited by Lukács &Molnár, op. cit, 608.
[589] See General Report, p. 80.

As to the acquisition of citizenship, the problem is that it is fully discretionary, both in substance and procedure. There is no right to appeal, no right to information during the process, no obligation to give a reasoned decision. (Hungary has made a reservation to the respective provisions of the 1997 Convention).

In general, some important clarifications are missing from the law, and are dealt with on a discretionary basis by authorities, such as the required economic resources for the fulfillment of the sufficiency condition or the civic knowledge exam.[590] This results in rather restrictive ordinary naturalisation practice.[591]

In contrast, the recently introduced extremely preferential naturalisation scheme which was meant for ethnic Hungarians outside the borders, is problematic in other regards.

Firstly, this is clearly an instrumental use of citizenship, since it is combined with voting rights. As one commentator put it: "Notoriously, the Hungarian government of Viktor Orbán handed out passports to more than 500,000 ethnic Hungarians who had been citizens and residents of neighbouring countries since the end of the First World War, and these returned the favour by voting overwhelmingly for him in the 2014 elections."[592] Since then, the number rose to around a million – cf the entire population of Hungary is around 10 million, i.e. new citizens who have never resided and are not going to reside in Hungary might effectively change the result of domestic elections.
Secondly, but in relation to the previous point, this politically important, "flagship" scheme is in turn easily abused by persons really not having any remote relationship to Hungary (eg language, ethnicity, ascendant citizenship), clearly in order to gain EU citizenship.

The investment immigration program is also a thriving business in Hungary[593] – similarly to Malta – and it remains to be seen how it will be countered by the EU. For now, no citizenship is offered on preferential terms, only permanent residence for those who invest 300 000 euros in government bonds for five years. They acquire permanent residence after half a year. Tellingly, when searching online for practicing migration lawyers to interview, attorneys' advertising themselves for helping in matters related to investor "citizenship" (residence) abound, but it is very hard to find a general immigration lawyer.
According to my interviewee, there are a lot of other practical hurdles.

For instance, the recognition of school documents and certificates is problematic. Other policies might also have specific – unintended – consequences for migrants. For some – some think, anti-Roma – reason, a few years ago, the government inserted a condition of completed 8-years primary school for acquiring a

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[590] In more detail, see *Access to citizenship and its impact on immigrant integration, Handbook for Hungary*, Prepared by the Migration Policy Group in coordination with Menedék - Hungarian Association for Migrants, Editor: Jasper Dag Tjaden (Migration Policy Group), 2013, http://cadmus.eui.eu/bitstream/handle/1814/29771/ACIT_Handbook_Hungary_ENGLISH.pdf?sequence=1.

[591] Cf. "For ordinary naturalisation, the demanding citizenship exam and economic resources requirements were perceived as major obstacles. According to one NGO representative, the vast majority of Hungarians would not pass the citizenship test. The language requirement is very demanding and not measured according to the Common European Framework of Reference on Languages. Several participants have called for a standardisation of the language level required. Economic resource and housing requirements for ordinary naturalisation are seen as being 'well above the Hungarian average' and thus de facto discrimination against low-income families." In *Handbook,* supra fn *590*, p. 12.

[592] Rainer Bauböck and Vesco Paskalev, "Citizenship Deprivation. A Normative Analysis", *CEPS Paper in Liberty and Security*, No 82/March 2015, https://www.ceps.eu/system/files/LSE82_CitizenshipDeprivation.pdf, citing K.L. Sheppele, "Hungary: An Election in Question", The New York Times Blog (http://krugman.blogs.nytimes.com/2014/02/28/hungary-an-election-in-question-part-1/).

[593] See http://www.mfa.gov.hu/kulkepviselet/CN/en/en_Konzuliinfo/hu_investment_program_overview.htm.

drivers' licence. Therefore, if as an immigrant you cannot prove that you completed 8 years of primary schooling, you are not entitled to get a driver's licence in Hungary.

Question 9 – Good practices

Please highlight any other legal norms, policies, instruments or practical tools which facilitate the exercise core citizenship rights in the country under study.

Annexes

- ✓ National provisions

Please provide a list of the most important national legal provisions (constitutional acts, legislation, regulations, domestic transposition and implementation measures, etc) and a list of relevant cases for your Member State (name, date and publication reference).

- ✓ Bibliography

Please provide a list of what you consider the most relevant recent bibliographic sources with respect to your country. You can also suggest references to books or articles which in your view should be included in the bibliography concerning relevant EU law (limit your suggestions to a maximum of 5 references). Please mention the title in the original language and include a translation in English, in brackets.

For the bibliography only, rather than stating the foreign language title in italics, please use single quotation marks so as to distinguish it from the title of the journal.

ANNEX VI – COUNTRY REPORT THE NETHERLANDS

CASE-STUDY D 7.3: Country Report The Netherlands

Exploring obstacles in exercising core citizenship rights in the Netherlands

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Universiteit Utrecht
Utrecht University School of Law

Dutch report on core citizenship rights

Dr. Hanneke van Eijken[594]

Theme I: Access and loss of nationality and EU citizenship status

Question 1 – Access to EU citizenship: nationality

1.1. What are the national conditions to acquire nationality of your country? Are there specific rules with regard to persons, who are threatened to become stateless? Are the conditions of acquiring nationality changed under the influence of the judgment *Ruiz Zambrano* of the CJEU?

According to the Dutch Constitution Dutch nationality shall be regulated by Act of Parliament (Article 2 Grondwet). The acquiring of the Dutch nationality is arranged in the *Rijkswet op het Nederlanderschap* ('Dutch Nationality Act').[595] Article 3 of the Act states that the Dutch nationality is automatically acquired if a child is born out of a parent with the Dutch nationality, even if the Dutch parent passed away before the date of birth. In order to be qualified as a parent, according to the Dutch law the legal mother is the one who gave birth to the child (Article 1:198 Dutch Civil Code), the legal father is the person who was married or in a civil union with the mother at the date the child was born or when he died before the birth, or when he has acknowledged the child as his legal child (Article 1:199 Dutch Civil Code). Adoption is also a ground to be granted the Dutch nationality, as discussed below.

A second option is when a child is born on the territory of the Kingdom of the Netherlands. A child that is found, as a foundling, on the territory of the Netherlands (including Aruba, Curacao or Saint Maarten) has the Dutch nationality, unless if within five years after the child is found it becomes clear that the child has a foreign nationality.

Furthermore, third-generation migrant children can be Dutch by birth: a child born on Dutch territory (in the Netherlands or in one of the Dutch overseas territories such as Aruba, Curacao or Sint-Maarten) of parents who were also born on Dutch territory and who habitually reside there.

Minor children may also acquire the Dutch nationality if they have a legal family status with a Dutch person (for instance if a child is legally recognised ('erkent') by a Dutch parent before the child is 7 years old). (Article 4).

Another ground for acquiring the Dutch nationality is when a child is adopted by (a) Dutch parent(s) (Article 5, 5a, 5b and 5 c of the Act lay down in detail the different situations of adoption in which this is the case).

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[595] The Act can be found online: http://wetten.overheid.nl/BWBR0003738/geldigheidsdatum_22-12-2015#Hoofdstuk5 (in Dutch) (accessed 23 December 2015).

Article 6 provides for several situations in which an alien can opt for Dutch nationality. These situations cover, amongst others, the situation in which a person is born on the territory of the Kingdom of the Netherlands (including Saint Maarten, Curacao and Aruba) and has had residency there ever since. In those circumstances he/she may acquire the Dutch nationality by option. Moreover if a child has been legally acknowledged by a Dutch parent but did not acquire the Dutch nationality, he/she can opt for Dutch citizenship after proof that the Dutch parent has taken care of the child for a period of three years (if the child did not already acquire the Dutch nationality on ground of Article 3 or 4 of the Act). According to Article 6(1)(b) a child born on the territory of the Kingdom of the Netherlands acquires the Dutch nationality if he/she is stateless and legally residing on the territory of the Netherlands for a continues period of three years. This clause is similar to the legislation that was in force (at that time) in Belgium while the Ruiz Zambrano family was residing in Belgium after their asylum request was denied. However, an important difference is that the Dutch legislation provides for an additional requirement of a residency period of three years (see also below).

The *Ruiz Zambrano* case law did not change the Dutch law, particularly. The Parliament asked the Minister of immigration and Asylum almost immediately after the judgement of the Court of Justice of the European Union (CJEU) whether the decision of the CJEU would have consequences for the Netherlands. The Minister at that time, Gerd Leers, answered the Parliament that the Dutch law would not need to be revised. He referred in his letter to the Parliament[596] to Article 6(1)(b) of the Dutch Nationality Act, which states that a child, who is born on the territory of the Kingdom (including Aruba, Curacao and Saint Maarten) and is lawfully resident for a continues period of three years and is stateless ever since he/she is born acquires the Dutch nationality. Consequently, only after a period of three years of continuous and legal residency and statelessness a child may acquire the Dutch nationality. As emphasised by the Minister in his letter there might indeed be situations in which the parents of a child in this particular situation would eventually have a derived right to reside in the Netherlands based on Article 20 TFEU and *Ruiz Zambrano*. However, the threshold in the Dutch Nationality Act ensures that only in particular, rare, a situation a child of two foreign parents acquires the Dutch nationality. This differs, as will be discussed in detail further on, from the situation in which a child has one parent with the Dutch nationality. It seems that most cases in the Netherlands with regard to Ruiz Zambrano occur in that situation. In that sense the *Ruiz Zambrano* judgement had and still has a significant impact in the Netherlands. However, the criterion of Ruiz Zambrano ('being deprived of the genuine enjoyment of the essence of the rights as a EU citizen') is applied quite strict by Dutch courts. That case law will be elaborated on in detail below.

The third possibility for acquiring Dutch nationality is by attribution of nationality (naturalisation) by the Crown (Art. 7 Dutch Nationality Act). Art. 8 Dutch Nationality Act sets out the requirements for naturalisation:

- The person must be an adult

[596] Letter of Minister G. Leers of 31 March 2011, 'Kamerbrief over de gevolgen voor het Nederlandse vreemdelingenbeleid inzake de uitspraak rond Zambrano': https://www.rijksoverheid.nl/documenten/kamerstukken/2011/03/31/kamerbrief-over-uitspraak-van-het-hof-van-justitie-in-de-zaak-ruiz-zambran (accessed 23 December 2015).

- There must be no objections against his or her permanent residence on the territory of the Kingdom or Aruba, Curaçao and Sint-Maarten
- The person has lawfully resided on the territory for at least five years prior to requesting naturalisation (with exceptions)
- The person is “ingeburgerd” [integrated in society]: he or she possesses sufficient knowledge of the Dutch language (and, if necessary, the language of one of the Dutch carribean islands), and Dutch government and society/culture. Usually, this is proven by taking the Dutch civic integration examination [inburgeringsexamen], but it may be proven in other ways, such as having followed (higher) education in the Netherlands and obtained a diploma. Nationals of Belgium, Luxembourg and Turkey enjoy a general exemption from the civic integration examination.[597]
- The person must we willing to renounce the current nationality (with exceptions)

The exceptions to the five-year requirement are:

- If the person is married to a Dutch citizen or has another form of durable relationship and they have been living together for an uninterrupted period of 3 years.
- If the person is stateless, he or she can apply after three years of lawful residence in the Netherlands
- When the person has been acknowledged as a minor (i.e. by establishment of paternity) by a Dutch father and have been cared for and brought up by this Dutch citizen for a period of 3 years, he/she can submit an application for naturalisation after 3 years.
- During adulthood the person was adopted by parents of whom at least one holds Dutch citizenship.
- The person has lawfully resided in the Netherlands for a period of 10 years, of which the last 2 years continuously, then he/she can apply after 2 years.
- A former Dutch citizen, who has lost this status.

The request for naturalisation will be denied if (art. 9 Dutch Nationality Act):

- If there are reasonable suspicions that the person is a threat to the Dutch public order, public morals or public safety.
- If the person refuses to renounce his or her other nationality, unless this cannot reasonably be expected from the person.
- If the person who enjoys the exceptions described above for marriage to a Dutch citizen, adoption as an adult by a Dutch citizen, or who had lost his or her Dutch nationality, resides in the country of his/her current nationality.
- If the person who lost his Dutch nationality as a minor, his/her application can only be denied if he/she has been convicted of a crime punishable with at least five years imprisonment or a crime against national security, within ten years prior to the application.
  The first two reasons for denying nationality do not apply to persons who:

- Are nationals of Parties to the Second Protocol amending the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality of 2 February 1993;
- Are born on the territory of the Netherlands, Aruba, Curaçao or Sint-Maarten and who reside there at the time of the application
- Are married to a Dutch citizen
- Are recognized in the Netherlands, Aruba, Curaçao or Sint-Maarten as a refugee.

[597] https://ind.nl/EN/individuals/residence-wizard/other-information/civic-integration

1.2. Under which conditions can nationals of your country be deprived of their nationality? Is there a difference in whether a citizen has (i) only the nationality of your country, (ii) has the nationality of another Member State of the European Union and (iii) those citizens having the nationality of your country and the nationality of a third country?

The loss of the Dutch nationality is regulated in Article 14 and 15, 16 and 16a of the Dutch Nationality Act.

There are, basically, three situations in which the Dutch nationality is withdrawn: (1) When a national has adopted the nationality of another country, when (2) a Dutch national committed fraud or hid information during the naturalisation procedure and (3) when a Dutch national is convicted for crimes against humanity or terrorism. These different grounds have their own nuances and will be discussed in more detail below.

Article 14 (1) of the Dutch Nationality Act provides that the nationality can be withdrawn when a person acquired the Dutch nationality on false information, fraud or because the individual at stake repressed relevant information. According to the Instructions to the Dutch Nationality Act (*Handleiding voor de toepassing van de RWN 1999*) the Secretary of the State may revoke the Dutch nationality in case of fraud or refusal to provide sufficient information during the naturalisation procedure. The withdrawal has a retroactive effect in the sense that the Dutch nationality is legally never granted to that individual. In the light of EU citizenship and the case of *Rottmann*[598] this is highly relevant, since as a consequence it can be argued that the status of EU citizenship is never acquired too. The revocation of the Dutch nationality is not possible in these situations, if the individual has the Dutch nationality for 12 years or more. In that case there is no ground for withdrawal, except for those Dutch citizens that are convicted for crimes mentioned in Article 6 (Genocide), 7 (Crimes against Humanity, including torture, enslavement) and 8 (War crimes, including wilful killing and torture) of the Rome Statute of International Criminal Court. If a person is convicted for one of those crimes the Dutch nationality may also be revoked after 12 years. The second reason to withdraw the Dutch nationality is provided by Article 14(2) of the Nationality Act. It reads that persons who is convicted for crimes against the safety and security of the Kingdom of the Netherlands as prescribed in Article 92-107a and 85 and 205 of the Criminal Code to which imprisonment of eight years or more is settled, can be deprived of their Dutch nationality. These crimes include terroristic attacks, attacks of the King, the Dutch Parliament, but also contact with foreign groups or entities to attack the Dutch state are listed. Moreover, conviction for crimes listed in Article 6, 7 and 8 of the Rome Institute of the International Criminal Court (see above) is ground to revoke the Dutch nationality, In the case the Dutch nationality is withdrawn because of the conviction of one of these crimes, the Dutch nationality is indefinitely revoked. An exception could be made after the citizen at stake has the Dutch nationality for at least five years (Article 14(3)). A minor could lose the Dutch nationality if the family bond with the Dutch family member would be disconnected (Article 14(4)). The Dutch nationality can only be revoked according to the grounds in Article 14 and 15 of the Act. With regard to the issue of statelessness Article 14(6) reads that the Dutch nationality cannot be revoked in case a person would become stateless. There is one exception to this rule that is when a person has committed fraud during his or her naturalisation procedure as provided in Article 14(1) of the Act.

[598] C-135/08, Rottmann, ECLI:EU:C:2010:104.

Article 15 and 15a, Article 16 and 16a make a distinction between minor and adult Dutch citizens. Article 15 (1) provides that an adult Dutch citizen loses his or her Dutch nationality when he or she voluntarily acquires another nationality (15(1)(a)). This is no ground for revocation of the Dutch nationality if the citizen at stake is born in the country of the foreign nationality, he/she is married with someone of that nationality, or during childhood was residing in that foreign country (Article 15(2)). Another ground to revoke the Dutch nationality occurs when a Dutch citizen actively resigns from the Dutch nationality by declaration (15(1)(b)). If a Dutch national has dual nationality and resides for more than ten years outside the Kingdom of the Netherlands and outside the European Union, the nationality can also be revoked (Article 15(1)(c)). Moreover the nationality will be withdrawn if the Dutch national joins a foreign military of a state that is in fight with the Kingdom of the Netherlands (Article 15(1)(e)) and when a Dutch national did not used possibilities to resign of his/her original nationality during the naturalisation procedure (Article 15(1)(d) and (f)). For children the Dutch nationality is lost when they due to family laws the connection with the Dutch nationality is being lost (adoption by foreign parents for instance), by a declaration of revocation by his/her parents or legal family guardian, if his/her parents lose their Dutch nationality (Article 16). In paragraph 2 of Article 16 some exceptions are mention: As long as the Dutch child has one parent with the Dutch nationality the nationality is not lost (Article 16(2)(a)), or when the Dutch parent passes away before the loss of the Dutch nationality, or when the child is born in the country of which he/she has acquired the foreign nationality of and is resident in that country.

The Dutch nationality is, moreover, also revoked when a Dutch citizen acquires the nationality of one of the countries that is party to the 1963 Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality (Article 15a and 16a).

In the light of the purpose of the report and obstacles for EU citizens it is interesting to note that according to the Dutch law and case law the revocation of the Dutch nationality is retroactive, meaning that a person actually never acquired the legal status of being a Dutch citizen. That also has consequences for the question whether an EU citizen has ever had the status of an EU citizen. In the light of *Rottmann*[599] this is significant. The CJEU held in that case that the withdrawal of nationality may be in conflict with the effectiveness of EU citizenship (Article 20 TFEU), since such withdrawal would fall because of its nature and consequences within the scope of EU law. If one argues that the Dutch nationality never is legally established, because of revocation, the scope of EU law would formally not be triggered either. As a consequence there is a distinction made between citizens with (a) the nationality of one of the Member States of the EU and those (b) that have the nationality of a third country. The latter category does not fall under the scope of EU law, if the Dutch nationality is revoked retroactive. *Rottmann* would than not apply to those citizens. The Dutch case law confirms this reading. On 7 April 2011 the District Court in The Hague[600] ruled for instance that a Somali national who acquired the Dutch nationality on ground of incorrect information and on that ground lost the Dutch nationality. In that particular case the Somali national acquired the Dutch nationality because he was adopted by a Somalian national that acquired the Dutch nationality. After that naturalisation procedure it was revealed that there was no evidence of the family ties, since there was no proof of the adoption, Therefor the Dutch nationality of the Somali national was withdrawn.

[599] C-135/08, *Rottmann*, ECLI:EU:C:2010:104.
[600] District Court the Hague, 7 April 2011, ECLI:NL:RBSGR:2011:BQ0863.

Apparently the Somali national was adopted by his much older brother, who had the Dutch nationality. According to the District Court that effect was not in violation of EU law, or *Rottmann*. The District Court held that the Somali national never acquired the Dutch nationality and therefore neither ever had the status of a EU citizens. Therefore EU law was not applicable to the situation. On 3 January 2014 the Supreme Court (*De Hoge Raad*) had a similar ruling. In that case a family of the nationality of Iraq acquired the Dutch nationality (in 1998), while using false identity cards. Therefor the Dutch Immigration Service (the IND) decided in 2012 to withdrawn the Dutch nationality and concluded that the citizens at stake had never acquired the Dutch nationality. After appeal the case became for the Supreme Court. The Supreme Court ruled that the family could not rely on *Rottmann* or Article 20 TFEU, since the family members never had the status of Dutch citizens, and therefore did not have the status of EU citizens, retroactive. Another example is the case of an Egypt national and his son. Both acquired the Dutch nationality after naturalisation. The son acquired the Dutch nationality because his father did. However, after the successful naturalisation procedure the father did not want to lose his Egypt nationality. According to the Dutch authorities that constituted the voluntarily acquiring of a foreign nationality (the Egypt nationality). Consequently, on ground of the fact that the Dutch national voluntarily acquired a foreign nationality (Article 15a of the Dutch Act on Nationality). Both the father and son appeal to that decision stating that the revocation of the Dutch nationality would be in violation of Article 8 ECHR and the *Rottmann*-case. The District Court held, however, that since the Dutch nationality is revoked retroactive a reliance on *Rottmann* and EU law is not appropriate, since they never acquired the status of Dutch national and the status of EU citizenship.[601] More recent case law of the Council of State reveals a different view, however. In a case decided in January 2016 the Council of State held that *Rottmann* was applicable to a situation in which the Dutch nationality of person who had previous the Turkish nationality was revoked, due to the fact that the person at issue was sought by the Turkish authorities and was convicted in Germany because of drug smuggle.[602] Since *Rottmann* was applicable, the State Secretary for Security and Justice and Minister for Immigration should have balanced the different interests, including the interests of the person involved. The Dutch Council of State did not agree with the restrictive interpretation of the applicability of *Rottmann* and held that the CJEU phrased in *Rottmann* more generally, so that also outside the strict Rottmann-circumstances Article 20 TFEU may apply. It seems therefore that the line of case law in which the retroactive revocation of the Dutch nationality set the application of *Rottmann* aside might have been left by Dutch courts.

Another important issue to be raised is the automatically withdrawal of the Dutch nationality after a Dutch national has been living outside the Netherlands for more than ten years. In May 2016 the Dutch Ombudsman published a report on this legal practice, criticizing the Dutch government.[603] One of the major points is that according to the Dutch Nationality Act Dutch nationals who are living outside the Kingdom of the Netherlands and outside the European Union with a dual nationality automatically lose their Dutch nationality. Dutch nationals lose their Dutch nationality automatically, without a further notice. At the moment these Dutch nationals request for a Dutch passport it is assessed whether a person had the Dutch nationality or not. In a case of automatic lose, most of the persons, are noticed

[601] District Court The Hague, 12 June 2014, ECLI:NL:RBDHA:2014:7153.
[602] Council of State, 20 January 2016, ECLI:NL:RVS:2016:89.
[603] Report 'Verlies Nederlanderschap', 10 May 2016 https://www.nationaleombudsman.nl/system/files/onderzoek/Rapport%20Verlies%20Nederlanderschap.pdf (last accessed 17 May 2016).

only at that time of the previous loss of the Dutch nationality. Persons that have lost their nationality automatically because of 10-years of residence in a third country can appeal to the decision of the refusal of a Dutch passport according to the Dutch Passport Act. However, that appeal is related to the refusal to be granted a Dutch passport as primary ground, not to the fact that the Dutch nationality is automatically withdrawn. On ground of Article 17 Dutch Nationality Act a person can ask the Dutch District Court to assess whether he/she has the Dutch nationality or not in a declaratory judgment. In those cases the judge assesses whether the person has indeed been resident in a third country and has a dual nationality. The question whether the automatic revocation of the Dutch nationality is valid in the light of EU law and the Rottmann-case law specifically seems not to be addressed. According to the Minister (Staatssecretaris) of Security and Justice Rottmann should be interpreted very narrowly and the proportionality test of Rottmann would, according to that view, only apply to the specific situation in which a Dutch national loses his/her Dutch nationality as a consequence of fraud and at the same time lost his/her nationality of another Member State of the EU.[604] Although, according to the authors opinion, Rottmann would be applicable to the automatic loss of the Dutch nationality, there might indeed be overriding reasons of public interest for the Dutch government to continue with this practice/uphold the legal provision. However, the fact that EU citizens are not informed about their (potential) lose of the Dutch nationality seems to be most problematic. Certainly because in terms of core rights of EU citizenship, nationality is the key, the gate to those core EU citizenship rights.

1.3. What is the current political and legislative discussion in your member state with regard to acquiring and withdrawing nationality?

In the Netherlands there has been and still is a fierce debate of whether the Dutch nationality should be revoked in case of Dutch citizens that are suspected to have fought in Syria. As observed above there is a ground for revocation of the Dutch nationality in case a Dutch citizen is convicted for terroristic crimes, but that ground seems more restrictive. In Augustus 2013 the Minister of Justice Teeven proposed a new law that would allow the Dutch government to revoke the Dutch nationality of persons who participate in terroristic organisations. That proposal was a reaction on the motion submitted by members of the parliament (*motie-Dijkhof*) of 28 May 2013.[605] In February 2015 the House of Representatives discussed this proposal. Issues that were criticised is the fact that the Dutch nationality is only revoked, according to the proposal, from people after a conviction and only of those who have a double nationality, since the Netherlands can, on account of international obligations, not withdraw the Dutch nationality with the consequence of a individual being stateless. In 2010 the Criminal Code included participation/involvement in a terroristic organisation as a crime. However, it seems that courts are reluctant to actually convict someone on that basis. Therefore some members of the House of Representatives feared that the threshold of actually being convicted would be too high to achieve the aim of the law. The Dutch nationality is not automatically withdrawn, but has to be decided in each individual case. On 26 February 2015 the proposal for the Act has been approved by

[604] See for instance the case Council of State, 20 January 2016, ECLI:NL:RVS:2016:89, par. 7.2..

[605] TK 29754, Nr. 225, Motie van het lid Dijkhoff c.s., to be found online: https://zoek.officielebekendmakingen.nl/kst-29754-225.html (accessed 24 December 2015). See on this development also ***H.U. Jessurun d'Oliveira, Terrorisme on-Nederlands?, Nederlands Juristen Blad (Dutch Journal of Law), to be found:*** http://njb.nl/blog/terrorisme-on-nederlands.10824.lynkx ***(accessed 24 December 2014).***

the House of Representatives.[606] The senate still has to discuss the proposal. The senate has many objections to the proposal. Amongst others the question whether the proposal is in line with EU law has been discussed. One of the issues that has been raised is whether the fact that the Dutch nationality of a minor Dutch national cab be revoked is in line with Article 24 of the Charter of Fundamental Rights of the European Union. Another point of criticism is that the proposed Act has only consequences for those Dutch nationals, who have a double nationality, since the measures would otherwise be in violation with the international obligations to prevent statelessness. However, therefore the proposed Act distinguishes between Dutch citizens having a singular nationality and those with a double nationality. Members of the senate have questioned whether that distinction is in accordance with the principle of equality before the law.[607] At the moment of writing the proposal has been struck at the senate.

At the moment the Act is as described under question 1.1. Also in that system there are possibilities to revoke the Dutch nationality for terroristic acts. As observed, the ground for withdrawal of the Dutch nationality only applies when a person has not only the Dutch nationality. There is therefore, indeed, a distinction between those individuals that have dual nationality and those who have only the Dutch nationality.

Theme II: Free movement rights of EU citizens

Question 2 - The right to free movement as a core citizenship right (Article 21 TFEU and the Citizens' Directive)

2.1. What conditions are laid down for EU citizens with the nationality of another Member State to reside in your country for a maximum period of three months?

Article 8.11 of the Alien Decree 2000 states that a EU/EEA/Swiss citizen has the right to reside for three months on the territory of the Netherlands when he or she shows a valid ID card/Passport of proves his/her identity with other documents.

2.2. What conditions are laid down for EU citizens EU citizens with the nationality of another Member State to reside in your country for a period longer than three months?

The Alien Decree 2000 (*Vreemdelingenbesluit 2000)* lays down the conditions for EU citizens to reside in the Netherlands. The Alien Decree contains a specific title for rights and conditions of EU citizens, but also citizens from EEA countries and Switzerland.

As observed above after proof of identity is submitted a EU citizen, EEA or Swiss citizen may reside in the Netherlands without further conditions (apart from the obligation to register at their municipality: a fine may be imposed of a maximum of 325 euros, see art. 2.38 juncto 4.17 of the Wet Basisregistratie

[606] See TK 34 016 (R2036), Wijziging van de rijkswet op het Nederlanderschap ter verruiming van de mogelijkheden voor het ontnemen van het Nederlanderschap bij terroristische misdrijven.
[607] See https://www.eerstekamer.nl/wetsvoorstel/34016_verruiming_mogelijkheden (accessed 4 January 2016).

Persoonsgegevens)[608]. Article 8.12. adds to that right a right to reside for those citizens after three months when he/she is amongst others economically active, or studies in the Netherlands.

The extended period of residency applies to those EU/EEA/Swiss citizens who:

(a) are in employment or enjoy the freedom of establishment, or is looking for work in the Netherlands and proves that there is a realistic chance of being employed in the Netherlands;

(b) have sufficient means and a comprehensive healthcare insurance;

(c) follows a professional education (one of the official educations listed in Dutch law) and has a comprehensive healthcare insurance and declares that he/she has sufficient means for the cost of maintenance for his/her and (eventual) family members;

(d) is a family member of a worker, jobseeker, self-employed or a EU citizens, Swiss or EEA citizen with sufficient means and a comprehensive health care insurance;

(e) the spouse, the registered partner or the child of the EU, Swiss or EEA citizen that has a right of residence as student under sub c;

(f) (g) and (h) aliens dependent on family members of EU/EEA and Swiss citizens because he/she is in the country of residence living with the family member, or because he/she is dependent on the family member of health or the daily care may also have a right to reside for more than three months.

2.3. Are there any measures in your country that would prevent own nationals to use their right to free movement? (e.g. a prohibition to leave the country on ground of criminal proceedings)

There has been a fierce debate in the political arena whether or not the Dutch nationality should be withdrawn from persons who have the intention to fight in Syria. Up until now, as described above, the withdrawal is linked to a conviction for terroristic crimes, and seems not to be used a preventing Dutch citizens to migrate. It is too early to be able to say whether this tactic will prevent Dutch citizens to go to Syria. With regard to citizenship rights obstacles: revocation of nationality is a clear breach of core citizenship rights. However, since the actually revocation would only take place after a conviction of serious terroristic crimes, I would not define that measure to be an obstacle to EU citizenship. To the contrary, one could even argue that the Dutch government tries with this law to protect EU citizens against terroristic attacks and therefore a withdrawal, if applied in accordance with proportionality, is probably a justified restriction of EU citizens to migrate.

Within the light of the terroristic attacks in Paris in November 2015, the debate may, however, have a more intense character and perhaps restrict the rights of Dutch nationals, suspected of participation in terroristic organisations, more. One of the discussions in legislative context is to impose a ban on Dutch nationals who are convinced or suspected of terroristic acts or desire to join terroristic organisations abroad (Syria and Iraq for instance). In that context there have been proposed two new

[608] http://wetten.overheid.nl/BWBR0033715/geldigheidsdatum_22-01-2016#Hoofdstuk4_Afdeling3_Artikel417

legislative proposals in 2015: one proposal for legislation to impose a prohibition to leave the Schengen area for suspected terrorists and a legislative proposal to withdraw the passport of persons who have a ban to leave the country on grounds of being suspected of supporting or joining terroristic organisations. On 9 December 2015 a proposal was imitated for the establishment of temporarily measures in order to restrict the free movement of persons who are a risk to the public security and who have intensions to join a terroristic organisation.[609] According to the proposal a person who can be related to terroristic activities can be imposed an area ban in the Netherlands or can be imposed a ban to have contact or to become in the neighbourhood of certain persons. Moreover a ban to leave the Schengen area can be imposed to those persons that are suspected of having the intentions to join terroristic organisations outside the Netherlands/EU.

Question 3 – The right to reside in the European Union (Article 20 TFEU and Directive 2004/38)

3.1. What is the current trend in case law in your country with regard to the applicability of Article 20 TFEU and references to the case *Ruiz Zambrano*? Are there specific issues noteworthy? (e.g. in the Dutch case law the question whether one or both parents of dependent children should be granted a derived residence right under Article 20 TFEU remains an important question).

Case law on Article 20 TFEU in the Netherlands: the right to reside

The case of Ruiz Zambrano has been decided in March 2011. Soon after that judgement, the case has been invoked in the Netherlands. Within one month the first case was decided by a Dutch court. In the following period more cases have been brought forward. The situation in the Netherlands was somewhat different than the facts of the case of Ruiz Zambrano. The majority of Dutch cases concern mixed families: a Dutch parent with a Dutch child and a third country national parent. In these cases the Dutch parent is more or less out of sight or incapable to take care of the Dutch child or children, raising the question whether the third country national parent should have a derived right to reside on the basis of Article 20 VWEU and *Ruiz Zambrano*. One of the most important, yet unanswered by the CJEU, question is whether Article 20 TFEU applied to one or to both parents with the nationality of a third country. Should a EU dependent citizen be able to live with his or her whole family or is the presence of one parent sufficient? As observed, these Dutch cases almost all concern mixed families, in which a third country national parent is in a relationship with a Dutch parent and who have together a child or children with the Dutch nationality.

Basically the line of case law in the Netherlands is that only in a situation in which a EU citizen has such a degree of dependence of his or her third country national parent, that he or she is likely to migrate with this third country national parent outside the EU, a reliance on Article 20 TFEU may succeed.[610] That line of case law is confirmed by both the Supreme Court (*de Hoge Raad*) and the

[609] TK, 9 December 2015, Tijdelijke regels inzake het opleggen van vrijheidsbeperkende maatregelen aan personen die een gevaar vormen voor de nationale veiligheid of die voornemens zijn zich aan te sluiten bij terroristische strijdgroepen en inzake het weigeren en intrekken van beschikkingen bij ernstig gevaar voor gebruik ervan voor terroristische activiteiten (Tijdelijke wet bestuurlijke maatregelen terrorismebestrijding).

[610] See also in Dutch: H. van Eijken, 'Ruiz Zambrano the aftermath: de impact van artikel 20 VWEU op de Nederlandse rechtspraak', Nederlands Tijdschrift voor Europees recht, (2012), pp. 41-48.

Council of State (*Raad van State, Afdeling Bestuursrechtspraak*).[611] According to the Council of State only when as a result of a denial of a residency right to the third country national a EU citizen will, because of the high level of dependence, have no other choice than to leave the European Union and follow the third country national to a third country Article 20 TFEU can be invoked.[612]

The first case in which Article 20 TFEU was relied, one month after *Ruiz Zambrano* was decided, concerns a national of Kosovo who migrated to the Netherlands and requested a residence permit without success. In the meantime, she gave birth to a daughter, after which her deportation was postponed for six weeks. She never left the Netherlands, however, and gave birth to a second child almost two years later. Her partner, a Dutch national, signed a declaration of paternity with regard to the two children, who had both been granted the Dutch nationality. The mother relied on the right to family life in her request for a permanent residence permit. She also relied on the *Ruiz Zambrano* judgment, since her children had acquired the Dutch nationality and were both European citizens. The Dutch court ruled, however, that the situation of the mother differed from that in *Ruiz Zambrano*, since her children could still enjoy residence in the European Union with their father, who had the Dutch nationality.

Even stricter are cases in which the Dutch parent is (partly) unable to take care of the children. In one of these cases the fact that the Dutch parent was mentally ill was not considered as a ground to grant a derived residence right to the other parent with the nationality of a third country. Another circumstance regarding which a Dutch district court did not find that both parents should be present to facilitate the residence of the Dutch children in the Netherlands was the fact that the related family consisted of eight children. In the meanwhile the CJEU decided the case of *Dereci* and confirmed with that judgment that Article 20 TFEU only applies to situations in which a EU citizen is forced to leave not only the Member State at stake but also the European Union as a whole as a consequence of a denial to grant a residence right to a third country national of whom the EU citizen is dependent. The Dutch court referred to the judgment in *Dereci* and ruled that the fact that it is desirable to live together as a complete family in one Member State cannot be included in Article 20 TFEU. In another case the fact that the Dutch mother could not take care of her children did not result in a derived residence right for the father, who had the Moroccan nationality. He entered the Netherlands without a residence permit in 2002 and such a permit was never granted to him. In 2010, he was deported to Morocco. During his residence in the Netherlands, he had a relationship with a Dutch woman and two children were born (in 2005 and 2007). The children stayed in a foster home since their mother could not take care of them. She visited the children once every four weeks. During these visits, the children also had contact with their father by phone. The father relied on a national procedure regarding the rights of his children to family life and to have contact with their parents as laid down in the Charter (Article 7 and 24(3)). According to the District court, the children were not obliged to leave the territory of the European Union, since they could stay with their foster parents in the Netherlands. Decisive in this case was the fact that the stay in the foster home was temporarily in nature. In another case another District Court decided that the fact that children would almost certainly have to be sheltered in a foster home. In that case the Dutch father of the Dutch child was convicted to life-sentence in prison and the

[611] Supreme Court, 14 February 2014, ECLI:NL:HR:2014:277 and Council of State, 9 August 2013, ECLI:NL:RVS:2013:725.
[612] Council of State, 20 April 2015, ECLI:NL:RVS:2015:1349, par. 1.1.

Turkish mother had the daily care of their child. In those specific circumstances the District Court held that it would render against Article 20 TFEU and the right of the child to have residence in the EU if the mother would have to leave the Netherlands.[613] Since the father was life-sentenced the child should have to be placed in a structural foster home or with foster parents if the child would want to stay in the Netherlands, and therefore in the EU. That fact made the case very particular. There are in Dutch case law, however, more examples of cases in which under exceptional circumstances the Dutch judge decided that it would run counter to Article 20 TFEU not to grant a derived residency right to a parent with the nationality of a third country.

Hence, although the Dutch case law and application of *Ruiz Zambrano* is rather restrictive, Dutch courts have been more lenient in cases where there are certain exceptional circumstances. An example is the case concerning a Turkish father and a Dutch mother, with a Dutch child. Although the mother could take care of the child, therefore ensuring its residence in the Netherlands and thus in the European Union, the serious psychological illness of the father was reason for the Dutch court to rule that the Turkish father had a derived right to reside in the Netherlands. His illness was serious and it was indicated that his deportation to Turkey would lead to so much psychological suffering that his Dutch spouse and child had no choice other than to join the father and reside outside the European Union. In another case, the Council of State ruled that in specific circumstances, where the children would be under the inspection of childcare and the third-country national parent would be deported to a third country, this would lead to a more lenient application of Article 20 TFEU. Nevertheless, the Court does require strong evidence that due to the specific situation the children would be forced to follow their parent to a third country. The mere declaration that the Dutch parent is unable to provide the necessary care is not sufficient to trigger the scope of Article 20 TFEU. The fact that the presence of the third-country national parent is important for the psychological health of the Dutch parent is insufficient if others could also provide help to the Dutch parent. In another case the District Court of The Hague held that a mother with the nationality of Iraq should have a derived right to reside in the Netherlands, in order to facilitate the right to reside in the EU of her child, since the Dutch father was diagnosed with schizophrenia and could not take care of his children.[614] In that case it was likely that the children would have to be place under supervision of youth authorities and could not stay in their home with their father if the mother would have been deported outside the European Union. In another case the third country national should be granted a derived right to reside on grounds of Article 20 TFEU in a situation of domestic violence by the Dutch parent. [615]

Basically there are two categories of cases in which Article 20 VWEU has been invoked: cases regarding residency rights (when a third country national does not have a so-called ‘machtiging voorlopig verblijf’ (a temporarily residence permit that has to be requested in the country of origin and cannot be requested in the Netherlands) and those cases in which a third country national parent has requested for social benefits. With regard to social benefits the highest court is the Central Appeals Tribunal (*Centrale Raad voor Beroep*).

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[613] District Court The Hague, residency Utrecht, 26 July 2012, ECLI:NL:RBSGR:2012:BX2769, par. 9.
[614] District Court The Hague, 29 January 2015, ECLI:NL:RBDHA:2015:761.
[615] Council of State, 20 April 2015, ECLI:NL:RVS:2015:1349.

The case law of the Dutch courts and *Ruiz Zambrano* are meanwhile transposed into Dutch policy rules, the Alien circular letter 2000 (B) (*Vreemdelingencirculaire 2000 (B), 2.2. beleidsregels*). In those policy rules it has been laid down that aliens (third country nationals, but in Dutch the term 'vreemdeling' (*alien*) is used)) have regular residency when they comply with three conditions: (1) the alien has a minor child, who has the Dutch nationality, (2) the child lives with the alien who has the care of the child and (3) the child shall has to follow the alien to reside outside the European Union, when the alien has to leave the Netherlands.

Social benefits and the right to reside (Article 20 TFEU)

In *Ruiz Zambrano* the Court stated that "[a] refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect"[616] as to deprive the genuine enjoyment of the substance of the European citizenship right. Noteworthy with regard to social benefits is a case concerning social benefits of the District Court Arnhem.[617] In this particular case, the Dutch court held that in order to facilitate the residence of the dependent Union citizens, a social allowance had to be granted. Since the Court of Justice stated in *Ruiz Zambrano* that Mr Ruiz Zambrano had to be granted a work permit in order to be able to facilitate the residence of his children, the question raised was whether this would also apply to social benefits, in the sense that not only should a third country national have a right to reside, but should also be facilitated to have sufficient means in order to take care of the EU citizens-children. On 20 November 2013 the District Court in The Hague confirmed, rather implicitly, that if a third country national is in a Ruiz-Zambrano-situation a right to social benefits for the costs of maintenance might have to be granted alongside a right to residency.[618] In that particular case the District Court, however, did not decide that the situation of the applicant fell within the sphere of *Ruiz Zambrano*. Consequently her reliance on Article 20 VWEU to have social benefits also failed.

The Dutch Central Appeals Tribunal (*Centrale Raad voor Beroep*) referred in March 2015 two questions to the CJEU.[619] It asked in the first place whether the fact that the day to day and primary care of the minor child by the parent with the nationality of a Third Country is decisive for the answer whether that parent has a derived right to reside in the Netherlands on the ground of Article 20 TFEU. Secondly the CRvB wants to know what weight should be given to the fact that the legal, financial and/or emotional burden does not rest entirely with Third Country National parent and what the consequence is of the fact that it cannot be excluded that the Dutch parent might in fact be able to care for the child.

It is remarkably it is the Central Appeals Tribunal that referred the question, whereas both other highest administrative courts in the Netherlands, the Supreme Court (*Hoge Raad*) and the Council of State (*Raad van State*) did not refer questions on the interpretation of Ruiz Zambrano and Article 20 VWEU in the light of the Dutch case law. These two highest administrative courts, as observed above, both have a strict line of case law and did not refer questions to the CJEU regarding mixed family and

[616] Ruiz Zambrano, par. 43.
[617] District Court Arnhem, 10 July 2012, ECLI:NL:RBARN:2012:BX3418.
[618] District Court The Hague, 20 November 2013, ECLI:NL:RBDHA:2013:16022.
[619] C-133/15, H.C. Chavez-Vilchez (pending).

the degree of dependence that is required in order to invoke Article 21 TFEU. It is the Central Appeals Tribunal that decides on access to social benefits. In that capacity the Tribunal was confronted with doubts on residency rights, since the Dutch Act regarding social benefits (*de koppelingswet*) requires that a person who asks for certain social benefits has a residency right in the Netherlands. The reference to the CJEU was made in eight different cases in which a third country national (in all the cases the mother) asked for either child-raise allowance ('kinderbijslag') or for social benefits for maintenance ('bijstand'). All the applicants were mothers of a Dutch child born out of a relation with a Dutch father. None of the applicants had a residence permit at the time of request. Some of the applicants were temporarily lawfully resident during their request for a residence permit, some did not have a temporally residency right and had to leave the Netherlands. No measures for expulsion were taken by the Dutch authorities. According to the Dutch 'Koppelingswet' (Connection Act in a very lose translation) third country nationals without a lawful residency right are not entitled to facilities or social benefits. They are not allowed to work, they cannot have an insurance and they are not entitled to request for social benefits, as was the case in these eight cases. The 'Koppelingswet' connects the personal data of the Alien Registry of the Alien Police with the Municipal Central Administration. Consequently for every request for facilities or benefits the residency right of the person at stake will automatically be controlled. In these eight cases in appeal at the Tribunal the Dutch father is in a more or less degree absent in the daily care for the child or children. In one case the Dutch father only saw his daughter immediately after she was born, but there has been no contact since that time, on the request of the Dutch father. In all cases the Svb ('De Sociale Verzekeringsbank'), the administrative body that assesses requests for social benefits) held that the third country national parent did not proof that the Dutch father could not have the care of the Dutch child or the Dutch children. The Central Tribunal of Appeals stresses that it has doubts whether the mother, with the nationality of a third country, might have a right to reside on the grounds of Article 20 TFEU and *Ruiz Zambrano,* as primary carers of a child who has the status of being a EU citizen. If that would be the case, the third country nationals, would have a residency right on the basis of EU law and therefore comply with the requirement of lawful residency in order to request social benefits. It is in that context that the Tribunal asks the CJEU the two above mentioned questions. On 10 May 2016 the hearing in the case at the CJEU took place. One of the main points of discussion is whether the mother (in all these cases) as a primary carer should have a derived right to reside in the EU, or whether it is important that she is the only (possible) carer of the Dutch child. In all the cases pending the mother is the primary carer for the child, whereas the father has a very small or no role. According to the Dutch authorities the fact that the father is present and might potentially become the primary carer for the child is reason not to grant the right to reside to the mother. According to the applicants the father is unfit/incapable to have the primary care for the child. Another point that has been raised is the burden of proof in these cases. According to the Dutch system and policy the mother with the nationality of a third country has to proof that the father cannot take care of the child. It is however very difficult for a parent to proof the incapability of the other parent by objective facts. The Dutch immigration service requires for instance a judgement of a family court to proof that the father with the Dutch nationality cannot take the primary care. In order to get such a verdict the mother basically has to request the judge to grant the Dutch father with the authority over the child, so that the judge can refuse to do so because the father is incapable to have the care and authority over the child. The last question the Dutch Appeals Tribunal refers to the CJEU concerned this burden of proof: should the parent with the nationality of a third country proof the incapability of the parent with the Dutch nationality? In terms of barriers to EU citizenship rights the burden of proof for the third country national parent could result in such a burden

that the right of the dependent child with the status of a EU citizen to have residency in the EU with his/her parent may render ineffective. If it is extremely difficult to proof that the Dutch father is incapable to take the primary care of the Dutch child, and when the Dutch Immigration Service only accepts objective proof, such as an advice of a youth care authority or a family law court, reliance on Article 20 TFEU may be extremely difficult. At the same time the position of the Dutch Immigration Service is understandable: they are not capable to actually assess the skills of the Dutch parent to take the primary care of the child. In the Netherlands such assessments are done by several authorities, but not on request of individuals. According to the policy rules of the Dutch Immigration Service the authorities consider the Dutch parent incapable to care for the child when the Dutch parent is unable to get the authority over the child (legally) and when the Dutch parent is in detention.

The case Jeunesse: a Dutch case before the European Court of Human Rights on residence rights

In October 2014 the European Court of Human Rights decided in a complaint against the Netherlands regarding the right to residency of a third country national with a Dutch father and three Dutch children.[620] The case concerned a Surinam national who was denied a residence right in the Netherlands, although her partner and her children had the Dutch nationality. Her three children and her partner had consequently the status a EU citizen. In the proceedings at the Dutch courts, she invoked Article 20 TFEU and Ruiz Zambrano, arguing that she should be granted a derived right to residency in order to take care of her family. The Dutch courts did not accept her reliance on either Article 20 TFEU or *Ruiz Zambrano*. Jeunesse submitted a complaint at the ECHR in Staatsburg and argued that inter alia the right to family life was violated by the refusal to grant her a residency right. The ECHR held that, under the exceptional circumstances of the case, "… insufficient weight was given to the best interests of the applicant's children in the decision of the domestic authorities to refuse the applicant's request for a residence permit." The ECHR refers to family rights as a collective right, in which the rights of the family as a whole have to be taken into account. Hence, even though, *Jeunesse* had no right to reside and to family life on the ground of the status of her children as European citizens, she and her family were protected by the ECHR. The Court of Human Rights stressed that the circumstances in the present case are very particular. The fact that she had been living in the Netherlands for 16 years, that there was no link with the third country (Surinam) and that Jeunesse took care of her three children on a daily basis, were aspects that certainly added to the final outcome of the case. The decision of the ECHR may have more far-reaching consequences, as the considerations by the Court regarding family life are formulated in a more general fashion. Up until now (more that a year later) there are no sign in Dutch legislation, policy or case law that the current trend of how to interpret Article 20 TFEU has changed. That has, as observed, a lot to do with the particularities of this case. Since that exceptional circumstances were also stressed by the ECHR it seems to give enough leeway for the Dutch authorities to maintain their policy, also in consideration of Article 8 ECHR. The Dutch Minister of Justice held that the consequences from the judgment in Jeunesse should not be overestimated and that the case was highly exceptional.[621] He also

[620] ECHR, Case of Jeunesse v. The Netherlands, 3 oktober 2014, Application no. 12738/10. See also H. van Eijken, Blog BEUcitizen: Family life & European citizenship: The Strasbourg Court Decision in Jeunesse v. the Netherlands (www.beucitizen.eu).

[621] Kamerstukken II 2014/15, 32 317, nr. 254, p. 2.

announced a new guideline to assess Article 8 ECHR. Seven months after the judgment in Jeunesse that new policy document/guideline was published how to deal with such cases in the light of Article 8 ECHR.[622] In that guideline there seems to be some more weight put on the interests of the family, but it is still quite concise. All in all it seems that the consequences of the judgment in Jeunesse are restricted to very exceptional situations.

3.2. What is the relation between Article 21 and 20 TFEU in national case law? Do national courts assess the scope of applicability of both articles?

Dutch courts seem to make a clear distinction between a EU citizen who relies on Article 21 TFEU and a EU citizens who may rely on Article 20 TFEU. The courts seem to apply these Articles not supplementary but separately and autonomously, dependent on whether there is a free movement situation.[623] If a EU citizen has used his/her right to free movement under Article 21 TFEU, he/she cannot rely on Article 20 TFEU according to the District Court The Hague. [624] Similar, a Dutch national married to a third country national and residing in the Netherlands cannot invoke Directive 2004/38, since there is no connection with free movement. [625]

3.3. According to Article 16 of Directive 2004/38 Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there." Are there any additional conditions in your country for EU citizens to acquire a permanent residency status in your country?

Directive 2004/38 is transposed in the Alien Decree (*Vreemdelingenbesluit 2000*). In that Decree the family members of EU citizens are defined under the title "Community/EEA". The title is applicable to EU citizens and those who have the nationality of Switzerland or one of the EEA countries. According to Article 8.17 of the Alien Decree 2000 an alien has a permanent residency right ('duurzaam verblijfsrecht') after five years continues and lawful residency. It seems that the Dutch legislation does not add additional requirements. There is at least one case that proves that the Dutch case law sometimes is more lenient than necessarily required from Directive 2004/38. That has to do with the fact that also registered partnership is accepted in the Netherlands to have at least an equal status as a marriage. Article 8.15 of the Alien Decree provides that in certain circumstances a foreign national may have a right to reside in the Netherlands, also when the Dutch/EU/Swiss partner is not residing in the Netherlands anymore. One of these grounds is laid down in para. 4 of Article 8.15., stating that a third country national, who is qualified as a family member has a continues right to reside in the Netherlands when the marriage or registered partnership at least was established for three years (under a). In a case before the District Court of Amsterdam the Court held that a national of Ghana, who has had a registered partnership with a British national for more than three years, after their separation could rely on Article 8.15(4)(a).[626]

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[622] Bijlage bij Kamerstukken II, 2014/15, 32 317, nr. 282.
[623] See on this point also J. Langer & A. Schrauwen, FIDE report the Netherlands (2014), p. 701.
[624] Rechtbank 's-Gravenhage, zittingsplaats Haarlem, 26 April 2011, ECLI:NL:RBSGR:2011:BQ5774.
[625] Rechtbank 's Gravenhage, zittingsplaats Zwolle, 9 March 2012, ECLI:NL:RBSGR:2012:BV8504.
[626] District Court Amsterdam, 27 March 2013, ECLI:NL:RBAMS:2013:4271.

Question 4 – Family Life and free movement rights

4.1. Who are defined as family members of EU citizens in your country?

According to Article 8.7 of the Alien Decree 2000 family members are defined as follows:

(a) the spouse

(b) the partner in which the EU citizen or EEA or Swiss citizen has a civil union with

(c) the descendant of the EU citizen or the minor child of the alien who is in a registered partnership or marriage with a EU citizen

(d) or parents of the alien or family member, who is the primary carer of that parent

Paragraph 3 of Article 8.7 declares that dependent aliens of someone who is acknowledged as a family member may fall within the personal scope of this Alien Decree if the family member has the daily care of that alien or when the alien residence on daily basis with the family member in the country of origin, or because the alien is dependent on the care of the family member because of health issues.

As observed also civil unions fall in the concept of family life in the Netherlands. In the Dutch legal system persons in a civil union are equalised as spouses, meaning that there is a broader range of persons that actually are defined as family members. Also civil unions that are registered in other countries are acknowledged in the Netherlands (Article 8.7 (b) of the Alien Decree), as long as these civil unions are established in accordance with valid international law rules.

4.2. Under which conditions can third country nationals have a (derived) residence right as a family member of (i) an EU citizen with the nationality of another Member State or as a family member of (ii) a citizen with the nationality of your country?

As observed above the Dutch Alien Decree 2000 makes a distinction, like Directive 2004/38 in residence rights until 3 months, after 3 months and after five years (permanent residency right). According to Article 8.12 of the Aliens Act family members of EU/EEA/Swiss citizens have a right to reside after three months in the following situations. When he/she:

(d) is a family member of a worker, jobseeker, self-employed or a EU citizens, Swiss or EEA citizen with sufficient means and a comprehensive health care insurance;

(e) the spouse, the registered partner or the child of the EU, Swiss or EEA citizen that has a right of residence as student under sub c of Article 8.12;

(f) (g) and (h) is dependent on family members of EU/EEA and Swiss citizens because he/she is in the country of residence living with the family member, or because he/she is dependent on the family member of health or the daily care may also have a right to reside for more than three months.

4.3. What are obstacles for EU citizens in your country with regard to family life with a third country national and or an EU citizen?

On the obstacles for EU citizens to have family life with a third country national the above-mentioned case law and policy with regard to Ruiz Zambrano and mixed families is certainly one of the most important issues in the Netherlands. In order to avoid the strict immigration policy of the Netherlands the so-called Belgium-route has become quite popular. In order to trigger the scope of EU law and therefore to be able to rely on the case of *Metock*,[627] in which the CJEU held that EU citizens may have family life on grounds of Article 21 TFEU in a host Member State, Dutch citizens with a third country national spouse, partner (registered or unregistered) move to Belgium. As soon as they are in Belgium, there is a cross-border link and therefore they fall within the more lenient protection of EU law and Article 21 TFEU. This will be discussed below in context of the question of abuse of EU law (question 6). If a foreign citizens has the nationality of a third country and is not qualified as a family member, there are several thresholds for residency in the Netherlands: the integration exam (*inburgeringsexamen*), the fees are higher, and the alien has to comply with an income-requirement. For EU citizens and their family members these conditions are not imposed.

THEME III: LIMITATIONS TO CORE CITIZENSHIP RIGHTS

QUESTION 5 – EXPULSION

5.1. Please explain how the grounds of expulsion of Article 27 and 28 of Directive 2004/38 are used by national authorities and how they are referred to in national case law.

Article 67 of the Aliens Act 2000 (*Vreemdelingenwet 2000*) confers the competence upon the Minister of Immigration and Asylum to declare an alien unwanted. In the case of B. and O. discussed under question 6 hereafter, the Minister had used that competence to declare B. unwanted. After that decision B. went to Belgium to reside there. His case became a free movement situation, since he had a Dutch partner.

[627] C-127/08, Metock, ECLI:EU:C:2008:449.

The expulsion grounds are transposed in the Alien Decree 2000. The grounds for expulsion are mentioned in Article 8.18 and 8.22 of the Alien Decree 2000. Article 8.18 provides that the permanent residency may only be revoked when a citizen is for two continues years not residing in the Netherlands (par. 1), or on grounds of public security and public order (par. 2). Article 8.22. provides the expulsion grounds in general: the Minister can refuse or end the lawful residency in the Netherlands on grounds of public security and public order, if the alien is an actual and serious risk for a fundamental interest of the society. The Minister has to take the personal circumstances of the alien at stake into account. The provision mentions the following: the period of residency in the Netherlands, the age of the alien, his/her health condition, the family and economic situation, the social and cultural integration in the Netherlands and the link the alien has with his/her country of origin. For aliens who lived in the Netherlands for a continuous period of 10 years or more and for minor children a stricter test applies: only for imperial reasons of public security. The law in that sense follows Article 27 and 28 of Directive 2004/38 and makes a distinction between those aliens who are residing for 10 years and those who resided for a shorter period. The alien has the possibility to request to wave the declaration of unwanted alien (par. 4) on which within 6 months a decision is made (par.5.). The Minister is obliged by law to assess within two years whether the threat for the Dutch society is still eminent (par. 6).

The Dutch case law seems also to apply with the standards of the EU: national courts assess whether the proportionality test has been applied correctly by the Minister and assess whether an eventual expulsion would infringe fundamental rights.[628] At the same time not many reasons of personal circumstances seem to be successful in order to challenge the expulsion order. The fact that the citizen was in a relationship with a Dutch citizen, the good behaviour in prison, the birth of a child, light forms of medical treatment were in the past not successful grounds in order to quash the expulsion order.[629]

In the context of this question a case decided by the District Court The Hague on withdrawal of a right to reside in the Netherlands and an entry ban imposed on a Moroccan national suspected of participation in jihad is noteworthy. In that case the Minister decided that the Moroccan national, who was born in the Netherlands and ever since lived in the Netherlands, and who had a temporary residency right to stay with his parent in the Netherlands had no right to reside in the Netherlands and was imposed an entry ban for 20 years, because of grounds of public security and public order. Although the case was not decided within the framework of Directive 2004/38, since it concerned a third country national, the District Court took a strict approach of proportionality and held that the Minister should motivate its decision by a more detailed reasoning.[630] The District Court did not refer to EU law but grounded its' decision on the Dutch principles of sound administration, which is logical since there was no EU dimension involved. In that sense, as observed, it lays outside the scope of this report, but it reveals the Dutch practice in courts, and the way courts deal with cases outside the scope of the Directive.

[628] J. Langer & A. Schrauwen, FIDE report the Netherlands (2014), p. 701.
[629] J. Langer & A. Schrauwen, FIDE report the Netherlands (2014), p. 704.
[630] District Court The Hague, 29 October 2015, ECLI:NL:RBDHA:2015:12349.

5.2. Is there evidence in decisions of the national authorities and case law that not fulfilling the conditions laid down in Article 7 (1) (b) Directive 2004/38 for the right to reside in another Member State (having a comprehensive healthcare insurance and sufficient means) leads to expulsion?

As observed above, the grounds for expulsion are transposed correctly from Directive 2004/38 into Dutch law. According to the Board of Appeals Tribunal in a decision of 19 March 2013[631] the competent authorities (municipalities and the Immigration Service) may not hold the non-compliance with Article 7 of the Directive against a EU citizen, in order not to grant a right to reside. The Tribunal emphasised in that decision that the fact that a EU citizen asks for social benefits may not result in an automatically expulsion of the EU citizen at stake. However, as has been observed, the 'Koppelingswet' connects the various registers of the relevant authorities. As a result a citizen without a residency right may not have a right to social security. That issue came up especially with regard to third country nationals. The Board of Appeals Tribunal asked the CJEU questions in this respect, in the discussed and pending case *Chavez-Vilchez*.

5.3. Is there evidence that in decisions of national authorities or case law a different (lower) standard of public order than prescribed by Directive 2004/38 and the case law of the CJEU is used with regard to expulsion grounds?

In the Netherlands there has been a debate whether there would be a national lower threshold of public order as a ground to expel a EU citizen or whether the EU standard of public order should apply to those third country nationals who have a derived right of residency in the Netherlands on grounds of Article 20 TFEU and Ruiz Zambrano.

In 2011, the same year Ruiz Zambrano was decided, such a question was laid down before a District Court in the Netherlands. In that case[632] the District Court of Amsterdam applied the European standards of public security and public order, stating that the third country national with a residency right on grounds of Article 20 TFEU did not show individual conduct that would amount to serious and actual risk for essential interest of the society. Consequently the third country national could not be expelled according to the District Court. In that case a Surinam mother of a Dutch child was convicted for drugs smuggle and for domestic violence. The conviction for drugs smuggle was five years old at the time of the case, and the case of domestic violence was a fight with her husband, which got out of hand, but was not a structural behaviour of the mother. For those reasons the Court held that she could not be expelled on grounds of public order.

Question 6 – Abuse

[631] Board of Appeals Tribunal, 19 March 2013, ECLI:NL:CRVB:2013:BZ3857.
[632] District Court the Hague, residence Amsterdam, 7 September 2011, ECLI:NL:RBSGR:2011:BT2711, par. 6.4.

According to the case law of the CJEU citizens may not benefit from abusing EU law. In the case *G and S* the CJEU ruled that "Proof of such an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the European Union rules, the purpose of those rules has not been achieved, and, secondly, a subjective element consisting in the intention to obtain an advantage from the European Union rules by artificially creating the conditions laid down for obtaining it."

Could you provide information on how abuse of EU free movement rules for EU citizens is interpreted and applied by national authorities and in national case law?

As observed above, in the Netherlands the so-called Belgium-route is a well-known method for EU citizens to be able to reside with their third country national family members. The case B. and O., decided by the CJEU in March 2014, was a consequence of this famous Belgium-route.[633] As described above, if a Dutch national resides for a certain period in Belgium, EU law is triggered and therefore the more lenient regime is applicable for family reunification/family life. A Dutch citizen who wants to have his/her family members in the Netherlands does not fall under Directive 2004/38, nor Article 21 TFEU and neither is Directive om family reunification applicable. The Dutch legislation is much stricter for Dutch citizens than for EU citizens of other nationality (reverse discrimination). The question in O. and B. was whether family life could be invoked if the Dutch citizen is only occasionally in Belgium in a relationship with a third country national. The Dutch Council of State (*Afdeling bestuursrechtspraak van de Raad van State)* referred on 5 October 2012 four questions.[634] The couple O. (a Nigerian and a Dutch national) have lived in Spain for two months together and O. had a residence card as a family member of a EU citizen. Since the Dutch spouse of O. could not find a job in Spain she moved back to the Netherlands, after which she residence in Spain with O. during holidays. The question that rose before the Council of State is whether there was actually family life between O. and his Dutch spouse, in order to ensure that the couple did not entered in a marriage in convenience. The minister of immigration and asylum (who is formally responsible for these kind of decisions) held that O. did not proved to have had actual family life with the Dutch O. The fact that O. as a family member of a EU citizen was registered in Spain was according to the Minister not sufficient. In the second case that led to preliminary questions a national of Morocco had a relationship with a Dutch national. He lived in Belgium where the Dutch national visited him during weekends. Also in that case the question was brought to the fore whether the couple could rely on the Carpenter-case law of the CJEU and could rely on a derived right of residency.

The CJEU held in its judgment that Article 21 TFEU was applicable on the situation of O., and that a third country national can have a derived right of residence in the Member State of the nationality of the EU citizen, if between the EU citizen and the third country national actual family life is established in another Member State. The Council of State meanwhile ruled in both cases. In the case of O. the Council of State held that the applicants did not submit sufficient proof of family life, and therefore could not rely on Article 21(1) TFEU. According to the Council of State the duration of residence in Spain together was too short to establish a sustainable family life.[635] In the case of B. the Council of

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[633] H. van Eijken, De zaken S. en G. & O. en B.: Grenzeloze gezinnen en afgeleide verblijfsrechten, Nederlands Tijdschrift voor Europees recht (Dutch Journal of European Law), 2015, pp. 319-324.
[634] Council of State, 5 October 2012, ECLI:NL:RVS:2012:BX9567.
[635] Council of State, 20 August 2014, ECLI:NL:RVS:2014:3179, par. 4.3.

State, moreover, ruled that the period in which B. cohabited with his Dutch partner was less than three months and too short to be able to have a derived right of residency in the Netherlands.[636] Even though the Council of State did not explicitly question under what circumstances abuse of EU law may be used as a ground for refusal, the CJEU added that Member States are free to refuse such right in case of abuse of EU law. According to the CJEU "Proof of such an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the European Union rules, the purpose of those rules has not been achieved, and, secondly, a subjective element consisting in the intention to obtain an advantage from the European Union rules by artificially creating the conditions laid down for obtaining it".[637] The CJEU stressed that only after the couple of a Dutch and a third country nationality resided for a continuous period or more in another Member State, they could rely on Article 21 (1) TFEU.[638] That was an important statement for the Dutch situations, since the CJEU consequently gave the Dutch courts and legislature a EU ground to restrict the 'Belgium-route', at least only to those who have stayed for a continuous period of three months or more in another Member State.

Theme IV: EU citizenship core rights in practice

Question 7 – Barriers from an empirical perspective: actual barriers to core citizenship rights

What are barriers to core citizenship rights (the rights to nationality, the right to reside, the right to family life) according to legal professionals working in the field of migration law?

(Please ask a lawyer, legal officer of the national migration services for information on what the actual barriers are in your country in their perspective.)

On 2 December 2015 I interviewed a lawyer specialised in family law as well as migration law. She has a lot of expertise in cases like Ruiz Zambrano, which she handled as a lawyer in the Netherlands. As observed above and confirmed by the lawyer may cases concern the situation of a mixed family. Other cases concern illegal mothers. One example is of a women with the nationality from Ghana, who came to the Netherlands with her mother, while she was a child. While her mother was illegal, also the daughter was illegal. There is a huge problem with these second and sometimes third generation illegal migrants, because they have been living and raised in the Netherlands for almost their whole live, but yet do not have a residency status. EU citizenship may be involved in such situation if the illegal migrant is involved in a relationship with a Dutch citizen.[639]

During our conversation she pointed out some practical issues that hinder lawyers in cases like *Ruiz Zambrano* to succeed in proceedings.

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[636] Council of State, 20 august 2014, ECLI:NL:RVS:2014:3184.
[637] B. en O. par. 58.
[638] Par. 59.
[639] Second generation illegal migrants, even though they are integrated and went to school in the Netherlands, do, in principle, not have a rights to reside. See for an example Council of State, 15 April 2015, ECLI:NL:RVS:2015:1289.

One of those issues is the fact that the IND, the Dutch Immigration and Naturalisation Service, in some cases withdraws its' decision on a formal objection ('*besluit op bezwaar*') just a couple of days before a court session and therefore the proceedings at the court are cancelled. Subsequently a new decision is being taken by the IND, to which the lawyer again object against ('*in bezwaar gaan*') and appeal to at the District Court. This practice makes the procedure longer than necessary and hinders the outcome of the case and legal certainty of the residency status of the third country national at stake.

Another issue is that the Dutch Immigration and Naturalisation Service (IND) requires extensive proof of the relationship between the third country national and the EU citizen, which is sometimes very difficult to acquire. On 19 February 2015 the Council of State decided that the IND and the Minister should assess the documents that proof the residency in another Member State (in *casu* Spain) in interrelation with each other. The case concerned a Dutch national married to a national from Ghana, who lived together in Spain. They invoked the right to move and reside (Article 21 TFEU) in order to claim a residency right for the third country national in the Netherlands. Therefor they had to proof that they have lived in Spain for more than three months (in accordance with the judgement in *B. & O.*). That they were unable to submit all documents the Minister asked for is insufficient according to the Council of State to refuse their claim.[640] As an example the lawyer who I interviewed told me about a case concerning a Carpenter-situation. A Dutch national had a company for which he had to reside short periods in other Member States, his wife with the Chinese nationality had no residence permit in the Netherlands. The IND required proof of his exercise of free movement for his business and also wanted to have proof that these trips are necessary for the company. The lawyer had to hand over the accounts of the company for instance in a discussion whether the company actually made enough profit.

Moreover, another barrier noteworthy is the fact that Dutch courts seem not have the tendency to ask preliminary questions to the CJEU. Even if a lawyer explicitly asks the court to start a reference procedure, most Dutch courts seem to regard these Ruiz Zambrano questions *acte clair* or *acte eclaire*. As observed above, quite recently the Board of Appeals Tribunal referred questions, but only after the Supreme Court and the Council of State have developed a consistent line of case law in '*Ruiz Zambrano*-like' cases.

Question 8 – Systematic or notorious deficiencies in the country under study?

Please, discuss here in detail any 'revealing' cases of weaknesses in the effective exercise of core citizenship rights in your country.

As has been observed above the case law and policy of the Dutch courts and the National Immigration Service (*IND*) with regard to Article 20 TFEU and Ruiz Zambrano situations is rather restrictively applied. Probably that line of case law is in line with how the CJEU interprets Article 20 TFEU, but since there is no case law yet on mixed families, such as the dominant situation in Dutch case law, this is still unclear. It will be very interesting to see what the CJEU will answer to the referred questions of the Central Appeals Tribunal (*Centrale Raad voor Beroep*).

[640] Council of State, 19 February 2015, ECLI:NL:RVS:2015:517.

In a broader context the public and political debate in the Netherlands concerning the refugee influx in Europe may be mentioned. It seems that the public opinion is on both edges of the perspective: either people want to welcome refugees or people are fierce against the shelter of refugees in the Netherlands. It seems, apparently, that both opinions drive Dutch citizens far from each other. There have been incidents of violence against refugees, and against authorities (for instance at municipal meetings with regard to the establishment of a refugee shelter). On the other side, more extreme, are citizens that call those Dutch citizens who are afraid of the consequences of the refugee influx racists. At the moment it does, technically speaking, not constitute an obstacle to EU citizenship rights, but in a broader context it is important to mention that the refugee influx led to a fierce and difficult debate, both in the society as well as in politics. In that sense there are some politics speaking of a mini-Schengen and to re-introduce border control. These debates take place at the political arena in the Netherlands, meaning that there is, at the moment, no legislative development to mention (yet).

Question 9 – Good practices

Please highlight any other legal norms, policies, instruments or practical tools which facilitate the exercise core citizenship rights in the country under study.

With regard to the good practices the fact that the Dutch legal system acknowledges civil unions equal to marriage is to be praised, in the sense that the protection for EU citizens and their family members is widened and broader than strictly speaking necessary on behalf of EU law.

Bibliography

Selection of Dutch relevant literature on core citizenship rights:

H. van Eijken, Kroniek Europees burgerschap, Nederlands Tijdschrift voor Europees recht (2016), forthcoming.

A.A.M. Schrauwen, Europees burgerschap in recente rechtspraak van het Hof van Justitie, SEW Tijdschrift voor Europees en Economisch Recht (2015), pp. 15-25.

H. Oosterom-Staples, Het recht op vrij verkeer van Nederlanders met een partner uit een derde land: een omstreden recht nader bezien, SEW Tijdschrift voor Europees en Economisch Recht (2015), pp. 398-414.

J. Langer & A. Schrauwen, FIDE report the Netherlands (2014) in: U. Neergaard et al, Union Citizenship: Development, impact and challenges, The XXVI Fide Congres in Copenhagen, 2014, Vol. 2, pp. 695-718.

H. Oosterom-Staples, Op het raakvlak van sociale zekerheid en migratierecht; Legaal verblijf als voorwaarde voor toekenning socialezekerheidsprestaties, Nederlands Tijdschrift voor Europees recht (2014), pp. 53-60.

G.R. de Groot, Verlies van het Nederlanderschap na tien jaar buitenland: problemen en oplossingen. Asiel- En Migrantenrecht (2014), pp. 86-93.

G.R. de Groot, Vrijwillige verwerving nationaliteit moeder, gedwongen verlies Nederlanderschap. Asiel- En Migrantenrecht (2014), pp. 286-288.

H. van Eijken, ‘Ruiz Zambrano the aftermath: de impact van artikel 20 VWEU op de Nederlandse rechtspraak’, Nederlands Tijdschrift voor Europees recht (2012).

A.P. van der Mei, S.C.G. van den Bogaert en G.R. de Groot, De arresten Ruiz Zambrano en McCarthy; Het Hof van Justitie en het effectieve genot van EU burgerschapsrechten, Nederlands Tijdschrift voor Europees recht (2011), pp. 188-199.

ANNEX VII – COUNTRY REPORT SPAIN

BEUCITIZEN
BARRIERS TOWARDS EU CITIZENSHIP

CASE-STUDY D 7.3:

Exploring obstacles in exercising core citizenship rights

COUNTRY REPORT: SPAIN

(UNIOVI Report 28/12/2015)

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UTRECHT UNIVERSITY

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Questionnaire Deliverable 7.3: Case study 'Core citizenship rights'

Extract from the DoW:

(i) A case study exploring obstacles that citizens face in trying to enjoy their core citizenship rights (e.g. right of residence in the EU). The analysis will focus on the following obstacles:

- Acquiring, keeping and regaining EU citizenship in the light of diverse national nationality/citizenship laws (e.g. limitations on dual citizenship; the granting of national citizenship to 'nationals' of a Member State living in another Member State/third country, effects of deception in application for citizenships, etc.);

- Obtaining residency rights for family members who are third-country nationals, even when the EU citizen has not exercised his or her right to free movement (in the light of national immigration rules and family laws).

INTRODUCTION

The objective of WP7 is to study, from the perspective of EU citizenship, specific problems EU citizens face in exercising civil rights and liberties in areas which fall within the scope of EU law, but also in areas beyond the scope of EU law. In the EU legal context, fundamental rights, including civil rights, have gained not only visibility but also, arguably, significance, now that the Lisbon Treaty has made the Charter of Fundamental Rights legally binding.

This case study will focus specifically on actual and potential barriers to core citizenship rights. These core citizenship rights entail, for the purpose of this deliverable, access and lose of nationality (and thereby also acquire and lose of EU citizenship status), the right to reside in a host Member State and in the Member State of nationality, the right to family life and family reunification in a Member State for EU citizens, the right to free movement of EU

citizens and the derogations to those rights: expulsion measures and abuse situations. The questionnaire is built on these themes.

PRACTICAL INFORMATION AND GUIDELINES

Task leaders: Sybe de Vries, Hanneke van Eijken

Please structure the country report based on the questionnaire below (including headings).

Make sure to include precise references to constitutional, legislative and regulatory provisions, cases and other relevant policy and legal documents. We also encourage you to look for and identify relevant empirical evidence of specific obstacles to civil rights implementation and enforcement in the EU (NGO reports, statistics, press extracts, testimonies, interviews, surveys, etc)

Please note that there may be some overlap with answers given in the context of the first and second tasks (country reports for Deliverable 7.1 and 7.2), and those sought this questionnaire. In such case, we kindly ask you incorporate relevant points into this country report, using appropriate cross-referencing.

The country report should be written in English. The text of country reports should give a general overview, and should be clear, easily accessible and easy to read. If certain concepts or notions do not translate well in English, we recommend that you use both the original language as well as the most appropriate English translation the first time a concept is referred to. Later mention may be in either language. Language editing is the responsibility of each author.

Please use the Kluwer author guidelines for references and citations: http://www.kluwerlawonline.com/files/COLA/COLAHOUSERUL2013.pdf.

Deadline for the report: 31 December 2015

Please, be reminded that the deadline is a very strict one. In case of delay, we will not be able to submit the deliverable on time.

BACKGROUND INFORMATION

The FIDE Congress of 2014 (Copenhagen) focussed, as one of the three main themes, on EU citizenship. In the general report (Union Citizenship: Development, Impact and Challenges) written by Jo Shaw and Niamh Nic Suibhne and the national reports the core citizenship rights and their transposition in the national context were analysed. The general report as well as the national reports serve as a starting point of this present questionnaire, in

order to build up on the research that has been carried out by the FIDE reports. Even though the FIDE report included a wider range of topics (e.g. political rights), the information of the general report and of the national report (which were submitted in September 2013) may serve as a good starting point of analysis.

The general report can be found:
http://www.research.ed.ac.uk/portal/files/15442767/Topic_2_on_Union_Citizenship_Edit.pdf.

ANOTHER USEFUL SOURCE FOR INFORMATION IS THE WEBSITE OF EUDOCITIZENSHIP, ON WHICH YOU CAN CONSULT DATA WITH REGARD TO NATIONALITY LAWS. SEE: HTTP://EUDO-CITIZENSHIP.EU/DATABASES.

RELEVANT EU LEGAL INSTRUMENTS

DIRECTIVE 2004/38/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC

Treaty of the Functioning of the European Union: Article 18, Article 20, Article 21.

EU Charter: Article 7, Article 20, Article 21, Article 45.

Relevant case law:

CJEU case law on Article 20 TFEU:

C-34/09, *Ruiz Zambrano,* ECLI:EU:C:2011:124
C-434/09, *McCarthy,* ECLI:EU:C:2011:277
C-256/11, *Dereci and Others* ECLI:EU:C:2011:734
C-40/11, *Iida*, ECLI:EU:C:2012:691
C-87/12, *Ymeraga*, ECLI:EU:C:2013:291

CJEU case law on nationality:

C-369/90, *Micheletti*, ECLI:EU:C:1992:295
C-135/08, *Rottmann,* ECLI:EU:C:2010:104.

CJEU case law on EU citizenship and family life:

C-127/08, *Metock* [2008] ECR I-06241, ECLI:EU:C:2008:449
C-34/09, *Ruiz Zambrano,* ECLI:EU:C:2011:124
C-256/11, *Dereci and Others* ECLI:EU:C:2011:734
C-40/11, *Iida*, ECLI:EU:C:2012:691
C-457/12, *S. en G.*, ECLI:EU:C:2014:136

C-456/12, *O. en B.*, ECLI:EU:C:2014:135

QUESTIONNAIRE

Theme I: Access and loss of nationality and EU citizenship status

Question 1 – Access to EU citizenship: nationality

1.1. What are the national conditions to acquire nationality of your country? Are there specific rules with regard to persons, who are threatened to become stateless? Are the conditions of acquiring nationality changed under the influence of the judgment *Ruiz Zambrano* of the CJEU?

1.1.1. Spanish Constitution, article 11, foresees that Spanish nationality is acquired, kept and lost in accordance with Law, what forwards to the Spanish Civil Code (CC), Royal Decree of 24 July 1889. This question belongs to its first Book, “on Persons”, First Title, “on Spaniards and Foreigners”, comprising articles 17-28. The regulation of nationality splits into three different categories related to its acquisition, which are: 1. Nationality of origin, 2. Nationality by option, 3. Nationality by executive order.

1.1.2. Nationality of origin, is characterized by the impossibility to be withdrawn, according to article 11 of Spanish Constitution. People enjoy this kind of nationality in the following cases:

1. Those born whose father or mother is Spanish (art. 17 SCC).
2. Those born in Spain, whose parents are foreigners if, at least, one of the genitors was in turn born in Spain, safe the case of consular and diplomatic servants (art. 17 SCC).
3. Those born in Spain, whose parents were aliens if they both were stateless or as a result of the enforcement of the national law of both parents the child was not to be granted any nationality (art. 17 SCC).
4. Those born in Spain whose parentage cannot be determined. Those under 18, whose first place of stay known was Spain are treated on equal footing (art. 17 SCC).

1.1.3. Acquisition by option is related to those who have entered into a parental relationship with a Spaniard of origin:

1. Those whose parentage or birth in Spain was discovered once they were 18 years old or older do not immediately become Spaniards of origin, but they must opt for Spanish nationality of origin within two years from the moment of the discovery.
2. Those foreigners under 18 who are adopted by a Spaniard shall become Spaniards of origin.
3. Those foreigners over 18 who are adopted by a Spaniard will opt for Spanish nationality, at their will, within the next two years to the constitution of the adoption.
4. Those who have been under the parental rights of a Spaniard.

5. Those whose father o mother had been a Spaniard of origin and mother or father or both, born in Spain.

1.1.4. There is also a right to acquire nationality by the setting-up of a genuine relationship between the subject and Spain:

1. When extraordinary circumstances concur by executive order.
2. By continuous residence, on condition that it is legal, continuous and immediately previous to the petition:
    a. General rule: 10 years.
    b. Refugees: 5 years.
    c. Nationals from Ibero-American countries, Andorra, the Philippines, Equatorial Guinea or Portugal, or else Sephardic Jews: 2 years.
    d. One year:
        i. Who is born in Spanish territory.
        ii. Those who being in a position to opt, have not exercised their right when he/she should have.
        iii. Those who have spent two years under the guardianship, watch or curatorship of a Spaniard or Spanish institution.
        iv. Those who, by the time of the application, had already passed a year married to a Spaniard, and is not legally or factually under separation or divorce.
        v. The widow or widower of a Spaniard, if there not exists cause of separation of divorce at the time of the death.
        vi. Those born abroad whose mother or father, grandmother or grandfather, would have been a Spaniard or Spaniards of origin.

1.1.5. On occasion of the terrorist attacks of 11-March 2004, the Government granted Spanish nationality by Royal Decree 453/2004, 18 march (OJS, nº 70, 22 March 2004) to the victims of the attacks, comprising those hurt by the attacks, the spouse and the descendents and genitors of the dead only in the first degree (son or daughter and parents).

1.1.6. In 2008, the Government issued a Royal Decree granting Spanish nationality to those people who had been members of the International Brigades that fought in the Spanish Civil War against the fascists and the military rebels (R D 1792/2008, 3 November, on the granting of Spanish Nationality to the volunteers to the International Brigades, OJS nº 277, 17 November 2008). This had already taken place in 1996, by Royal Decree 39/1996, 19 January, granting Spanish nationality to the members of the International Brigades, OJS nº 56, 5 March 1996. This prior R D offered a term of three years to appear before Spanish authorities and to declare the acceptance, the second one passed in 2008 tries to offer a new opportunity to those who missed the first chance and also softens the compatibility of Spanish nationality with other ones, with a view not to causing the renounce of the previous nationality of those accepting the Spanish.

1.1.7. Currently, R. D. 1004/2015, 6 November (OJS nº 267, 7 November 2015) regulates the application of nationality on the basis of continuous residence. In such cases article 6 demands on the applicant that the degree of integration in Spain be measured, this would

take place through the accreditation of Spanish Language proficiency, requiring DELE A2 level and, in addition, by means of a written test on historical, constitutional and socio-cultural values, based on the characterization of Spain as a social and democratic State under the rule of law, which proclaims as superior values of Spanish State freedom, justice, equality and politic pluralism; and on the knowledge and respect of the principles that are the grounds for national living-together. The questions of the test, according to the R D 1004/2015, are divided into blocks: 60% of the questions have to deal with the Spanish Constitution and the territorial administration, whereas the rest must tackle culture, history and social daily-living. Those nationals of Spanish-speaking countries are dispensed with the Spanish examination.

1.1.8. In the light of the foregoing, article 17.1.d) SCC foresees that those born or whose first known place of stay be Spain, ought to be granted Spanish nationality of origin, what is intended to reduce statelessness. Equally the provisions giving refugees the chance to become nationals provided they have resided legally, continuously and immediately before the application for Spanish nationality over five years in Spain, may help reduce those cases. With this same aim, refugees and stateless people may acquire nationality by residence.

1.2. Under which conditions can nationals of your country be deprived of their nationality? Is there a difference in whether a citizen has (i) only the nationality of your country, (ii) has the nationality of another Member State of the European Union and (iii) those citizens having the nationality of your country and the nationality of a third country?

1.2.1. Those who enjoy origin nationality cannot be deprived of it, by express mandate of the Constitution, article 11. However, they may lose it:

1. Those emancipated who
    a. Usually reside abroad
    b. And voluntarily acquire another nationality (safe it is Ibero-American, Philippines, Andorra, Equatorial Guinea or Portugal).
    c. Or exclusively use the foreign nationality they enjoyed before emancipation
    d. And that three years' time elapsed between the emancipation or the acquisition of the foreign nationality.
    e. In spite of the above described, if the person claims its will to keep Spanish nationality in the mentioned term, the nationality will be preserved.
2. In all event, those emancipated that expressly renounce Spanish nationality and have another nationality and reside usually abroad.
3. Those who are born and reside abroad and enjoy Spanish nationality by the fact that his father or mother are Spaniards, also born abroad, will loose their Spanish nationality
    a. Should the laws of the residence country grant them the nationality of that country

b. Save they claim before Spanish authorities that they want to remain Spanish over a term of three years from the moment of emancipation or of coming of age[644].

4. These provisions are not enforceable in time of war.

1.2.2. Those who enjoy non-origin Spanish nationality shall lose it

1. When over three years they use the nationality they renounced in order to acquire the Spanish.
2. When they voluntarily join an army or armed group or take political office in a foreign State against the express prohibition of the Government.
3. The final judgment declaring a person to have acquired Spanish nationality by deceit, failure to disclose relevant information or fraud will convey the nullity of the acquisition.

1.2.3. Spanish law also affords the recovery of nationality under the following conditions:

1. Be a legal resident in Spain, save being emigrant or son of emigrant, and the Minister of Justice may dispense with this condition under exceptional circumstances.
2. Declare before the Spanish authority in charge of the Civil Register his/her will of recovering the Spanish nationality.
3. Register within the Civil register the recovery.
4. Those who have incurred in the loss of nationality must be discretionally authorized by the Government.

1.2.4. The R D 1004/2015 includes the possibility that, once the nationality is granted, it never becomes effective, given that in order to deploy all its effects it must fulfil the conditions that the resolution is filed within the Civil Register within the following 180 days after its notification, accompanied by the formalities of article 23 SCC and, in addition, over that period of time the applicant must not have behaved uncivicly, otherwise, the Dirección General de los Registros y el Notariado (General Direction of Registers) must send information thereon to the Civil Register whose servants in charge may refuse the inscription of the acquisition of nationality, exclusively, on grounds of public order disruption. The Consejo de Estado in its opinion on the Draft of R D 1004/2015 had the occasion to explain this point:

> "From this point of view, it is necessary to analyze, in the first place, if the RD can impose on the applicants that their civic behaviour is observed after the issuing of the nationality concession, right up to the moment it is filed within the Civil Register [...] Concerning the concept of "civic behaviour", the jurisprudence of the Supreme Court is unanimous when pointing that this is an undetermined juridical concept which calls for a case-by-case assessment. In any event, it is possible to state that it is not

[644] This provision will affect only those emancipating or coming of age after 2003, on account of the inter-temporal regime foreseen in Act 36/2002, 8 October 2002.

merely encompassing a concrete time-moment, but a long period of time, so far it is an attribute of the whole behaviour of an individual and not only referred to concrete acts. Thus, conversely to the residence requirement [...] the "civic behaviour" requires a global assessment of the person's course of action, without a concrete temporal limit. On these grounds, it seems reasonable that the norm under examination requires the "civic behaviour" not only till the moment the Minister of Justice decides on the nationality but also to the very inscription of the acquisition within the Civil Register [...]

Notwithstanding, in spite of the above said, it is necessary to analyze if the commission of an action of "bad behaviour" is enough to withdraw, *ipso iure*, the efficacy of the resolution of the Justice Minister [...] Article 12 of the R D adds that if the General Direction of Registers had any evidence of the breaking with the "civic behaviour" requirement, it should transmit it to the Civil Register competent authority and that this remission "will prevent the register of the nationality acquisition". In the light of the foregoing, the breach of this requirement would turn out to operate as a resolutive condition that would result in the deprivation of efficacy of the resolution granting the nationality" (Council of State, Opinion 928/2015, 30 September 2015).

1.2.5. An entirely different question is that one bound to the succession of States phenomena. In the frame of the independence process opened in Catalonia, different representations by several relevant spokespersons of parties promoting independence have pointed that in the event of a political "break-down", the Catalans would not lose their condition of EU Citizens. With such aim, some pieces of argumentation have been issued by the "Asamblea Nacional Catalana[645] too (https://assemblea.cat/sites/default/files/material/Nacionalidad%20en%20la%20Rep%C3%BAblica%20Catalana.pdf) , in which it can be read that no-body would have to lose Spanish nationality, should Catalonia become independent from Spain. In the same vein, some positions of experts can be found pointing out that the eventual Catalans would keep their condition as EU citizens (http://www.constitucio.cat/wp-content/uploads/2015/09/Vidal20150924_IndCatNacEsp.pdf; http://www.eldiario.es/catalunya/politica/Eduard-Sagarra-ciudadanos-UE-independencia_0_433957439.html). However, on closer inspection, it is to some extent remarkable that the statements therein contained scantly quote Public International norms on the issue, in fact, all those backing up this hypothesis reason as follows: article 11 of Spanish Constitution prohibits that origin-Spaniards be deprived of their nationality, so far the Catalans have been borne origin-Spaniards, even though they gain independence from Spain, the Spanish nationality would cling to them, thus, no legal option would remain possible for Spain, should she want to withdraw her own nationality from the Catalans. Several doubts are cast by this reasoning.

[645] This organization proclaims to have arisen the 30 April 2011, by means of a declaration that defines the ANC as "popular organization, unitary, plural and democratic". This declaration created a Secretariat made up of 30 people and in charge of the thrust of the independence process and the dissemination of the very organization (http://assemblea.cat/?q=node/31). This is the organization that has organized the independence-claiming demonstrations in Catalonia.

1.2.6. To begin with, it seems very inplausible that in the development of an independence process the whole population of a State may have the nationality of the predecessor State. If it is looked into International Law, it is clear that every State needs three elements to be considered as such: territory, government and population. It is impossible to conceive of a State whose population still keeps the nationality of its predecessor, it will throw into question the very existence of the State. In fact, independence processes in along the decolonization have always tended to avoid this possibility, given that the population was previously national of the colonial-State and in many occasions the colonial powers tried to hinder the independence process by considering the territory as a national province and the inhabitants as nationals, sometimes with a special status, therefore, keeping the nationality would preserve the political nexus with the predecessor State, what seems not desirable.

1.2.7. In the second place, nationality claims for a juridical relationship between the State and the national, what appears to be even more important at the moment, when the link between the national and the State seems to faint, from a material point of view (see the commentaries of the International Law Commission to the "Draft Articles on Diplomatic Protection, with Commentaries, 2006", pp. 32 and 33 http://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf). It seems stunning that once and at the same time a territory and its inhabitants, or its majority, claim independence from a State and want to remain nationals of it, in fact this will cast serious doubts on the independence again, so far nationality does not only provide rights but also duties.

1.2.8. The reasoning of those who claim that Catalans would also be Spaniards and EU citizens relies, finally, on the extraterritorial enforcement of Spanish Constitution, given that the rationale underlying the theory of the double massive nationality (Spanish-Catalan) takes for granted the enforcement of Spanish constitution to those living in the new State, it calls the Constitution to be enforced in a State other than Spain. This seems to be very haphazard, so far it is the part of internal law that constitutes a State and the very hard-core of its sovereign and it institutes a political organization. This kind of enforcement would stretch too far Spanish law, imperilling the independence of the eventual new State, therefore stepping into the very essence of sovereignty: the relationship between nationals and State (see PCIJ, *Nationality Decrees issued in Tunis and Morocco, Series B,* 7 February 1923 http://www.icj-cij.org/pcij/serie_B/B_04/Decrets_de_nationalite_promulgues_en_Tunisie_et_au_Maroc_Avis_consultatif_1.pdf).

1.2.9. In addition, the International Law Commission has proposed a drafted text on "Nationality of Natural Persons in Relation to the Succession of States (1999)", whose article 24 deals with the succession of States in case of separation of part of the territory, in such case, according to ILC point of view, the predecessor State (article 25) "shall withdraw its nationality from persons concerned qualified to acquire the nationality of the successor State in accordance with article 24",given that this article foresees that the successor State attributes nationality to all those living within its borders. The ILC explains this lose of the previous nationality as follows:

> "*Paragraph 1* of article 25 deals with the withdrawal of the nationality of the predecessor State as a corollary to the acquisition of the nationality of the successor State. This provision is based on State practice which, despite some inconsistence, indicates such withdrawal has been to a large extent an automatic consequence of the acquisition by persons concerned of the nationality of a successor State" ("Draft Articles on Nationality of Natural Persons in relation to the Succession of States with Commentaries, 1999", http://legal.un.org/docs/?path=../ilc/texts/instruments/english/commentaries/3_4_1999.pdf&lang=EF, pp. 46 and 47).

1.2.10. The whole text is governed by the fundamental premises of considering nationality as a human right (article 1) and of involving States in the prevention of statelessness (article 4). In spite of this aim, the text acknowledges that States enjoy a wide discretion that is tried to be minimized by the effect of some general provisions: Article 8 includes the general rule to attribute nationality on account of the place of residence, leaving room for treaties between the parties to bring about other solutions (in connection with article 5, which settles a territorially based presumption of nationality); article 9 reminds the reader that a State may require those who want to acquire its nationality, to renounce their previous one, highlighting that this rule "is generally accepted [that], as a means of reducing or eliminating dual and multiple nationality, a State may require the renunciation of nationality of another State as a condition for granting its nationality" ("Draft Articles on Nationality of Natural...", *doc.cit.,* http://legal.un.org/docs/?path=../ilc/texts/instruments/english/commentaries/3_4_1999.pdf&lang=EF, p. 31); and article 10 foresees that "1. A predecessor State may provide that persons concerned who, in relation to the succession of States, voluntarily acquire the nationality of a successor States shall lose its nationality. 2. A successor State may provide that persons concerned who, in relation to the succession of States, voluntarily acquire the nationality of another successor State or, as the case may be, retain the nationality of the predecessor State shall lose its nationality acquired in relation to such succession" ("Draft Articles on Nationality of Natural...", *doc.cit.,* http://legal.un.org/docs/?path=../ilc/texts/instruments/english/commentaries/3_4_1999.pdf&lang=EF, p. 32), what the Commission considers a very common outcome of these processes. This discretion of the States concerned is spelled out in the Commentary to article 1, "right to nationality" which is conceived of as a means of avoiding statelessness, but that does not grant any right to dual or multiple nationality (see "Draft Articles on Nationality of Natural...", *doc.cit.,* http://legal.un.org/docs/?path=../ilc/texts/instruments/english/commentaries/3_4_1999.pdf&lang=EF, p. 25). In the whole text, there is no any proclamation of a right to dual/multiple nationality, furthermore, it is considered an exceptional situation, hardly compatible with the whole population of State or a large number of citizens having dual or multiple nationality of another State involved in the succession, in fact article 11 takes into consideration the question of the will of the persons concerned, claiming that States involved "shall give consideration" to it. But the right of option there envisaged does not convey a right to dual/multiple nationality, in fact, the text foresees both the right of States to withdraw its nationality and the right to require persons concerned to opt, moreover, the ILC expresses its view that "the respect for the will of the individual is a consideration which, with the development of human rights law, has become paramount. However, this does not mean that every acquisition of nationality upon a succession of States must have a consensual basis.

The Commission considers that a right of option has a role to play, in particular, in resolving problems of attribution of nationality to persons concerned falling within an area of overlapping jurisdictions of States concerned", adding that "the expression shall give consideration" implies that there is no strict obligation to grant a right of option to this category of persons concerned" ("Draft Articles on Nationality of Natural...", *doc.cit.,* http://legal.un.org/docs/?path=../ilc/texts/instruments/english/commentaries/3_4_1999.pdf&lang=EF, p. 34).

1.2.11. In the light of the foregoing, it seems clear that there is no legal constraint on Spain to keep the nationality on those living in Catalonia. The ILC has pointed out, and seems to be the most plausible solution, that a treaty amongst the parties concerned is the best option in order to regulate this question, bearing in mind that the principles governing the question are: 1. Every individual has a right to nationality and statelessness must be prevented; 2. Every State has a right to require the individual to renounce any other nationality in order to acquire its own; 3. There is a presumption of nationality on account of the place of residence; 4. There is a right of involved States of withdrawing nationality, provided it does not generate statelessness.

1.2.12. The succession of States involves, in this eventual case the creation of a new State, the appearance of a new sovereignty that should be respected, therefore the enforcement of article 11 of the Spanish Constitution does not seems to play a role in this kind of phenomena, given that the article disciplines the relationship between Spaniards and Spanish State, but this relation will disappear in the case of an independence, so far a new sovereignty would arise, conveying that it must be respected and, being nationality one of the fundamental areas of sovereignty, it is not possible to enforce Spanish constitution beyond the borders of Spain, as far as third country nationals are concerned. By the same token, if the Catalans remained Spaniards on the exclusive claim of the Spanish Constitution to be enforced in Catalonia by the eventual Catalan authorities, this will impose on Spain the determination of who is to be considered a national from the outside, thus breaching the exclusivity of nationality and forcing Spain to acknowledge a situation taking place beyond its borders and created with no consideration to her own will. The respect of Spanish sovereignty calls for Spain to decide on this point with the sole limits of International Law, and the respect of Catalonia's sovereignty is hardly compatible with another foreign State's law determining the nationality of Catalans.

1.3. What is the current political and legislative discussion in your member state with regard to acquiring and withdrawing nationality? (e.g. In the Netherlands there is a fierce debate whether the Dutch nationality can be withdrawn of persons, who are suspected to be part of a terroristic organisation).

1.3.1. Over the last years, it has been broadly discussed whether the nationality applicant should have to pass an exam on Spanish culture. As previously mentioned nowadays it is part of the procedure to acquire Spanish nationality for all those who apply for it by way of residence, R. D. 1004/2015, 6 November. However the redaction of the R D was to some extent surrounded by controversies. The Council of the Judiciary produced a report (Consejo General del Poder Judicial (Council of the Judiciary), Report on the Draft R D on the acquisition of Spanish nationality, 30 September 2014) on the draft R D and pointed that the

criteria used to assess the degree of knowledge of Spanish culture and values should be included in the very text of the norm, independently of an eventual Ministerial Order developing the question. In addition, the R D attributes to Instituto Cervantes the redaction and performance of the examination, what for the Consejo General del Poder Judicial casts some doubts on account of the purpose of this Institution, oriented primarily to the promotion of Spanish Language. Nonetheless, the Council of State did not highlight this aspect of the Draft R D, pinpointing only some technical failures (Consejo de Estado, Opinion 928/2015, 30 September 2015, http://www.boe.es/buscar/doc.php?id=CE-D-2015-928).

1.3.2. A lot of political criticism was brought about by the PSOE, as main party of the opposition, the mass media echoed this point, as mere example:

http://www.20minutos.es/noticia/2569207/0/examenes/nacionalidad/espanola/

http://www.elconfidencial.com/ultima-hora-en-vivo/2015-07-03/el-psoe-ve-arbitrario-e-injusto-un-nuevo-examen-para-obtener-la-nacionalidad_625454/

http://www.eldiario.es/desalambre/Conseguir-nacionalidad-tramite-gratuito-manana_0_441306115.html

http://eldia.es/agencias/8188183-INMIGRACI-N-NACIONALIDAD-PSOE-ve-arbitrario-injusto-nuevo-examen-obtener-nacionalidad

http://www.radiointereconomia.com/2015/10/15/psoe-tacha-de-injusto-y-arbitrario-el-examen-para-adquirir-la-nacionalidad/

1.3.3. The recent jurisprudence of Spanish tribunals and the Supreme Court highlight another interesting problem, which is the one concerning the possibility that the Spanish Secret Service (CNI) steps in the nationality application in order to oppose the granting of the nationality. It is to be mentioned here the Judgment of Supreme Court, Contencioso Administrativo, Section 6, 9 March 2015, where a the Court faced the case of a Cuban scientist who had joined a research programme in Spain. During her work she allegedly transferred information to a Cuban Intelligence Official, what was discovered by the Spanish Secret Service that, after investigating, was convinced of the smuggling of relevant industrial information. When the Cuban scientist requested the Spanish nationality, in the frame of the procedure, which conveys the gathering of different reports from different Ministries, the Secret Service issued a confidential report advising to deny Spanish nationality on account of national interest and national security, however, the Supreme Court considered that the information provided in the report is not conclusive and may well overstep the limits of the right to fair trial if taken for granted, therefore, found in the opposite to what the Public Attorney claimed and the Secret Service proposed.

1.3.4. This had already been dealt with by the Supreme Court in the Judgment, Contencioso Administrativo, Section 6, 22 December 2011, in a case where a Jordan person requested the Spanish nationality and in the gathering of reports the Secret Service proposed the denial of the granting, given that according to its information the applicant had taken part of Abu Nidal organization, deemed a terrorist organization, and therefore constituted a threat to

national security. Conversely to this point of view, the Supreme Court understood that this position was not backed by reliable information and that the invocation of national security to prevent the applicant from knowing the whole of information in the report or supporting the position of the CNI impaired his possibilities to counter the arguments, thus he was hindered from appropriate defending the case, in other words, the right to fair trial was not respected and the Supreme Court found favourable to the applicant of Spanish nationality.

Theme II: Free movement rights of EU citizens

Question 2 - The right to free movement as a core citizenship right (Article 21 TFEU and the Citizens' Directive)

2.1. What conditions are laid down for EU citizens with the nationality of another Member State to reside in your country for a maximum period of three months?

The Law applicable to this case, as the very Ministry of House Affairs displays in its web (http://www.interior.gob.es/en/web/servicios-al-ciudadano/extranjeria/ciudadanos-de-la-union-europea/normativa-basica-reguladora 17-11-2015) is Directive 2004/38/EC and Regulation (UE) 492/2011. At the national level, the Royal Decree 240/2007, 16 February (*OJS* nº 51, 28-2-2007), as amended by Royal Decree 1161/2009, 10 July, Royal Decree 1710/2011, 18 November, Royal Decree-Law 16/2012, 20 April, and Royal Decree 1192/2012, 3 August. In the light of the foregoing, the regime is as follows:

a) Entrance: article 4 of RD 240/2007 demands that the EU citizen has a valid ID card or passport, indicating the nationality of the person. If the person requesting the entrance lack any of those documents, before being returned, he/she will be treated in a way that facilitates that person receives his/her documents within a reasonable term or else will be allowed to prove their existence by other means, provided that this is the only impediment to enter Spain.
b) Stay: article 6 of RD 240/2007 expressly refers the possession of the ID card or passport used at the moment of entrance, being that stay non computable as far as residence is concerned.

2.2. What conditions are laid down for EU citizens EU citizens with the nationality of another Member State to reside in your country for a period longer than three months?

Article 7 of RD 240/2007 (as amended by Royal Decree-Law 16/2012) says that a EU can enter and reside for a period longer than three months, provided that he or she:

a) Is a worker or a self-employed.
b) Has sufficient economic resources for him/herself and his/her family in order to prevent them from turning into a social burden for Spain and they enjoy a comprehensive medical insurance.
c) Has enrolled an educative institution programme, provided the institution is acknowledged or funded by the competent administrative authority and the person

enters and stays in Spain to follow a programme/course; in addition he/she must have comprehensive medical insurance and declare to have sufficient economic resources to prevent he/she and his/her family from becoming a social burden.

d) Is a family member of a EU citizen that fulfils the conditions laid down in letters a, b, and c.
e) Workers and self-employees that no longer perform their activities will yet be considered workers and self-employees under the following conditions:
    a. If he/she is experiencing a temporary disability.
    b. If he/she has been non-voluntarily dismissed, and, after a year at least working, has registered within the public employment service, in order to find a job.
    c. If he/she has been non-voluntarily dismissed after serving a contract whose length is under 12 months or having been non-voluntarily dismissed within the first 12 months of the service of the contract, and he/she has registered within the public employment service, in order to find a job. In this case, he/she will be granted the condition of worker/self-employed by a period that is not inferior to six months.
    d. If he/she is following professional-training programmes, provided the programme is related to his/her previous job unless he/she has been non-voluntarily dismissed.
f) Those applying for residence in Spain must fulfil other administrative steps, basically register within the Central Register of Aliens, what they have to do before the Aliens Bureau or the closest Police Station, being immediately given a certificate. The person concerned must simultaneously show the passport or ID card and any other document of the previously mentioned.
g) Concerning sufficient Economic resources, the authorities cannot require a concrete amount of money, but to pay consideration to the concrete circumstances of the case. In any event, the calculus must not exceed the amount fixed under which a Spaniard is given social assistance.

2.3. Are there any measures in your country that would prevent own nationals to use their right to free movement? (e.g. a prohibition to leave the country on ground of criminal proceedings)

Article 530 of the Procedural Criminal Law, “when the respondent or indicted has been released pending the trial, on bail or not, must appear before the Court or Tribunal the days indicated in the order on provisional measures and in addition all those times he/she is summoned by the competent judicial Organ. In order to guarantee the enforcement of this measure the judge may order the withholding of his/her passport”. As consequence the trips must be authorized by the competent judicial authority and the right to freedom of movement is curtailed.

Question 3 – The right to reside in the European Union (Article 20 TFEU and Directive 2004/38)

3.1. What is the current trend in case law in your country with regard to the applicability of Article 20 TFEU and references to the case *Ruiz Zambrano*? Are there specific issues

noteworthy? (e.g. in the Dutch case law the question whether one or both parents of dependent children should be granted a derived residence right under Article 20 TFEU remains an important question).

3.1.1. The Spanish Courts have incorporated article 20 TFEU in their legal reasoning when it comes to the permits of stay of parents and other relatives of under-age nationals of EU countries. Two main tendencies may be found on closer inspection. On the one hand there are judgments of Courts which point out that the expulsion of a third-country national whose son/daughter (sometimes brother/sister) has acquired or been attributed the nationality of a EU Member country is a cause that softens and introduces a legal exception to the duty to expel illegally-resident aliens. On the other hand, the Courts bring in the invocation of this circumstance in order to recap on the Ruiz Zambrano case, mentioning that article 20 TFEU may be played down if the expulsion of illegal-resident aliens undermines the rights of those under-age whose EU-citizen condition would be imperilled by the expulsion, therefore, in such conditions the expulsion must be put down in order to guarantee that the under-age involved enjoys the rights of EU citizenship, what would not be possible in the opposite. In this vein, the references to Ruiz Zambrano are broad and well-founded, frequently the very judgement is broadly quoted in order to justify the position of the national Court.

3.1.2. It is noteworthy that other considerations merge when the Courts face this kind of cases. So, many judgments expressly refer to the interests of the under-age and the right to family life, combining the jurisprudence of the EUCJ and ECHR. This mixture results in the concession of the permit on more than one ground, and not only on the utile effect of EU law. In this vein, the Courts have allowed parents who were to be expelled from Spain, to remain within Spanish borders when they were benefiting of parental rights on account of their descendents, even in spite of having divorced, so far the divorce agreement or judgment foresee a visit-regime.

3.1.3. At the moment, the current debate focuses on the question of criminal offences and its compatibility with the requirements of the Act on Rights and Duties of Aliens in Spain, given that the renovation of stay permits are subject to the good behaviour of the applicant, therefore, the general legal regime of article 57 of the mentioned Act, foresees the expulsion of all those foreigners who have been criminally condemned. However, the mid-hierarchy Courts of Spain have found in the way that a person demanding such renovation and who is the father/mother of an under-age Spaniard has a right to stay in spite of such criminal records, given that they are to request the “EU-citizen relative card”, whose regulation does not allow Courts to include the absence of criminal records as one of the requisites of the renovation. At the moment Spanish Supreme Court, Contencioso Administrativo, Section 3, has referred the question to EUCJ, by Order, 30 March 2014, asking as follows:

> “Is it compatible with article 20 TFEU, as interpreted by Judgments of 19 October 2004 (C-200/02) and 8 March 2011 (C-34/09), a national Act that rules out the permit of stay to parents of under-age EU citizens, who also depend on them, on account of the criminal records of the applicant in the country where he/she applies, even in spite of conveying the forced exit of the under-age citizen as a consequence of his parents leaving the territory?”

3.1.4. In the jurisprudence of Regional Supreme Tribunals, the question has been dealt with as follows:

a) Some Tribunals have straight discarded the expulsion from the territory and granted the permit to stay on account of the under-age EU citizen, therefore enforcing article 20 TFEU as interpreted in Ruiz Zambrano: JTSJ, Valencia, Contencioso-Administrativo, Section 5, 22 February 2013; JTSJ, Valencia, Contencioso-Administrativo, Section 5, 27 February 2013; JTSJ, Valencia, Contencioso-Administrativo, Section 5, 24 April 2013; JTSJ, Valencia, Contencioso-Administrativo, Section 5, 8 May 2013; JTSJ, Valencia, Contencioso-Administrativo, Section, 5, 31 May 2013; JTSJ, Basque Country, Contencioso-Administrativo,6 November 2014; JTSJ, Castile-Leon, Contencioso-Administrativo, Section 1, 13 December 2013; JTSJ, Valencia, Contencioso-Administrativo, Section 5, 4 June 2014; JTSJ, Galicia, Contencioso-Administrativo, Section 1, 9 July 2014; JTSJ, Andalusia, Contencioso-Administrativo, Section 4, 14 July 2014; JTSJ, Catalonia, Contencioso-Administrativo, Section 2, 14 November 2014; TSJ, Madrid, Contencioso-Administrativo, Section 10, 11 December 2014; JTSJ, Castile-La Mancha, Contencioso-Administrativo, Section 2, 22 January 2015; JTSJ, Islas Baleares, Contencioso-Administrativo, Section 1, 28 January 2015; JTSJ, Andalusia, Contencioso-Administrativo, Section 4, 20 March 2015; JTSJ, Basque Country, Contencioso-Administrativo, 24 March 2015; JTSJ, Valencia, Contencioso-Administrativo, Section 5, 25 February 2015; JTSJ, Basque Country, Contencioso-Administrativo, 27-2-2015; JTSJ, Valencia, Contencioso-Administrativo, Section 5, 25 March 2015; JTSJ, Valencia, Contencioso-Administrativo, Section 5, 22 May 2015; JTSJ, Madrid, Contencioso-Administrativo, Section 10, 16 June 2015; JTSJ, Aragón, Contencioso-Administrativo, Section 1, 24 July 2015.
b) Other Tribunals point out a double basis: on the one hand, both article 20 TFEU in the light of Ruiz Zambrano and, on the other hand, also that the internal legislation and its systematic enforcement would lead to conclude that criminal records may not univocally imply the expulsion of the person concerned when rooting is involved, in other words, when the rooting of the person in Spain is clear, the existence of criminal records does not put down the application (JTSJ, Basque Country, Contencioso-Administrativo, 25 June 2014).
c) The Judgment of the TSJ, Basque Country, Contencioso-Administrativo, 25 February 2014, grants the permit, on account of article 20 TFEU as interpreted in Ruiz Zambrano, to a father who has been divorced and has criminal records on account of the interest of the under-age citizen, given that the divorce-agreement foresaw a visit regime. This same reasoning may be found in JTSJ, Basque Country, Contencioso-Administrativo, 9 April 2013, where the Tribunal resorts to EU Law to hold the interest of the under-age EU citizen in having her father live with her (JEUCJ, 23 December 2009, C-403/09, *Jasna Deticek and Maurizio Sgueglia*) and, by the same token, to article 24 of the European Union Charter of Fundamental Rights.
d) Stretching this argument in JTSJ, Basque Country, Administration Jurisdiction, 4 December 2012, in JTSJ, Valencia, Contencioso-Administrativo, Section 5, 7 October 2014; in JTSJ, Valencia, Contencioso-Administrativo, Section 5, 15 October 2014; the Tribunals found that the person claiming to be a relative did not fit in the categories contained in Directive 2004/38, therefore, they were not entitled to the protection

dispensed to EU citizen's relatives, however, the Tribunal used a double background to support the applicant and decided to grant a residence permit: firstly, with a view to enforcing the EU Fundamental Rights Charter, secondly, interpreting the situation quoting expressly the Judgment of EUCJ, 15 November 2011, C-265/11, *Dereci et al.*, and by the same token invoking article 8 of the European Convention of Human Rights. In this same vein, the TSJ of Castile-Leon, Contencioso-Administrativo, Section 1, found, in the Judgment of 13 June 2014, that a mother/father may not claim the Ruiz Zambrano doctrine when the other genitor is a Spanish national, given that the parents may be expelled from Spain without jeopardizing the enjoyment of the EU citizenship by the under-age, however, the Tribunal considered that the references to article 7 of EU Fundamental Rights Charter and to article 8 of ECHR, in addition to national jurisprudence of the Constitutional Court, are ground enough to concede the permit of residence; what has been later confirmed in JTSJ, Castile-Leon, Contencioso-Administrativo, Section 1, 27 February 2015.

e) Conversely to the previous judgment, the very TSJ, Basque Country, Contencioso-Administrativo, Judgment 29 January 2014, considered that in spite of article 20 TFEU, the interest of the under-age EU citizen and the crimes of domestic violence against the kid, what had previously placed her under the tutelage of the Regional Social Authorities, and the express previsions of RD 240/2007, allow to deny the residence permit on account of "public order".

3.1.5. Turning now to past debates, but at the same time very relevant, the Government released RD 240/2007 with the sole intention of adjusting national law to EU law, therefore, trying to incorporate a comprehensive regime for EU citizens moving into Spain. The regulation was so EU-centred that it turned out to impose on Spaniards a more severe regime in order to have their relatives live in Spain, given that EU citizen whose nationality was not Spanish could rely on RD 240/2007, whereas Spaniards in the same situation were bound to employ the common regime, as foreseen in the Act on the Rights and Duties of Aliens. This situation was put to an end, when the Supreme Court found that some of the articles of the RD 240/2007 should be declared null and void. The case was as follows. Article 2 of the RD 240/2007 contained the scope of personal application, explaining that RD 240/2007 was to applicable to "the relatives of any OTHER MEMBER STATE (emphasis added) nationals", thus the regimen, in a literal interpretation, was excluded for the relatives of Spaniards, who had to undergo the different procedures enshrined in the Act on Rights and Duties of Aliens. In the view of the Supreme Court there was a contradiction between RD 240/2007 and Directive 2004/38/EC:

> "The recourse must be accepted, given that article 3 of Directive 2004/38/EEC affects –as subjective scope of the norm- the position of "all citizens who move or reside in a Member State other than that of which they are a national, and to their family members", expression which does not exclude the a Spaniard's family –regardless of their nationality- residing with him/her [...] in other EU Member State, in the case of return from another Member State to the State of their nationality, in other words, to Spain. This exclusion conversely does take place on account of the expression object of this recourse in article 2, first paragraph, of the mentioned RD, thus the relatives of the Spaniards –who obviously are not endowed with Spanish nationality- are subjected to a different regimen [...] To sum up, the return of Spaniards to their

country of origin, from another Member States of EU accompanied by their family (extra-European nationals), must not affect the European status that they are enjoying in this other Member States, so far that European Status enshrined in Directive 2004/38/EC cannot be curtailed or undermined by the internal regulation of one of the Member States"(JSC, Contencioso-Administrativo, Section 5, 1 June 2010).

The Spanish Supreme Court declared on these grounds that article 2 was null and void and ever since the question has been so interpreted and enforced by the Tribunals.

3.2. What is the relation between Article 21 and 20 TFEU in national case law? Do national courts assess the scope of applicability of both articles?

The relation does not exist, in fact, most of the judgments refer only to article 20 TFEU, but they do not delve into the relation between both articles. In order to assess the applicability of article TFEU most judgments from Ruiz Zambrano case on quote literally this judgment of the EUCJ.

3.3. According to Article 16 of Directive 2004/38 Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there." Are there any additional conditions in your country for EU citizens to acquire a permanent residency status in your country?

No, there are not. Article 10 RD 240/2007 develops the regimen of the Directive, basically there is little difference between both norms, notwithstanding attention must be paid to the transposition of article 17, given that Spanish R D eases the granting of the permanent residence when the spouse or the registered couple-mate is Spanish or she/he has been Spanish and they have lost their nationality on cause of the marriage, in such cases the length of the residence will not be borne in mind, so far the case falls within the scope of article 17.1 (a) and (b) of Directive 2004/38.

Question 4 – Family Life and free movement rights

4.1. Who are defined as family members of EU citizens in your country?

4.1.1. The definition of family members is to be found in Royal Decree 240/2007 and Royal Decree 987/2015, 30 October. The situation is as follows, on the one hand the initial regime contained in R D 240/2007 foresaw a concept of family that could be considered restrictive, therefore and on the other hand, R D 987/2015 incorporated into Spanish law a broader concept of family members. The preamble of this second national regulation expressly elaborates on this topic quoting the interpretation of Directive 2004/38/EC operated by EUCJ in Lida case (C-40/11), 8-11-2012, and mentioning the "dependant" concept as the key element of this new R D, whose roots are to be found in Lebon case (C-316/85, 18-6-1987), Jia (C-1/05, 9-1-2007) or Reyes (C-423/12, 16-1-2014). In the same vein, the Preamble of RD 987/2005 retrieves SEUCJ Rahman case, C-83/11, 5-9-2012, in which the Court

reminded of the right of State not to accept every entrance application in spite of demonstrating that there exists “dependence” of a EU citizen.

4.1.2. In the light of this explanation, article 2 of R D 240/2007 defines family as follows:

a) The spouse of the EU citizen, on condition that there is no declaration or agreement of nullity of the marriage or divorce.
b) The law-partner if registered within the authorities of EU or EES States, unless the record has been cancelled and bearing in mind that the record as law-couple and matrimony are incompatible.
c) The descendents of the EU citizen and those of his/her spouse/law-partner if they are under 21, dependants or legally-declared disable, provided that it has not taken place a declaration or agreement of nullity or a divorce or the law-couple record has not yet been cancelled.
d) Straight forebears of the EU citizen and those of his/her spouse/law-partner provided they are dependants, and that it has not taken place a declaration or agreement of nullity or a divorce or the law-couple record has not yet been cancelled.

4.1.3. The concept of dependant is developed by R D 987/2015, which has introduced an article 2.bis in R D 240/2007 that puts it this way:

a) EU citizen’s family members, no matter their nationality, can apply for the regime of R D 240/2007, when accompanying him/her or gathering with him/her, if they irrefutably prove that at the moment of the application:
    a. They depend on the EU citizen or they live with the EU citizen in their country of origin.
    b. That on account of serious health reasons or by cause of disability, the EU citizen’s familiar must strictly claim to be dependent of the EU citizen and this takes on his/her personal care.
b) The non registered law-couple, provided they prove that it is long-lasting. In any event, this shall be so considered when it is proven that they have martially lived together and continuously over a year, unless they have common descendants in which case they shall prove the mere living-together.

4.1.4. This concept of dependant is separated from the concept of dependant foreseen in the Act on Rights and Duties of Aliens in Spain, which demands a closer inspection in order to verify the degree of dependence, as may be illustrated by Supreme Court Judgment, Contencioso Administrativo, Section 3, 24 July 2014, which delves into the economic exchanges and their importance as basis of the daily-living of the dependant; as the very Supreme Court has stated, “it is foregoing that the familiar grouping is easier and less restrictive criteria must be enforced when the applicant is a EU Citizen [...] and that the interpretation of “dependant” must be inferred from European law...” (JSC, Contencioso Administrativo, Section 3, 20 October 2011).

4.1.5. The R D further calls on the authorities in charge to assess individually each case bearing in mind:

a) Personal circumstances of the case.
b) The degree of financial or physical dependence and the degree of kinship.
c) When it is relevant the degree of seriousness of the sickness or disability.
d) That the living-together is to be considered irrefutable, if it is proven they have lived together over 24 months.
e) A non-registered law coupled benefits from this regime when they prove that it is long-lasting, in other words that they have martially lived together and continuously over a year, unless they have common descendants in which case they shall prove the mere living-together.

4.2. Under which conditions can third country nationals have a (derived) residence right as a family member of (i) an EU citizen with the nationality of another Member State or as a family member of (ii) a citizen with the nationality of your country?

As exposed in the previous answer.

4.3. What are obstacles for EU citizens in your country with regard to family life with a third country national and or an EU citizen?

The Foro para la Integración Social de los Inmigrantes has drawn attention to the lapse of time spent in the procedure to get the resolutions on familiar-grouping and its filing within the Civil Register, up to two years. However, this flaw has been detected only in the common regime of familiar-grouping and nationality acquisition, not concerning the EU Citizen regime of R D 240/2007 (Foro Inmigración Social de los Inmigrantes, 2014[646]).

THEME III: LIMITATIONS TO CORE CITIZENSHIP RIGHTS

QUESTION 5 – EXPULSION

5.1. Please explain how the grounds of expulsion of Article 27 and 28 of Directive 2004/38 are used by national authorities and how they are referred to in national case law.

1. he Court of Justice of the European Union considers criminal offenses covered by particularly serious crime areas set out in the Treaty on the Functioning of the European Union can justify an expulsion of a citizen of the Union, even if he has lived for over ten years in the host Member State. Although the Court determines the extent to which the conduct of the person concerned poses a real and present threat to a fundamental interest of that State, to extend the scope of the concept of "imperative grounds of public security" can lead to an overlap with the concept of "public order" to decrease, in practice, the enhanced protection against expulsion

[646] The "Foro para la Integración Social de los Inmigrantes", it is a consultive organ integrated by representantives of the Government and the representatives of NGO's specialized in the matter, it was foreseen in the Law of Rights and Duties of Aliens, and developed by R D 557/2011. The members of the Foro can be consulted in a Ministerial Order of the Ministry of Employment and Social Security (http://www.foroinmigracion.es/es/Normativa/documentos/BOE-14_julio_2015_NOMBRAMIENTO.pdf)

provided for in subparagraph a) of paragraph 3 of Article 28 of Directive 2004/38. The Court distinguished between imperative grounds of public security, a concept which is considerably more limited than serious reasons, within the meaning of paragraph 2 of this Article, given that the European Union legislature clearly intended to circumscribe the measures based on that paragraph 3 to exceptional circumstances. But the individualization of matter left to the national court is the determination that criminal offenses constitute a particularly serious detriment to a fundamental interest of society can pose a direct threat to the peace and security of the population and therefore should be included in the concept of imperative grounds of public security may justify an expulsion, as well as assessing the reinforced protection, according to understand the importance of ties with the host.

2. In the Supreme Court declared in several judgments that the concept of public order may be invoked in order to justify the expulsion of a national of a Member State of the Community national, in the event that there is a real threat and sufficiently serious threat to a fundamental interest of society, without which the mere existence of criminal records alone constitute grounds for the taking of such action, because only when those evidencing the existence of personal conduct constituting a present threat to public policy should be restricting the residence of a national of another Member State.
3. Under domestic law, and consequently Directive 2004/38/EC of the European Parliament and of the Council of 29th April 2004 on the right of citizens of the Union and their family members to move and reside freely in the territory of the Member States it led to the Royal Decree no. 240/2007 of 16th February on the entry, free movement and residence in Spain of citizens of the Member States of the European Union and other States party to the Agreement on the European Economic Area - recently amended by Royal Decree 1710/2011 of 18th November - internal regulatory text of preferred application, subject to any more beneficial, the Organic Law on Rights and Freedoms of Foreigners in Spain and their social integration, as expressly provided for in Article 1.3 of this.
4. The expulsion order may only be issued, unless duly justified urgency, with "the previous report of the State Bar of the province" (Art.16.1). Subsequently, the decision of the competent authority ordering the expulsion of the applicant for residence permit or registration certificate, "without prejudice to any administrative or judicial remedies legally appropriate," "shall, upon request, for examination by the Director of the Legal Service of the State or the State Bar in the province, "the applicant may submit allegations" unless precluded by reasons of state security "; Following the opinion of the State Attorney, the competent authority shall confirm or revoke the decision (Art.16.2). Compliance with this provision is given to Community legislation which provides that an appeal is entered against measures of expulsion on grounds public policy. It should be added that the expulsion must be motivated with information about legal remedies that can be brought against them, delay to do it to whom authority should be formalized and the time to leave the Spanish territory. Except in duly justified urgent cases this period may not be less than one month from the date of notification (art. 18.2). In any case, the decision on the extension of the deadline may not to be an impediment to assume control of the expulsion order before administrative and/or judicial bodies. The expulsion orders shall be signed by

the Government Deputy Delegate or Delegate in the case of a single province Autonomy (art. 18.1).

5. Within the preferential treatment that is established for the presence of EU citizens in Spain, it must be considered that, for purposes of expulsions, while the general rule of Article 57.2 of the Organic Law on Rights and Freedoms of Foreigners in Spain and their social integration, is that the conviction of a foreign citizen inside or outside Spain, for a criminal offense punishable by deprivation of liberty exceeding one year, is cause for expulsion, in far as EU citizens and assimilated only an expulsion decision may be taken regarding nationals of a Member State of the European Union or another State party to the Agreement on the European Economic Area, or their family members, irrespective of nationality, who have acquired right of permanent residence in Spain, where there are serious grounds of public policy or public security. Also, before a decision taken in this regard, the length of residence and social and cultural integration of the person concerned in Spain will take into account their age, health, family and economic situation, and the importance of links with their country of origin and that when adopted for reasons of public policy or public security the decisions of expulsion shall be based exclusively on the personal conduct of the person who is the subject of those and, in any case, must represent a genuine, actual and sufficiently serious threat affecting a fundamental interest of society, and that will be assessed by the competent body to decide, based on reports from the police or judicial authorities, prosecutors contained in the record. The existence of previous criminal convictions shall not in itself One reason for taking such measures (art. 15.1.c), second paragraph, and 5. d) of the Regulation on Entry, Free Circulation and Residence in Spain of Citizens of Member States of the European Union and other States party to the Agreement on the European Economic Area. Therefore, it must be concluded that, although limited and restricted in relation to foreign citizens in general, it is possible the expulsion of EU citizens of the country where there are serious grounds of public policy or public security, which must be assessed before taken one decision to that effect, for instance the duration of residence and social and cultural integration of the person concerned in Spain, their age, state of health, family and economic situation, and the importance of links with their country of origin and, when adopted by reasons of public policy or public security, such decisions must be based exclusively on the personal conduct of those who is the subject of which, in any case, it must represent a genuine, present and sufficiently serious threat affecting a fundamental interest of the society, and it will be assessed by the competent body to decide, based on reports from the police or judicial authorities, prosecutors contained in the record. Special rule being that the existence of previous criminal convictions shall not in itself grounds for taking such measures.
6. It is interesting to see, for example, the argument set out in the Judgment of the Supreme Court of December 17th, 1993: "The Maastricht Treaty signed in Maastricht on February 7th, 1992, and in force since November 1st, 1993, once finally ratified after the Judgement of the German Constitutional Court of 12th October 1993, it is recognition of the incorporation of the concept of citizenship of the Union, specifying the extension in the opinion of this art. 8) EC Treaty and conferring on European citizens in the art. 8) EC Treaty, the right to move and reside freely within the territory of the Member States, inferring from its regulation the essential content of the free movement comprising a ban for the host of demanding requirements, establish

impediments or offer obstacles they go beyond what is necessary to ensure public order and safety, and control the identity and nationality of those who cross the border. " This affirmative assertion to freedom of movement doctrine is not only assumed by the Supreme Court, but also by other courts, including one can also find resolutions relevant to the topic at hand. Deserve special attention, for example, two judgments of the Superior Court of Madrid, meeting about administrative decisions that decreed the expulsion of two EU citizens as a result of a protest at the opening of the joint annual meeting of the IMF and the World Bank attended by the Kings of Spain. The conduct of the two EU citizens led to the imposition of a sentence of one day in prison (under arrest). The Court considers disproportionate expulsion order and the subsequent ban on entry into our territory within three years. The Court echoed the ECJ jurisprudence in cases that pertain to public policy is made, and in particular the issues ***Bouchereau*** and ***Van Duyn*** and they stress that the activity is not considered sufficiently important to justify the expulsion of the national territory the appellant. The Court argues that "recourse to the concept of public policy presupposes, in any event, the existence, in addition to the disruption to the social order which any infringement of the law, of a genuine and sufficiently serious threat undermines interest critical of society" and remembered that the mere existence of criminal convictions may not automatically motivate an expulsion. Moreover, highlights how the Administration will not give adequate reasons why it considers that the conduct in question is contrary to the specific interests of public order, pointing instead the court that "no evidence that the appellant from his criminal conviction, had developed a personal conduct that this desirable on grounds of public policy, public security or public health, their expulsion from Spain. Ultimately it lack any motivation or consideration of the personal conduct of the appellant as a real and statements against the fundamental interests of society threat". In similar terms also it expressed the Supreme Court against an expulsion of a Community citizen for five years, which also estimates that conduct should not be considered contrary to public policy. In line outline what conducts are to be excluded from the qualification of public policy, we must exclude an offense against traffic safety of driving under the influence of alcohol. It reaffirms that the mere existence of criminal convictions does not equal risk to public order and fewer cases in which it has not even been such conviction. Also it references to the principle of proportionality when analyzing the conformity of the measure and the demonstration that the current threat is made. In this sense, in some cases, it is considered under Community law expulsion when, despite the absence of criminal convictions, police investigations offer a clear indication of risk to public order.

7. More recently they have imposed, mainly to Bulgarian and Romanian citizens, measures of expulsion from national territory on the basis of reasons of public order and public security. This requires, as we saw, to take into account his personal conduct, which, in any case, must represent a genuine, present and sufficiently serious threat affecting a fundamental interest of society, and that will be valued by the body competent to decide, based on reports from the police or judicial authorities, prosecutors contained in the record, without the existence of previous criminal convictions constitute, by itself, grounds for taking such measures must be assessed before taken one decision to that effect, the duration of residence and social and cultural integration of the person concerned in Spain, their age, state of health, family

and economic situation, and the importance of links with their country of origin. Rules of which it follows that the harmful consequence of the expulsion of a citizen of the European Union and other States party to the Agreement on the European Economic Area may be adopted by reason of his personal conduct constitutes a genuine, present and sufficient threat affecting a fundamental interest of society, which imposes analyze the specific situation of the appellant in that day. This has occurred even when no evidence that those expelled had been convicted criminally, but it was established that he had been arrested numerous times for offenses relating to the property. Based on these facts it can be stated that such conduct is totally incompatible with civil peace and respect for the other members of society, then, who leads in a short time, to the plurality of policing, beyond respect for the presumption of innocence that is creditor as to each of the situations that gave rise to them, may not be understood as a person who respects public order and social peace and should be understood to constitute a real threat, present and sufficiently serious threat affecting a fundamental interest of society in which he lived and whose hospitality may not be considered to have returned. The conduct of the expelled is not compatible with respect for the public order and peace if Spanish citizens continually triggers actions of the law enforcement in the investigation of his conduct.

8. Finally, we want to bring up a judgment of the Superior Court of Cantabria, of September 24th, 2012, which dismissed the appeal filed by the Government Delegation in Cantabria, confirming the judgment of the Court of Administrative Litigation No.1 of Santander of 21th November 2011, by which the decision of the administration to expel a foreign country long-term resident was revoked. Interesting statement because clearly and educational exhibits abundant ECJ case law on the expulsion of foreign citizens living long-lasting way. In this sense the idea that appreciates "the conviction of an offense, despite being sentenced to a penalty of imprisonment exceeding one year is not enough by itself to appreciate the real and serious threat to public order".

5.2. Is there evidence in decisions of the national authorities and case law that not fulfilling the conditions laid down in Article 7 (1) (b) Directive 2004/38 for the right to reside in another Member State (having a comprehensive healthcare insurance and sufficient means) leads to expulsion?

1. The Spanish regulation also incorporates the Community demands that these measures may not be adopted for economic reasons and should be based solely on the personal conduct of the concerned "that, in any case, must represent a genuine, present and sufficiently serious threat affecting a fundamental interest of society "without which the very existence of a criminal record can justify the imposition of such measures (art. 15.5. c) and d) Royal Decree 240/2007 of February 17th). Also the expiration of the passport, identity card or residence card may not be the grounds for expulsion (art. 15.7), because in such cases, sanctions may only equivalent to those imposed on nationals in similar cases.
2. There is in any case to take into account the Order PRE / 1490/2012, of July 9th, laying down rules for the application of Article 7 of Royal Decree 240/2004 of 16th February on entry are held, free movement and residence in Spain of citizens of the

Member States of the European Union and other States party to the Agreement on the European Economic Area. However, recent case law has indicated that the indeterminate legal concept enough to not become a burden on the social assistance in Spain during their period of residence must be located in the area of uncertainty of the legal concept, considering that the resources should be considered negative assurance area exclusively in cases where the sources of income credited reflect poor social integration in so far as it constitutes the key bow Spanish architecture immigration system.

3. As regards economic means in any case, a fixed amount may not be established, but must take into account the personal situation of nationals of a Member State of the European Union or another State party to the Agreement on the European Economic Area. In any case, this amount does not exceed the level of resources below which social assistance is granted to the Spanish or the amount of the minimum pension from Social Security.
4. The PRE/1490/2012 Order of July 9th has received regulatory development by different autonomous communities deserve one positive value as a whole.

5.3. Is there evidence that in decisions of national authorities or case law a different (lower) standard of public order than prescribed by Directive 2004/38 and the case law of the CJEU is used with regard to expulsion grounds? (e.g. In the Netherlands there seems to be a tendency to ground expulsion orders on a national ground of public order, which has a lower threshold than the EU ground for public order)

1. There is no evidence indicating that the decisions of national authorities follow a concept other than that specified by the Directive 2004738 public order. The entry of Spain into the European Communities has led to greater objectification of the concept of public order in the entry and stay in our country, which has also benefited from EU foreigners, without prejudice to the scope of the clause that much more wide in the case of the latter.
2. Spanish practice shows that freedom of movement is the most significant for individuals between classic freedoms of Community law, and that after the Treaty of Maastricht, could well be defined as "fundamental right of European citizens". The conclusion to be drawn from the study of Spanish jurisprudence is that, as some Statement has expressly formulated, the concept of public order is handled a "European" restrictive concept. Which not only it is in line with Community law, but also with an interpretation in accordance with our constitutional order. The extent of Community Law interpretation to aliens generally emphasizes the assumption of an increasing objectification of the concept of public policy, itself a recognition, on the one hand, individual rights and, secondly, the rule of law, no longer part of Community law, but the common European law.

Question 6 – Abuse

According to the case law of the CJEU citizens may not benefit from abusing EU law. In the case *G and S* the CJEU ruled that "Proof of such an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the European Union rules, the purpose of those rules has not been achieved, and, secondly, a subjective element consisting in the intention to obtain an advantage from the European Union rules by artificially creating the conditions laid down for obtaining it."

Could you provide information on how abuse of EU free movement rules for EU citizens is interpreted and applied by national authorities and in national case law?

1. None except for some marriages and other unions of convenience.
2. In 2014 the European Commission published a handbook to help EU Member States take action against marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement. The Commission prepared the handbook in close cooperation with Member States following requests by a number of EU countries for support in dealing with the phenomenon. The aim of the handbook is to help national authorities effectively tackle marriages of convenience, while safeguarding the right of EU citizens to free movement. The guidelines published will also help to ensure that national authorities address this phenomenon - the extent of which varies significantly between Member States, - based on the same factual and legal criteria throughout the Union.

Theme IV: EU citizenship core rights in practice

Question 7 – Barriers from an empirical perspective: actual barriers to core citizenship rights

What are barriers to core citizenship rights (the rights to nationality, the right to reside, the right to family life) according to legal professionals working in the field of migration law?

(Please ask a lawyer, legal officer of the national migration services for information on what the actual barriers are in your country in their perspective.)

Question 8 – Systematic or notorious deficiencies in the country under study?

Please, discuss here in detail any 'revealing' cases of weaknesses in the effective exercise of core citizenship rights in your country.

Question 9 – Good practices

Please highlight any other legal norms, policies, instruments or practical tools which facilitate the exercise core citizenship rights in the country under study.

The reports of Instituto Elcano (Spanish think-tank, see: "Inmigración: propuestas para un cambio", written by C. González Enríquez, nº 12, December 2009) and NGOs (Foro para la Integración Social de los Inmigrantes, "Informe sobre la situación de los inmigrantes y refugiados en España. Junio 2014" http://www.foroinmigracion.es/es/MANDATO-FORO-

2010-2013/DocumentosAprobados/Informes/Documento_N_4_Informe_2014.pdf), point out some hints that may help improving the right to acquire nationality and get residence permits. Both sources draw attention to the fact that it is necessary to increase the staff and the material resources at the disposal of the Civil Register. In the same vein, they consider that it would be very profitable that the competent authorities standardized forms and formal elements of the documents that be presented by the parties. The Elcano Instituto thinks it very useful to create a national Institute for Immigration. It is remarkable that the Instituto Elcano considers profitable that the acquisition of nationality legislation reduces the inequalities favouring currently those born in Latin-America, Philippines, Portugal, etc.; the grounds seem to be the historical moment in which these rules were enacted, given that the background against which they were passed has faded, furthermore, the then legislator thought it impossible that a fair number of people from those countries could want to acquire Spanish nationality, what time has turned out to be false, given that between 2011 and 2013, 486.302 resolutions granting nationality were conceded by the Government. From the whole cipher, in 2011-2012, 116691 immigrants were Latin-American, 24816 were African, and 4297 were European, what conveys that most of nationality acquisitions take place after two years of residence (105842). In the period between 2012-2013, 248484 people coming from Latin-America became Spaniards, 74744 from Africa, 10916 Europeans, and 10020 Asian; 164003 acquired nationality by residence of two years (Data taken from Informe sobre la situación de los inmigrantes y refugiados en España. Junio 2014" http://www.foroinmigracion.es/es/MANDATO-FORO-2010-2013/DocumentosAprobados/Informes/Documento_N_4_Informe_2014.pdf p.13, te report also points out that for the momento there are not any more precise statistical records in Spain).

Annexes

- ✓ National provisions

Please provide a list of the most important national legal provisions (constitutional acts, legislation, regulations, domestic transposition and implementation measures, etc) and a list of relevant cases for your Member State (name, date and publication reference).

- ✓ Bibliography

Please provide a list of what you consider the most relevant recent bibliographic sources with respect to your country. You can also suggest references to books or articles which in your view should be included in the bibliography concerning relevant EU law (limit your suggestions to a maximum of 5 references). Please mention the title in the original language and include a translation in English, in brackets.

For the bibliography only, rather than stating the foreign language title in italics, please use single quotation marks so as to distinguish it from the title of the journal.

National Provisions.

1. Spanish Constitution, OJS, nº 311, 29 December 1978.

2. Royal Decree publishing the Civil Code, OJS nº 206, 25 July 1889.
3. Royal Decree 39/1996, 19 January, granting Spanish nationality to the members of the International Brigades, OJS nº 56, 5 March 1996.
4. Royal Decree 453/2004, 18 March, granting Spanish nationality to the victims of the terrorist attack in Madrid, 11 March 2004, OJS, nº 70, 22 March 2004.
5. R D 1792/2008, 3 November, on the granting of Spanish Nationality to the volunteers to the International Brigades, OJS nº 277, 17 November 2008
6. Royal Decree 240/2007, 16 February, on the entry, freedom of movement and residence of EU citizens and citizens of the EEA in Spain, OJS nº 51, 28-2-2007, as amended by
7. Royal Decree 1161/2009, 10 July, amending the Royal Decree 240/2007, 16 February, on the entry, freedom of movement and residence of EU citizens and citizens of the EEA in Spain, OJS nº 177, 23 July 2009.
8. Royal Decree-Law 16/2012, 20 April, on urgent measures for the sustainability of the Public Health National System and the improvement of its quality and service, OJS nº 98, 24 April 2012.
9. Royal Decree 1192/2012, 3 August, on the condition of beneficiary and insured entitled to sanitary assistance under the Public Health System, OJS nº 186, 4 August 2012
10. Royal Decree 987/2015, 30 October, amending the Royal Decree 240/2007, 16 February, on the entry, freedom of movement and residence of EU citizens and citizens of the EEA in Spain, OJS nº 268, 9 November 2015.
11. R. D. 1004/2015, 6 November, approving the regulation on the acquisition of Spanish nationality by residence, OJS nº 267, 7 November 2015.

National Courts and Tribunals decisions.

A) Supreme Court:

1. Supreme Court Judgment, Contencioso Administrativo, Section 3, 20 October 2011
2. Order of Supreme Court, Contencioso Administrativo, Section 3, 30 March 2014
3. Supreme Court Judgment, Contencioso Administrativo, Section 3, 24 July 2014
4. Judgment of Supreme Court, Contencioso Administrativo, Section 6, 9 March 2015
5. Judgment of Supreme Court, Contencioso Administrativo, Section 6, 22 December 2011

B) Judgment of Tribunal Superior de Justicia (JTSJ).

1. JTSJ, Basque Country, Contencioso-Administrativo, Section 2, 4 December 2012
2. JTSJ, Valencia, Contencioso-Administrativo, Section 5, 22 February 2013
3. JTSJ, Valencia, Contencioso-Administrativo, Section 5, 27 February 2013
4. JTSJ, Basque Country, Contencioso-Administrativo, 9 April 2013
5. JTSJ, Valencia, Contencioso-Administrativo, Section 5, 24 April 2013
6. JTSJ, Valencia, Contencioso-Administrativo, Section 5, 8 May 2013
7. JTSJ, Valencia, Contencioso-Administrativo, Section, 5, 31 May 2013

8. JTSJ, Castile-Leon, Contencioso-Administrativo, Section 1, 13 December 2013
9. JTSJ, Basque Country, Contencioso-Administrativo, Section, 29 January 2014
10. JTSJ, Basque Country, Contencioso-Administrativo, 25 February 2014
11. JTSJ, Valencia, Contencioso-Administrativo, Section 5, 4 June 2014
12. JTSJ, Castile-Leon, Contencioso-Administrativo, Section 1, found, 13 June 2014
13. JTSJ, Basque Country, Contencioso-Administrativo, Section 2 , 25 June 2014
14. JTSJ, Galicia, Contencioso-Administrativo, Section 1, 9 July 2014
15. JTSJ, Andalusia, Contencioso-Administrativo, Section 4, 14 July 2014
16. JTSJ, Valencia, Contencioso-Administrativo, Section 5, 7 October 2014
17. JTSJ, Valencia, Contencioso-Administrativo, Section 5, 15 October 2014
18. JTSJ, Basque Country, Contencioso-Administrativo, Section 3, 6 November 2014
19. JTSJ, Catalonia, Contencioso-Administrativo, Section 2, 14 November 2014
20. JTSJ, Madrid, Contencioso-Administrativo, Section 10, 11 December 2014
21. JTSJ, Castile-La Mancha, Contencioso-Administrativo, Section 2, 22 January 2015
22. JTSJ, Islas Baleares, Contencioso-Administrativo, Section 1, 28 January 2015
23. JTSJ, Valencia, Contencioso-Administrativo, Section 5, 25 February 2015
24. JTSJ, Basque Country, Contencioso-Administrativo, Section 2, 27 February 2015
25. JTSJ, Castile-Leon, Contencioso-Administrativo, Section 1, 27 February 2015
26. JTSJ, Andalusia, Contencioso-Administrativo, Section 4, 20 March 2015
27. JTSJ, Basque Country, Contencioso-Administrativo, Section 3, 24 March 2015
28. JTSJ, Valencia, Contencioso-Administrativo, Section 5, 25 March 2015
29. JTSJ, Valencia, Contencioso-Administrativo, Section 5, 22 May 2015
30. JTSJ, Madrid, Contencioso-Administrativo, Section 10, 16 June 2015
31. JTSJ, Aragón, Contencioso-Administrativo, Section 1, 24 July 2015

Bibliography

1. ANDRÉS SÁENZ DE SANTA MARÍA, P., “Movilidad de estudiantes y ciudadanía de la Unión: un análisis a través de la jurisprudencia del TJUE” (Students movility and EU citizenship: an analysis of EUCJ jurisprudence”), *Revista de Derecho de la Unión Europea,* nº 27/28, 2014-2015, pp. 231-258.
2. PÉREZ VERA, E., “Ciudadanía y nacionalidad de los Estados miembros” (“Citizenship and nationality of Member States”), *Revista de Derecho de la Unión Europea,* nº27/28, 2014-2015, pp. 217-230.
3. RODIÈRE, P., “Quel droit de circulation en Europe pour les personnes inactives et démunies ?”, *Journal de Droit Européen,* 2015, nº 218, pp. 146-151.
4. JIMÉNEZ BLANCO, P., “Los demandantes de empleo en Europa: derecho de residencia y acceso a las prestaciones sociales”, *Bitácora Millenium DiPr,* nº 2, 2015, http://www.millenniumdipr.com/ba-33-los-demandantes-de-empleo-en-europa-derecho-de-residencia-y-acceso-a-las-prestaciones-sociales.