# Freedom of Movement in the EU:
## A Look Behind the Curtain


www.ecas.org

ecas
European Citizen Action Service

European Citizen Action Service

# Freedom of Movement in the EU:
## A Look Behind the Curtain

*Author: Anna Nicolaou*

*Editor: Assya Kavrakova*

*Design: Konstantin Jekov*

ACT4FREEMOVEMENT

This publication has been produced in the framework of the ACT for Free Movement Project

Epim European Programme for Integration and Migration

This project has been supported by the European Programme for Integration and Migration (EPIM), a collaborative initiative of the Network of European Foundations. The sole responsibility for the content of this publication lies with the author(s) and the content may not necessarily reflect the positions of NEF, EPIM, or the Partner Foundations.

# Contents

# THE MAIN FINDINGS

## Introduction

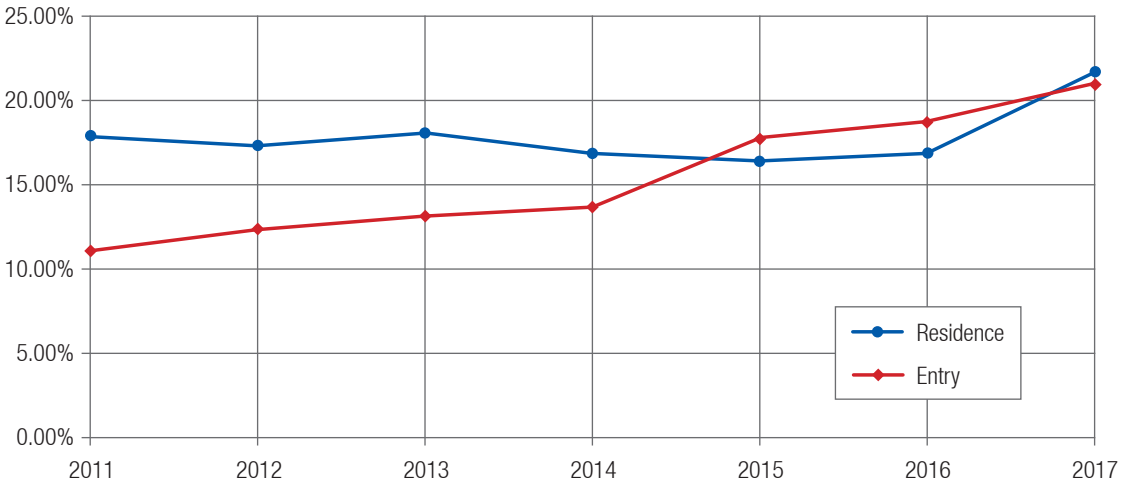
The right to move and reside in another EU country is very dear to EU citizens. The number of EU citizens living and working in another EU country has been increasing steadily, reaching 16 million in 2016[1]. While such a cross border move goes smoothly for many, there is still a large number of EU citizens who face significant difficulties.

The **European Citizen Action Service (ECAS)** has performed research in order to determine what these difficulties are and to establish what action must be taken to enable more EU citizens to move and reside freely in the EU. The findings are included in a comprehensive report, entitled **"Freedom of Movement in the EU – A Look Behind the Curtain"**[2], outlining the obstacles mobile EU citizens and their family members have reported facing with regard to their rights of **entry** and **residence** in another EU country. This is a summary of the main findings.

The evidence was derived from enquiries that citizens submitted to **Your Europe Advice (YEA)** between January 2015 and June 2017. YEA is an EU advice service on personal EU rights of citizens and businesses which ECAS manages under contract with and on behalf of the European Commission[3]. YEA receives approximately **20,000 citizen enquiries a year**.

**More than** 1/2 of all YEA enquiries **concern** citizens' **entry and residence rights** in the EU and these issues have been of increasing concern to citizens in the last year.

### Residence and Entry Queries as a % of All YEA Queries Received between 2011–2017




[1] Eurostat – Migration and migrant population statistics
http://ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics

[2] [perhaps include link to the main report here?]

[3] http://europa.eu/youreurope/advice/

While not all such enquiries received by YEA indicate problems with citizens' entry and residence rights, approximately 10–15% of them do. Thus, roughly **1,000 enquiries each year bring to light problems** that mobile EU citizens and their families are facing when travelling to, or wanting to reside in, another EU country.

Given how fundamental entry and residence rights are to freedom of movement in the EU, it is important to determine what these obstacles are, why they arise and what can be done to eliminate them.

The research has shown that these obstacles are many and varied, but some stand out because they are recurrent and affect the largest number of mobile EU citizens and their families. This summary provides an outline of the main problems, which all arise as a result of citizens' EU rights not being respected. The five areas where action is most urgently needed are identified below.

# Obstacles to Entry

**Entry rights** is an issue that has been increasing in importance over the last 6 years. While only 11% of questions received by YEA in 2011 concerned entry rights, by 2017 they had exceeded **20% of all enquiries**. While some enquiries concern the entry rights of EU nationals, **the vast majority relate to the entry rights of non-EU family members**.

## EU nationals

**EU nationals face** few issues when it comes to entering another EU state. This is reflected by the fact that **only 10% of all entry enquiries** concern EU nationals.

**The main problems** that EU nationals have reported facing when travelling within the EU are:

- Difficulties **obtaining travel documents from their own consular authorities** when they are resident in another EU country.
- Their **national ID cards not being accepted** as a valid travel document:
  - if they are in paper format – this has affected Greek and Hungarian nationals.
  - expired French ID cards have had their validity extended in France by 5 years without the possibility to obtain new cards – this leads to problems when trying to use the card as a travel document as the card appears to have expired.
- Dual EU national children have been **denied exit** by their country of nationality when traveling only with a passport issued by the country of their other EU nationality – this has affected Polish children in particular, who have been required to hold a Polish passport in order to be able to exit Poland.

## Non-EU family members

**Non-EU family members** on the other hand have been facing increasing problems. **90% of all entry enquiries** concern the rights of non-EU family members travelling with their EU family member or joining an EU migrant in their host EU country.

The main problems that non-EU family members have reported facing when travelling to, and within, the EU are:

- Difficulty obtaining clear and correct information on the specific entry rules that apply to non-EU family members from consulates and their visa service providers.
- A visa is required when it should not be:
  - from non-EU family members travelling in and out of the Schengen area, who hold a family member's residence card issued by an EU country on the basis of EU law;
  - from non-EU family members whose EU residence card will expire less than three months after their intended date of departure from the destination country.
- Those non-EU family members who do require a visa cannot apply for it in the EU country where they are visiting or even resident – they are told to return to their country of origin and apply for a visa from there.

**Non-EU family members cannot obtain a visa quickly and for free,** despite being entitled to under EU rules.

Since January 2015, YEA has received **> 500 enquiries** evidencing this problem.

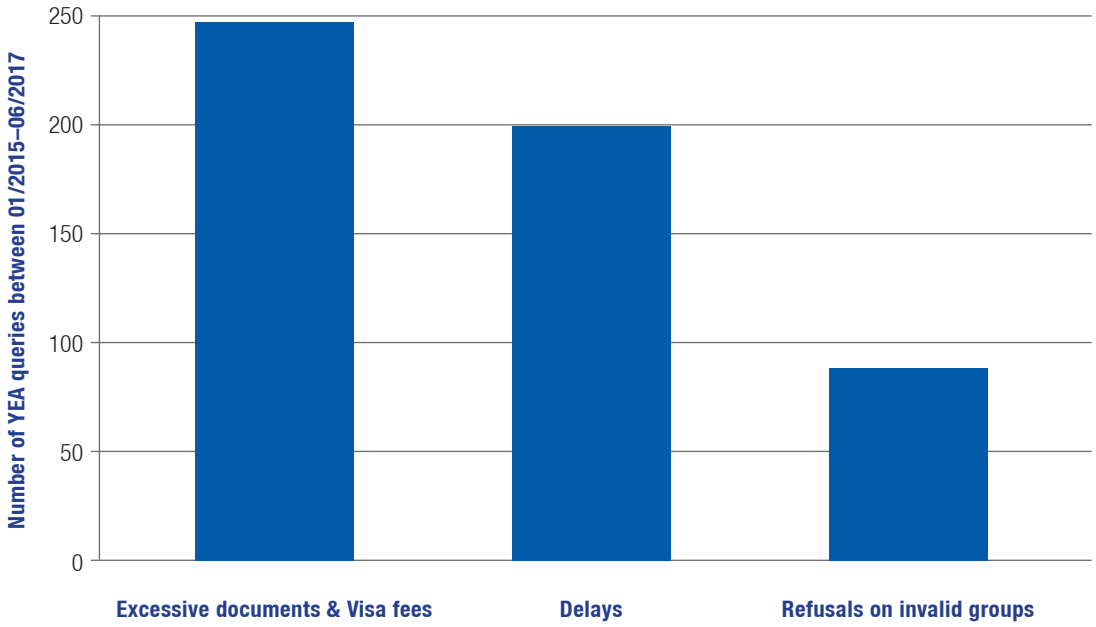
**The reasons** for this are:

- Family members have difficulties in contacting the relevant consulate and face long delays to obtain an appointment;
- No direct access to the consulate of the destination country is possible – family members are obliged to use the private visa service providers and thus pay the relevant fees;
- Consular staff and visa service providers are unaware of, or wrongly apply, EU rules (e.g. in order to process the non-EU family member's visa application under EU rules, Swedish consulates require that the EU family member is resident, or intends to reside, in Sweden); and
- Consulates do not accept that the non-EU national is a "family member" of the EU national (e.g. marriage certificates issued in non-EU countries are not accepted).

**The consequences** of non-EU family members having to obtain a visa on the same terms as other non-EU nationals are:

- ***Family members have to pay visa fees and provide excessive documents*** (e.g. proof of accommodation, health insurance, sufficient resources, justification of the purpose of the trip, proof of return travel);
- ***Delays*** in obtaining a visa ( >150 enquiries evidencing delays since January 2015 concern ***Ireland*** – citizens have reported waiting up to 2 years for an Irish visa); and
- ***Family members' applications are refused on invalid grounds*** (e.g. visas are denied because the consulate is not convinced the family member will leave the EU before the expiry of their visa).

## Consequences of the Accelerated Procedure not being Applied to non-EU Family Members




## CASE STUDY 1

A British citizen resident partly in Hungary and partly in Cameroon wished for his Cameroonian wife to visit him in Hungary. She applied for a short-term Schengen visa and provided all required documentation as well as a letter from her husband explaining the reason for her application and making express reference that it was made on the basis of EU rules that apply to family members of EU nationals.

The citizen writes:

*"Despite the above, the Cameroonian employee dealing with the visa application insisted that my wife complete the fields on the Schengen Visa application form not required by EU citizen family members, provide evidence of her own employment and bank statement and pay the visa fee. It was apparent that the visa application was being treated as an independent application as a tourist, not as the family member of an EU citizen. The employee appeared to have no knowledge of Directive 2004/38. [...]*

*My wife was requested to return to the consulate 2 days later to collect her passport. When she collected it, the visa application had been rejected, for the following 2 reasons:*

'The information provided about the purpose and conditions of your intended stay was not credible'

'Your intention to depart from the territory of the Member States before the expiry of the visa could not be ascertained'

*There was also a remark* – 'It is assumed here that a covert family reunification is to take place' [...]".

(YEA enquiry from February 2016)

- **Original travel documents are withheld** (both those of the visa applicant and the EU family member) – citizens cannot travel during the visa application processing time.
- **Long term or family reunification visas are required** when a short term visa should be sufficient. The application process for such visas is more cumbersome. This is a particular problem in France and Germany, where family members who enter on a short term visa face difficulties in obtaining residence documents.
- **Visas are issued with limited duration** when family members have a right to stay with their EU family member for 3 months unconditionally.
- **Unprofessional conduct by consular staff.**
- **Detention and delays at the border** because border control officers were not aware of, or did not apply, EU rules.
- **Denied entry/exit** on grounds that do not relate to public policy/security.

# Obstacles to Residence

**Residence rights** is an issue that has always been of great concern to citizens in the EU. In **2017**, enquiries relating to residence rights in the EU had **exceeded 20% of all enquiries**. Citizens are particularly concerned about the **rights of their non-EU family members**, with such enquiries comprising **over 1/3 of all residence enquiries**.

## Difficulties obtaining a residence document

While for many citizens obtaining a residence document in their host EU country is a fairly simple matter, especially when they are moving to work and have a permanent work contract to show, there are still many who face problems. Those **most likely to face problems** obtaining a residence document for themselves and their non-EU family members are the **self-employed**, **part-time** and **interim workers**, **jobseekers**, **students**, and the **self-sufficient** (including cross border workers).

Delays in processing applications and issuing residence documents is a major problem:

- **215 enquiries** were received between January 2015 and June 2017 in which citizens complain about not getting their residence documents in time;
- **Ireland**, **Sweden** and the **UK** accounted for > 1/2 of these delays;
- **Non-EU family members** are the most affected and often have to wait longer than six months for their residence card.

## Restrictive practices by national authorities

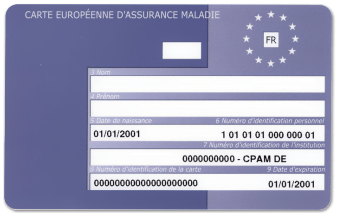
While citizens face difficulties exercising their residence rights in many EU countries, the following **three examples of restrictive practices** reported in YEA enquiries **stand out** as they affect many mobile EU citizens.

## 1. The *personnummer* saga in Sweden


Sweden, like many other countries, has a population register. Everyone who is resident in Sweden must be registered in this registry and have a personal identification number, the *personnummer*. The *personnummer* features on all Swedish ID cards and is given to EU citizens in the form of a separate card. **Many EU citizens and their family members are not able to obtain a *personnummer* in Sweden** and without it many essential public and private services are inaccessible.

Since 2015, more than 200 citizens have contacted Your Europe Advice reporting problems they face as a result of not having a *personnummer*. EU migrants and their family members are denied a *personnummer* if:

- **they cannot show that they will be resident in Sweden for > 1 year** (e.g. jobseekers, interim workers, students);
- **they are not working and cannot provide an S1 Form** (which is evidence that their home EU country will cover their healthcare costs in Sweden).
  - *The European Health Insurance Card is not accepted.*
  - *Private health insurance, although technically an alternative, is also, in practice, not accepted – there is no private health insurance product available on the Swedish market that can meet the requirements of the Swedish authorities.*




### Catch 22

Many EU countries require proof of residence in another EU country in order to issue an S1 Form. Since EU citizens no longer need to register with the immigration authorities in Sweden, the *personnummer* is the only official proof that they reside in Sweden.

**If EU migrants have no *personnummer* they often cannot get an S1 Form from their home country => no S1 Form, no *personnummer*!**

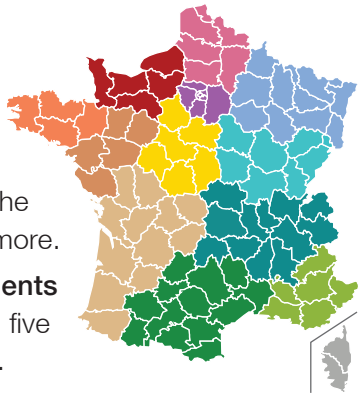
### CASE STUDY 2

An Italian national writes:

*"I have moved to Sweden as a person with sufficient resources. I have given an extract of my savings, a document to the social board saying that I will work as psychologist for a training that I have already found with the unemployment agency, I speak also Swedish, level B. I still miss a S1 document in order to obtain my personal number, this document would show that I am insured. I cannot obtain it in Italy as I am not employed. I do not know how to solve this situation. How can I explain to the tax agency that in Italy it is impossible to obtain it without work? I have the European Health Insurance card but it is not valid for those working permanently here".*

(YEA enquiry from March 2017)

## 2. The **residence cards** problem in France



There is **no requirement for EU migrants** resident in France **to register** with the national authorities, **but** French law provides that **they can apply for a residence document if they wish** and EU law gives them the right to obtain one after they have lived in France lawfully for five years or more.

**However, French prefectures often refuse to issue residence documents to EU nationals**, even to those who have lived in France for more than five years. The reason given is that EU nationals are not required to have one.

Since the Brexit referendum vote, **UK nationals** have been particularly affected – they have been told to await the outcome of the Brexit negotiations before applying for residence documents.

### BUT

**EU citizens are being asked for a residence document** in order to:

- continue receiving **family or disability benefits**;
- continue receiving the **guaranteed minimum income**;
- benefit from **other public and private services**.

### CASE STUDY 3

A UK national, who is self-employed in France, writes: *"The Caisse d'Allocation Familiales in France have told me my rights will stop in France as of the 1st April 2016. I received this news today the 29/03/2016 even though the letter is dated the 16 February 2016.*

*They ask for a Titre de séjour' that the prefecture tells me is not necessary as I am an EU citizen."*

(YEA enquiry from March 2016)

## 3. The non-recognition of foreign marriage certificates in Spain, France, Italy and Portugal

EU citizens wishing to travel or move to **Spain** with their non-EU family members face difficulties applying for a visa or a residence document for their non-EU family members if their marriage certificate was issued by a non-EU country. The same problem, albeit to a somewhat lesser extent, is encountered by family members applying for entry visas for **Italy** and **France**, and those applying for residence cards in **Portugal**.

### *The requirements*

In order to recognise a **non-EU marriage certificate**, the immigration authorities or consulates often require that, besides being apostilled and officially translated, the certificate **must be**:

- **registered** in the country of the EU citizens' nationality; and/or
- **recent, not > 3 months old**.

★ *These additional requirements are not always clearly specified on the immigration portals that applicants are likely to consult.*

### *The problem*

These requirements add an administrative step that is **complicated, costly** and sometimes impossible to fulfil.

Registering a marriage certificate in one's country of origin and obtaining a new, more recent marriage certificate from the non-EU issuing country, **may take several months**. Travel to the relevant country may be necessary and the costs may not be insignificant.

★ *In some cases, citizens report that they are given only **10 days** to provide the relevant documents, otherwise they risk having their application rejected.*

**It may even be impossible** to obtain the relevant documents as some countries (e.g. the UK) do not have a registry of marriages, or in the case of same-sex marriages, because the EU citizen's country of origin does not recognise them.

### *The consequences*

Non-EU family members whose marriage to an EU national took place outside the EU are not recognised as a "family member", thus:

- they **cannot obtain a visa quickly and for free** in order to travel to the EU country;
- if they managed to enter the EU country of destination, they face **significant delays obtaining a residence card**;
  - *in the meantime, they cannot work;* and
  - *they fear that they must return to their country of origin to get a new visa if their residence application cannot be completed before their short term visa expires.*
- **same-sex spouses are not considered as family members**, even though the EU country of destination recognises same sex marriages.

## CASE STUDY 4

*"I am Hungarian holding also Serbian passport. I am working in Spain. My husband is Serbian (non EU). We got married in Serbia. They told us we need Serbian marriage certificate to be recognised in Hungary in order to get working permit for him in Spain [...]. To get it we need to wait minimum 6 months (information from official Hungarian Ministry web page we got from Hungarian embassy in Madrid), but I know people waiting already 1.5 years with no answer from Hungary.*

*My husband has his date for visa application on June 9. We got it couple of weeks ago and it is extremely difficult to get date. I am afraid that we will not have this document till then and that we will have to ask for a new appointments for him. In that case it would be earliest in August. The other problem is that Spain recognizes certificates for 3 months from issuing date and that we have to apply for appointments and certificate again if we don't get certificate on time.*

*Is there any possibility to apply with Serbian marriage certificate translated and approved in Spanish [embassy] in Belgrade since we are both holding Serbian passport. Is there any other solution for this situation".*

(YEA enquiry from April 2016)

★ *Similar problems are faced by citizens who have **non-EU birth certificates** and must rely on them to prove their family relationship to an EU citizen.*

# Conclusion and Recommendations

Although freedom of movement in the EU has come a long way and EU citizens generally move and reside freely in the EU, obstacles still remain. EU nationals with non-EU family members often see their family members' entry rights not being respected. Moreover, EU nationals wishing to settle in another EU country are not always able to obtain a residence document easily. Those without a long term work contract are more likely to face difficulties. Residence documents are still often made a prerequisite to completing administrative formalities and accessing public and private services. More needs to be done at EU and national level in order to achieve true freedom of movement in the EU.

On the basis of the evidence at hand, the following **FIVE ISSUES** that affect the largest number of mobile EU citizens and their family members are **in most need of action at EU and national level**:

**1. The personnummer problem in Sweden** – this problem has existed for over 10 years. Action taken at EU and national level to date has not been sufficient to remedy it. On the contrary, the increasing number of citizen enquiries that YEA continues to receive on this issue indicate that this problem has worsened since 2015.

**Action needed:**

- **The Swedish tax authority**, which issues the *personnummer*, **should**:
  - **accept the EHIC** as evidence of comprehensive healthcare cover; and
  - **relax the excessive requirements for private health insurance** so that private health insurance policies taken out by citizens can, in practice, be accepted as evidence of comprehensive healthcare cover in Sweden.

***Alternatively:***

A system should be put in place whereby EU migrants can contribute to the Swedish national healthcare system in a proportional way and be able to rely on this as evidence of comprehensive healthcare cover without having to provide an S1 Form or any other evidence of healthcare cover.

- **Swedish legislation** (§3 of the Swedish Population Register Law 1991) that provides for the obligation to register in the population registry if one intends to reside in Sweden for at least one year, **should be amended to allow for the possibility to register immediately, or at least within 3 months**. This would bring the concept of residence in the Swedish legislation in line with that in EU law (Directive 2004/38).

***Alternatively**, if Swedish legislation remains unaltered,*

- the Swedish tax authority should accept a letter of intent from the citizen as evidence that they are likely to be resident in Sweden for at least a year; and
- the temporary personal number, currently issued to those who can demonstrate an intent to stay in Sweden for six months, should be issued in the same format as the regular *personnummer*, to ensure it is accepted by the IT systems of public and private service providers and should be provided to all temporary residents irrespective of their intended length of stay.

**2. The residence card problem in France** – this has been a problem for approximately 3-4 years and has worsened since the Brexit vote, with UK nationals particularly affected.

**Action needed:**

- an investigation must be carried out to determine the reason behind the prefectures' frequent refusal to issue residence documents to EU nationals, despite French and EU law allowing EU nationals to obtain such documents. (Citizens' enquiries received by YEA have not provided an indication of the possible reasons behind this policy). The prefectures should be instructed to comply with the relevant French and EU legislation; and
- the Caisse d'Allocations Familiales (and any other government agency applying the same policy) should be instructed to cease making the payment of benefits conditional upon presentation of a residence document. This is a breach of EU law (Article 25 of Directive 2004/38), thus enforcement action might be considered by the European Commission, if necessary.

### 3. The marriage certificate problem in Spain, Italy, France and Portugal

**Action needed:**

Positive action is required at EU and national level to ensure that:

- **only an apostille stamp (or legalisation) and a certified translation should be required** for a non-EU marriage certificate (or other public document) to be accepted as proof of a family link when non-EU family members apply for entry visas or residence cards;
- **any additional requirements**, aiming to establish whether a marriage is genuine, **should only be imposed in cases where there is reason to suspect abuse**, not as a general policy.

### 4. Excessive delays in issuing residence cards in Sweden, Ireland and the UK

This is a persistent problem that exists in several EU countries, but it is most serious in Sweden, Ireland and the UK, which account for over half of all citizen enquiries sent to YEA where this issue has been flagged.

**Action needed:**

While the situation in the UK should be dealt with in the specific context of Brexit, **positive action at EU level is necessary in order to enforce EU law in Sweden and Ireland, ensuring that residence cards are issued to non-EU family members no later than six months from the date of application**.

### 5. Excessive delays in issuing entry visas to family members of EU nationals in Ireland

This is a serious and persistent problem, which accounts for 3/4 of all YEA citizen enquiries flagging the problem of delays in obtaining a visa. According to the Irish Naturalisation and Immigration Service, the current processing time for most visas is 8 weeks. However, family members of EU nationals have reported significantly longer delays.

**Action needed:**

Positive action is needed at EU and national level to find a solution that strikes a balance between preventing abuse and ensuring that EU free movement rules are respected so that **family members of EU nationals are issued entry visas on the basis of an accelerated procedure.**

# 1. Introduction

The right to move and reside in another Member State – enshrined in Articles 20(2)(a) and 21 TFEU – is very dear to EU citizens[1]. The number of EU citizens living and working in another EU country has been increasing steadily, reaching 16 million in 2016[2]. While such a cross border move goes smoothly for many, there is still a large number of EU citizens who could do with fewer difficulties[3] and less discrimination[4].

In the period between January 2015 and June 2017, Your Europe Advice (YEA)[5] responded to:

- **13,236 enquiries** concerning the **entry** rights EU nationals and their family members; and
- **13,127 enquiries** concerning their right to **residence** in another EU country.

Regarding **entry rights**, by far the most questions concern the rights of non-EU family members to travel with an EU migrant. Citizens want to know about the visa rules which apply to non-EU family members and whether their family members are visa exempt. Family members often face immigration and border control authorities, as well as air carrier staff, who are either unaware of, or disregard, the fact that EU law grants such family members special rights when they travel with or travel to join an EU national in another Member State.

Enquiries concerning EU citizens' entry rights comprise only a tenth of all enquiries that relate to entry, which reflects the fact that EU citizens can generally travel hassle free within the EU. Some obstacles remain, but these are not as numerous as those that are faced by their non-EU family members.

---

[1] As highlighted in several Eurobarometers – 71% of respondents to the Flash EB 430 on EU citizenship (Oct. 2015) agree that free movement of people within the EU has economic benefits for their country. 56% of respondents to Standard EB (Nov. 2016) considers the free movement of people as being the most positive result of the EU, 81% support "the free movement of EU citizens who can live, work, study and do business anywhere in the EU" and 62% have positive feelings about immigration of people from other EU Member States. The vast majority of respondents to the Commission's public consultation on EU citizenship (2015) also had a positive view of the free movement of citizens in the EU – section 2.8 of the Report (*http://ec.europa.eu/justice/citizen/document/files/2015_public_consultation_booklet_en.pdf*).

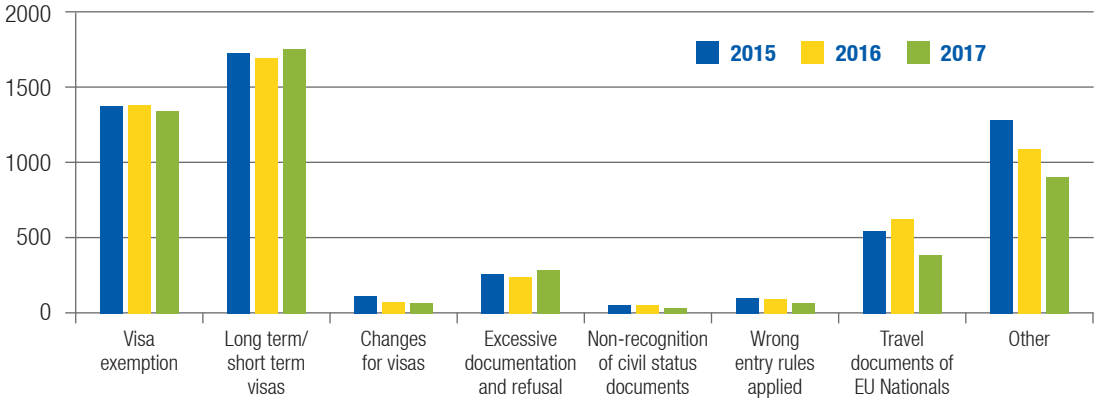
[2] Eurostat – Migration and migrant population statistics (*http://ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics*).

[3] While 64% of respondents to the Commission's public consultation on EU citizenship mention that they did not experience difficulties when living in another EU country, the remaining 36% that did, report lengthy and unclear administrative procedures, lack of sufficient information on/or awareness of their rights as the main problems they faced (see section of 2.5 of the above Report).

[4] One in five of respondents to the Commission's public consultation on citizenship have said they were discriminated on the basis of their nationality, for example, when trying to access public employment services or the healthcare system, when trying to get their civil status documents accepted or accessing social security and social and tax advantages.

[5] YEA is an EU advice service on personal EU rights of citizens and businesses which the European Citizen Action Service (ECAS) manages under contract with and on behalf of the European Commission (*http://europa.eu/youreurope/advice/*).

## YEA enquiries on the right to entry, by subtopic, received from 2015 to 2017

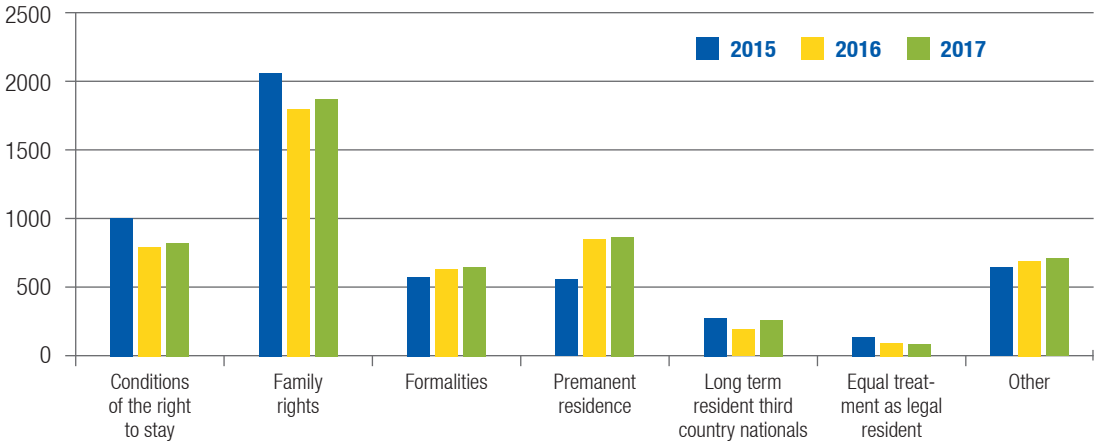



Regarding **residence rights**, the area of most concern to citizens is family rights, comprising over one third of residence related enquiries. Most enquiries come from EU nationals who wish to have their non-EU family members accompany or join them in another Member State. Non-EU family members struggle in getting their residence rights recognised and in obtaining a residence document on the basis of EU Directive 2004/38.

Citizens also often enquire about residence formalities, the conditions to their right to stay in another Member State and the right to reside permanently in another Member State. While many enquiries are requests for information or clarification of citizens' EU rights, many others reveal the obstacles that mobile EU citizens and their family members face. In particular, citizens often face significant delays in obtaining their residence documents – even up to two years in some cases. They are often required to produce excessive documentation in order to prove that they have the right to residence and having their right to permanent residence recognised is also not always easy.

This report outlines the obstacles which mobile EU citizens and their family members still encounter today when travelling within the EU and settling in other Member States. The evidence comes from enquiries citizens submitted to YEA between January 2015 and June 2017. The most 'interesting' of these enquiries concerning entry and residence rights, included in the quarterly feedback reports (QFRs) produced by ECAS from Q1 2015 to Q2 2017, have been analysed. They bring to light infringements of EU law by national authorities, gaps and grey areas in EU law and general obstacles to citizens' free movement rights.

## YEA enquiries on the right to residence, by subtopic, received from 2015 to 2017



Obstacles to **entry** are outlined in Section 2 and obstacles to **residence** in Section 3. Section 4 outlines the "grey areas" in current EU legislation that cause most trouble for mobile EU citizens and their family members, and provides suggestions on how these could be clarified.

# 2. Obstacles to Entry

## 2.1. In a nutshell

By far the most enquiries received by YEA in relation to entry rights concerned entry requirements for **non-EU family members** of migrant EU nationals. Citizens struggle to obtain clear and correct information about entry rules for their non-EU family members, whether online or directly from consulates or their private visa service providers. In many cases, a visa is required when family members are visa exempt. Those family members who do require a visa are sometimes not even able to submit an application. This happens, for example, when they try to apply in the country where they are legally present or even resident but are told to apply from their country of origin instead. When applications are accepted, family members' right to have the application processed for free and quickly, as provided for by Article 5(2) of Directive 2004/38, is often ignored. They have to comply with all the formalities and provide the same documents required from non-EU applicants who are not related to EU citizens. They may experience great delays in obtaining a visa or even have their application rejected on invalid grounds. Their original travel documents are sometimes withheld during the process, leaving them unable to travel. In some cases, family members have been required to apply for long-term visas, with the added administrative formalities that are involved, when a short term one should suffice. When visas are issued, they are sometimes limited in duration to less than three months, for no valid reason, despite the family member's unconditional right to remain in the EU with the EU national for up to three months. Moreover, family members have not always been treated courteously by consular staff or border control agents, they have been delayed and detained at the border and, in some cases, they have been denied entry on invalid grounds. The problems are exacerbated when airline staff do not apply EU entry rules and deny boarding to family members who have every right to travel.

Regarding **EU nationals**, while they face significantly fewer problems when travelling within the EU, they have, in some cases, been subject to excessive border checks and identification requirements. In some cases, their national identity cards have not been accepted as a valid travel document, airlines have imposed excessive requirements on them, and their own Member State would not allow them to exit when they travelled only with a passport issued by another Member State. Migrant EU citizens have faced difficulties obtaining or renewing their travel documents in their Member State of residence in a timely manner, which has affected their travel plans.

## 2.2. Non-EU family members

### 2.2.1. The quest for the right information

As the Commission pointed out in its 2009 Communication on Directive 2004/38 (the 2009 Communication)[6], "the authorities of Member States should guide the family

[6] COM (2009) 313 final – 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.

members as to the type of visa they should apply for"[7]. Citizen enquiries reveal that such guidance is not always forthcoming. The websites of consular authorities – which are applicants' first point of call – often make no distinction between applicants who are family members of EU nationals and those who are not. When citizens then get in touch with the consulates themselves or with their external visa processing centres, not only are family members of EU nationals not always guided as to the type of visa they should apply for, they are often given incoherent or incorrect information about the entry rules that apply to them.

### 2.2.1.1. Online information sources on entry rules do not distinguish between family members of EU nationals and other non-EU citizens

A common source of confusion for citizens are national websites outlining entry rules which do not distinguish between non-EU nationals who are family members of EU citizens and those who are not[8]. Websites of external visa service providers do not make this distinction either[9]. Citizen enquiries sent to YEA reveal that visa applicants are often confused about which entry rules apply to them or may be completely unaware of their rights under EU law. Thus, they end up applying for a visa on the same terms as other EU nationals who are not family members of EU citizens, even though they should be able to do so on more favourable terms or may even be visa exempt.

### 2.2.1.2. Confusing or incorrect information given by national authorities

Citizens also report struggling to obtain clear information on entry rules for their non-EU family members when contacting consulates directly. They are often given information which is confusing[10] or even incorrect[11]. Citizens who are visa exempt have been told

---

[7] Par. 2.2.1 of the 2009 Communication.

[8] **Cyprus:** An EU national wishing to travel to Cyprus with his non-EU children was confused about visa formalities for the children. The website of the Cypriot consulate in the UK does not make a clear distinction between non-EU family members of EU nationals and other third-country citizens. Citizens wishing to travel to **France**, **Spain** and **Ireland** reported facing the same problem.

[9] Citizens reported this problem when reviewing the online information of **TLScontact** (visa service provider for the **French** embassy) in Tbilisi and in Madagascar.

[10] **Greece:** A Bulgarian citizen who wanted to travel to Greece with his Russian wife received conflicting information from the Greek consulate in Sofia regarding entry rules for his wife – he was initially told that his wife did not need to obtain a visa in advance and that proof of family relationship and her Bulgarian visa would suffice for the border crossing. He was later told that his wife had to obtain a regular visa (the accelerated procedure was not applied) and that she would not be able to obtain a visa at the border as she did not have a Bulgarian residence permit. The citizen risked not being able to obtain the visa in time for travel. **Spain:** The Spanish consulate in Australia does not seem to be aware of how Directive 2004/38 should be applied to non-EU family members of Cypriot nationals. In this case a Cypriot national resident in Australia intends to move to Spain with his non-EU wife to take up a teaching job there. The wife should have been issued a Schengen visa quickly and for free on the basis of Art. 5(2) of Dir. 2004/38. Instead, the consulate purported to charge a fee and suggested that because he is a Cypriot national and not a national of a Schengen country, that the wife could not benefit from the free movement rules. Further citizen enquiries revealing similar problems concerned **Spain**, **Greece**, **Croatia**, **UK**, **Germany**.

[11] **Finland:** The Finnish authorities required a non-EU family member to apply for a residence permit rather than an entry visa. **Portugal:** A non-EU family member of a Spanish citizen, with a UK residence card, was informed by a border control official that this card would only permit entry to Portugal for 5 days if she did not have a Schengen visa; **Italy:** The American wife of an Irish citizen wanted to obtain an entry visa to join her spouse resident in Italy, after having previously resided for 90 days in Portugal and Italy. The Italian consular authorities in the US informed her that she had to wait 90 days before returning to the EU and had to re-enter on a tourist visa, which would only allow her to stay another 90 days in EU. The authorities seemed unaware of the citizen's right to join her EU husband pursuant to Directive 2004/38/EC.

they needed a visa[12]. Those who did need a visa were told they did not[13]. In some cases, this meant that travel plans were jeopardised and excess costs incurred[14]. Family members who require a visa but apply for the wrong type of visa are often not guided as to the type of visa they should apply for[15]. Family members have also been told that they must travel with the EU citizen at all times and were not informed of the possibility to join their EU family member in their host Member State[16].

An added complication is seen in **France** and **Germany**, which, as explained in **section 2.2.6** below, (wrongly) require non-EU family members to obtain a long term visa when they intend to settle there. Citizens have reported contacting the consulates of these countries to enquire about travel rules only to be told that a visa was not necessary (because they were visa exempt under Schengen rules for short term entry) or that they should apply for a short term visa. Upon arrival in the country, they were unable to obtain a residence card as they did not have the required long term visa and were told to return to their country of origin in order to obtain a visa there[17].

### 2.2.1.3. Visa service providers are ignorant of EU family members' rights and misinform citizens

When Member States outsource part of the visa application process to external service providers, these service providers are often ignorant of the rules that apply to family members of EU citizens. Citizens report being misinformed about the rules and told that they must follow the regular visa procedure that applies to non-EU applicants

[12] A visa exempt spouse of a UK national who wished to travel with her spouse to Spain via Zurich, was told by the Swiss authorities that she had to have a Schengen visa issued by Spain. **Austria:** The Austrian Consulate in Bucharest told a visa exempt family member that he would need a visa to enter Austria. **France:** The French consulate in London is not recognising that a UK issued Art.10 residence card exempted the spouse of an Irish national from the visa requirement for France; **Bulgaria:** The Bulgarian consulate in the UK told a non-EU family member of a Latvian national that she will require a visa despite holding an Art. 10 residence card issued in the UK; **Greece:** Greek embassy in London tells a visa exempt family member that she will need a visa to travel to Greece. A similar issue was reported in **Ireland**.

[13] **Italy:** The Italian authorities wrongly advised an Italian citizen, resident in Italy, that his non-EU family member who held a residence document issued on the basis of Italian national legislation can travel with him to the UK without an entry visa. **Poland:** The Belarusian wife of a Cypriot national, who held a residence document on the basis of Cypriot law, wanted to travel to Poland. The Polish consulate wrongly advised that she did not need an entry visa, even though Cyprus is not a Schengen country and her permit was not issued on the basis of Directive 2004/38.

[14] **Hungary:** The non-EU wife of a British citizen holding a residence card issued by the UK was wrongly advised by the Hungarian authorities that she could benefit from the visa exemption. However, when she tried to check in at the airport, she was denied boarding because of the missing visa.

[15] **Italy:** A UK citizen resident in Italy wants his Pakistani wife to join him. She applied at the Italian embassy for a family reunification visa. The Embassy should have advised that that was not necessary, and that a short-stay entry visa would suffice – for which only the passport and proof of a family link with EU citizen (marriage certificate) are necessary. Instead, the Italian Embassy required them to register the marriage in Italy (which is a very long and costly process) and asked for an original and attested "declaration of hospitality".

[16] **UK**.

[17] **France:** A Portuguese national requested a long term visa for her Tunisian spouse but the Tunisian consulate only issued a short term one. He was later unable to obtain a residence card in France on the ground that he did not have a long-term visa. **France:** A US spouse of a German national wishing to stay in France for 7 months applied for a long term visa in the US – the French consulate in the US told him he did not need a visa, but when applying for a residence card in France he was told he needed a long term visa in order to obtain a residence card and that he had to go back to obtain one from the US. **France:** The French consulate in Philippines required the non-EU wife of a Romanian national to provide return tickets in order to be issued with a short term Schengen visa, she is not given information on how to join her husband and not given the option to apply for a long term visa – even though this will (wrongly) be required when applying for a residence card in France. **Germany:** A German citizen and her Mexican husband who wanted to settle in Germany were told by the German Consulate in San Francisco that he could enter Germany visa-free (as Mexicans are visa exempt under Schengen rules for short term entry). The husband could not register in Germany and was forced to go back to Mexico and apply for the long term visa.

who are not related to EU nationals. This problem has arisen in particular when citizens contact **TLS contact**, concerning visa applications for France[18], and **VFS Global**, regarding visa applications for Germany[19], France[20], Spain[21], Sweden[22], Italy[23] and

> ▶ *"I am an EU citizen currently working and living in Sulaymaniyah, Iraq, along with my family. On 16-17 November 2016, my Iraqi spouse, accompanied by myself and our British son, visited Erbil, Iraq to apply for Schengen visa [for Austria] through [...]* ***VFS Global****. We [relied] on the reply email received from [the] Austrian Embassy in Amman, Jordan, stating that she can apply for the visa in Erbil.*
>
> *However, she was not allowed by the visa center staff members to submit the visa application, because she is a spouse of an EU citizen. She was rather advised to visit other countries to apply for Schengen visa, while those countries require their own entry visa to visit.*
>
> *All Iraqi citizens and residents can apply for the visa at the visa application centre in Erbil, except for family members and spouse of EEA citizens who are not allowed by the center to submit the application."*

[18] A Norwegian enquirer mentioned that TLScontact (Tunisia) was ignorant of the fact that Norway is an EEA member State and that consequently the special rights for family members of EU/EEA nationals under Directive 2004/38/EC applied in the case of her Tunisian husband; A UK national (moving to France from China), mentioned in their enquiry to YEA that TLScontact (China) would not allow his Indonesian spouse to apply for a visa on the ground that her Chinese visa will expire earlier than 6 months at date of application. TLS was ignorant of the fact that she can apply for a short term visa even if the intention was to move permanently to France; Another UK enquirer, who is moving to France for work purposes, reported that TLScontact (in Agadir, Morocco) showed flagrant ignorance of the special rules applying for family members of EU citizens, her Moroccan husband wishing to join her in France was treated just like an ordinary visa applicant as far as documentation required, visa fee, access to consular services directly are concerned and was threatened with visa denial. The UK spouse could not get through to the French embassy in Agadir and other embassies were unable to help; Another UK national reported that TLScontact (Moscow) informed his Russian wife that the French consulate does not accept marriage to an EU citizen as a route for obtaining a visa and she has to submit the full list of documents; The online information of TLScontact (Antananarivo, Madagascar) does not make any special mention of family members of EU citizens when it comes to short term visas, contrary to long term visas. Thus citizens are led to believe that the only option for family members is to apply for a long term visa for France; The spouse of a French national, who has an Article 10 residence card, was told by TLScontact (London) that he must provide a "livret de famille" attesting the marriage, otherwise a visa would be required and a service fee charged.

[19] VFS India.

[20] An EU national mentioned to YEA that VFS (Mumbai, India) told his family members applying for a visa that they know nothing about the directive, nor care about it; A UK enquirer resident in France said that VFS (India) advised his parents that they needed to contact the UK consular services. The UK consular services refused to see the citizens, who were not sure about how to proceed.

[21] A UK enquirer mentioned that VFS in Vietnam misinformed his Vietnamese wife, telling her that the visa fee waiver did not apply to her. She was told that *"Although the U.K is not officially out of the EU, there is a new law that family members of British nationals have to pay [a] visa fee and will be considered as any other applicant"*. She could not obtain the correct information from the Spanish embassy; The Spanish consulate in Cairo, Egypt, refused to process the visa application of the Egyptian wife of a UK national, sending the citizen to VFS, who in turn refused to apply the accelerated procedure and applied a fee; VFS (UK) did not apply the Article 5(2) accelerated procedure to the dependent mother of the UK national who wanted to travel to Spain together with her son – they are told that she would only be entitled to apply as a family member if she had a 'family member's residence card'; A French national resident in the UK, who wished for his Peruvian spouse to join him in Spain where he will be for a conference, was given conflicting information by VFS (UK) as to entry rules to Spain for his wife.

[22] The service provider for the Swedish consulate in Turkey (VFS) misinformed an Iraqi national, who wanted to join his Norwegian wife in Sweden saying that he needed to have a Turkish residence permit to apply for a visa. The Swedish government's website states that applications from Iraqi citizens should be made to the Swedish embassies in Turkey, Jordan or Iran (*http://www.swedenabroad.com/en-GB/Embassies/Baghdad/Visit-Sweden/Visa-for-visiting-Sweden/*).

[23] VFS (Nairobi, Kenya) required a UK national to provide an invitation letter so that he and his Kenyan wife can travel to Italy.

Austria[24]. Other service providers for Germany[25] and Finland[26] have also been the subject of complaints. ◀

## 2.2.2. A visa is required when it should not be

Article 5(2) of Directive 2004/38 provides that possession of a valid Article 10 residence card shall exempt non-EU family members from the visa requirement. The Court of Justice of the EU has confirmed this in Case C-202/13 *McCarthy* (on 18 December 2014) and clarified that the visa exemption also applies when travelling to the EU national's country of origin[27].

Despite this, citizen enquiries reveal that the visa exemption is not always applied to non-EU family members who have been granted a residence card in another Member State. While this is generally not an issue within Schengen, it is a problem when travelling in and out of the Schengen area.

In **Malta**, Article 5(2) has not been properly transposed into national legislation[28] and thus only residence cards issued by the Maltese authorities exempt the family member from the visa requirement.

In other Member States, while the visa exemption may be applied to the non-EU family members of other EU nationals, it is not applied to the non-EU family members of returning own nationals. Several enquiries reveal that there is confusion or ignorance of the *McCarthy* case among national authorities regarding the application of the Article 5(2) visa exemption to the non-EU family members of EU nationals who reside abroad and travel back to their own Member State. This is a significant issue in the **UK** and **Ireland** where national legislation does not allow for the possibility to apply the visa exemption to non-EU family members of own nationals[29].

[24] See the case study.

[25] A German national wishing to obtain a Schengen visa for her non-EU spouse was told by WorldBridge (Qatar) that a service fee as well as a fee for the visa will apply.

[26] Gerry's (Pakistan) rejected the application of a Pakistani spouse of a Dutch national because they did not fill in all questions on the application form. They seemed unaware of the accelerated procedure that applies to family members.

[27] Par. 41-42 where the Court held that "…there is nothing at all in Article 5 indicating that the right of entry of family members of the Union citizen who are not nationals of a Member State is limited to Member States other than the Member State of origin of the Union citizen. Accordingly, it must be held that, pursuant to Article 5 of Directive 2004/38, a person who is a family member of a Union citizen and is in a situation such as that of Ms McCarthy Rodriguez is not subject to the requirement to obtain a visa or an equivalent requirement in order to be able to enter the territory of that Union citizen's Member State of origin".

[28] The Free Movement Order (Subsidiary Legislation 460.17, LN 191 of 2007), Article 3(2) provides that "[...] family members who are not nationals of a Member State shall be required to have an entry visa, which shall be issued free of charge as soon as possible and on the basis of an accelerated procedure, unless they are already in possession of a valid residence card [...]". "Residence card" is defined in Article 2 as "a card issued to a family member or other family member who is a third country national in accordance with article 7 as proof of the holder's right of residence in **Malta** as at the date of issue".

[29] In the **UK** the Immigration (European Economic Area) (Amendment) Regulation 2015 SI No 694, which came into force on 6 April 2015 following the *McCarthy* judgment, allows family members of EU nationals who hold an Article 10 residence card issued by another Member State to enter the UK without needing an entry document. However, this visa exemption has not been extended to family members of UK nationals who reside abroad. (See par. 10 of the instructions to Border Control officers in Annex A of the following document: *https://www.whatdotheyknow.com/request/254330/response/629766/attach/2/FOI%2034444%20response.pdf*). This issue features consistently in UK related enquiries sent by citizens to YEA – more than **90 enquiries** bringing this particular problem to light have been received since 2015. Family members of dual UK/EU nationals have also been affected by this. Moreover, despite not needing to obtain an entry document in the first place on the basis of EU law, family members of returning UK nationals have been denied EEA Family Permits or have even been denied entry at the UK's borders. In **Ireland**, the relevant legislation – S.I. No. 473/2014 – Immigration Act 2004 (Visas) Order 2014 and S.I. No. 548/2015 –

In several other Member states, non-EU family members of returning own nationals are required to obtain a visa when they hold an Article 10 residence card issued in the UK – the reason often given is that the UK is not part of the Schengen area[30]. There is, therefore, confusion around the distinction between the Schengen *acquis* and Article 5(2) of Directive 2004/38 (pursuant to which the visa exemption applies EU-wide) and ignorance of the interpretation given to this Article by the CJEU in *McCarthy*[31].

Moreover, visa exempt family members have not only been required to obtain a visa, but have even been denied the right to travel with their EU family member altogether, on the ground that their residence card expires in less than three months from the intended date of departure[32]. This arbitrary requirement is contrary to these citizens' free movement rights under Directive 2004/38 – they cannot be required to show evidence of intended departure. It also goes beyond what is permitted under the Schengen rules, where the 3 month validity requirement applies to the non-EU national's passport, not their residence document[33]. A striking example comes from **Cyprus** where the Ukrainian wife of a Cypriot national resident in the UK could not travel to Cyprus with her husband even though she held an Article 10 residence card valid untill 2 months after the intended date of return and her application for a permanent residence card was pending: ▶

European Communities (Free Movement of Persons) Regulations 2015 – is phrased in terms whereby only family members of other EU nationals can benefit from the visa exemption. As a result, non-EU family members of returning Irish nationals are required to get a visa for Ireland, the same way as if the Irish spouse was resident in Ireland. (See: *http://www.citizensinformation.ie/en/moving_country/moving_to_ireland/rights_of_residence_in_ireland/residence_rights_of_family_members.html* and *http://www.migrantproject.ie/index.php/returning-to-ireland/residency-information*). For example, in one case the Egyptian husband of an Irish national resident in Hungary was told by the Irish embassy in Budapest that he would require a visa despite holding an Article 10 residence card. In another case, the Filipina wife of an Irish national resident in Cyprus was required to get a visa despite holding an Article 10 residence card. The Citizens Information Phone Service in Ireland (0761 07 4000) have also confirmed to YEA that non-EU family members of Irish nationals would indeed require a visa for Ireland, despite holding an Article 10 Residence card issued in another Member State.

[30] **Portugal:** An Indian spouse of a Portuguese national resident in the UK tried to enter Portugal with his Portuguese spouse and was told his Article 10 UK residence card was not sufficient and that he should have obtained a visa; **Bulgaria:** The Bulgarian consulate in the UK tells a non-EU family member of a Latvian national that she will require a visa despite holding an Art. 10 residence card issued in the UK; **Austria:** The Austrian authorities inform an Austrian national that his non-EU wife would need an entry visa each time she travels back to Austria with him if they relocate from Austria to the UK; **Germany:** The German border control/police require the Russian wife of a German national to obtain a visa at the border despite holding an Article 10 residence card from the UK, on the ground that the UK is outside the Schengen area and that the Directive 2004/38 does not apply as regards returning to one's own country; **Slovakia:** A non-EU partner of a Slovakian national is told by the Slovakian consulate in London that he will need a visa to travel to Slovakia with his Slovakian wife despite holding an Article 10 residence card issued in the UK; **Poland:** A Ukrainian wife of a Polish national was required to obtain a visa to enter Poland with her husband despite holding an Art. 10 residence card from the UK on the ground that the UK is outside the Schengen area and thus cannot rely on her UK residence card to travel in Schengen.

[31] This issue has also arisen with **Cyprus**, which is not part of the Schengen area. The Cypriot consulate in the Hague required a non-EU registered partner of a Cypriot national to obtain a visa to travel with his partner to Cyprus, even though he held a permanent EU family member's residence card issued by the Belgian authorities. (Cyprus recognises registered partnerships as equivalent to marriage irrespective of sex.)

[32] **Spain:** A non-EU wife of an Irish national resident in the UK, who is visa exempt because she holds an Art. 10 residence card, applied for a visa but was refused a visa for Spain on the ground that her UK residence permit would expire in less than three months; **Spain:** the Spanish consulate in London required the spouse of a Spanish national who held an Article 10 residence card to obtain a tourist visa; **Greece:** A dual Cypriot/Greek national resident in Cyprus wants to travel to Greece with her Egyptian husband who holds a Cypriot residence card – it is not clear if it is an Article 10 residence card or one issued on the basis of Cypriot law. The Greek authorities require the husband to obtain a visa and in order to do so he must have a Cypriot residence card which is valid for at least 3 months from the date of departure from Greece.

[33] Article 6(1)(a)(i) of Regulation 2016/399 (Schengen Borders Code).

Moreover, non-EU family members who hold permanent residence cards pursuant to Article 20 of Directive 2004/38 are, paradoxically, sometimes required to obtain entry visas. As explained in **section 4.4** below, this is the result of a restrictive interpretation of Article 5(2) of the Directive by some Member States.

## 2.2.3. Refusal to process visa applications

Consulates (or external service providers) sometimes refuse to accept the visa applications of non-EU family members. Citizens are directed to a consulate in a different country, which can be very inconvenient, or not given the opportunity to apply at all. Citizens have no way of challenging such refusals as they are not given in writing.

### 2.2.3.1. Applications are not accepted in the country of legal presence or legal residence

Pursuant to Regulation 810/2009 (Schengen Visa Code), applicants can apply for a Schengen visa in the country where they legally reside (Article 6(1)) or in the country where they are "legally present but not residing" if they can provide a justification for doing so. While it is for the consulate to assess whether the justification presented by the applicant is acceptable, the Schengen Visa Handbook[34] confirms it would generally be excessive to require such applicants to return to their country of origin.

Despite this, when it comes to travel in and out of the Schengen area, citizens report being denied the opportunity to apply for a visa from their country of legal presence[35]. They are told to apply

▶ *"My wife and I have booked tickets to travel together to Cyprus [...]. As her UK Residence Card of a Family Member of an EEA national does not expire until [...] 2 months after we plan to return back to the UK, I thought she would be able to travel with me to Cyprus without a problem. However, according to the website of the High Commission for the Republic of Cyprus to the UK*, her UK Residence Card of a Family Member of an EEA national must be valid for at least 3 months at the time of departure from Cyprus. I called the High Commission and I was told that she cannot travel to Cyprus with me without a UK Residence Card of a Family Member of an EEA national with an expiration date at least [three months from the date of departure]. I asked them whether she can be issued a Cypriot visa to cover at least the duration of our trip and I was told that one of the Cypriot visa requirements is "A United Kingdom residence permit (or relevant visa) valid at least for three months after departure from the territory of the Republic of Cyprus" (see the same website). So getting a Cypriot visa is not possible."*

* *http://www.mfa.gov.cy/mfa/HighCom/london.nsf/All/C5BC5D60E65345B280257BCD00401BF1?OpenDocument*

[34] COM(2010) 1620.

[35] **Denmark:** The Danish consulate in London has refused to process a Schengen visa application made by the Indian parents of a British citizen, who are lawfully present in the UK on a two year visit visa; **Germany:** The service provider for the German consulate in the London (VFS), tells the South African wife of a UK national who is in the UK on a visitor visa, that she must apply for a German visa in South Africa; **Spain:** The Spanish consulate in London has informed the mother of a British citizen, who was lawfully present in the UK while on holiday there, that she was not able to apply for a Schengen visa to travel to Spain because she did not have a UK residence permit; The consulate also told a Chinese spouse of a UK national, who was in the UK on a visitor visa, that she must apply from China; and finally, told a UK national that his Filipina wife will not be able to obtain a visa there unless she has a UK residence permit. The Spanish consulate in Thailand refused to allow the family member of an EU citizen, who is lawfully present in the country on a six month sabbatical, to apply for Schengen visa; Several other cases were reported in Spain; **Malta:** The Maltese consulate in London refused to process visa applications from non-EU family members with a valid UK visa unless they have a UK residence card. **Belgium:** A family member's application was refused because her UK visa would expire in less than 90 days, the citizen was told to apply from her home country; **France:** The French consulate in the UK refuses to accept a visa application from the Russian parents of a UK national who are in the UK on a visit visa and from the Tunisian husband of a Greek national who is lawfully present and is awaiting the issuance of his residence card. **Portugal:** a stepdaughter of a British citizen could only apply for a Schengen visa at the Portuguese consulate in the UK if she had an EEA Family Permit. The citizen was informed by the Portuguese consulate that if she only had a regular visa then she would need to apply for a Schengen visa in her country of origin, Thailand. Several other cases were reported in **Malta**, **Sweden**, **Belgium**, **France**, **Finland**.

▶ *"I am British and my husband is a citizen of the Dominican Republic. He is currently here in the UK on a family visitor visa as I have just given birth to our first child. His visa will expire on 6th April 2015. I wish to exercise my treaty rights and move to Spain so that he may stay with us. However, the Spanish Consulate here in London says that to apply for the Schengen Visa you must have a UK resident permit. We cannot afford to go back to the Dominican Republic in order to apply for a visa and then come all the way back to Europe. I would prefer to go directly to Spain from the UK. From what I have read of the EU law it appears to be an irrelevant requirement. Can you please shed some light on this matter and tell me what we can do?"*

from their country of origin instead, even when doing so would impose a disproportionate burden on them. In some cases this seems to be due to a general policy (rather than a case by case assessment) and affects mainly non-EU family members lawfully present in the UK[36]. ◀

Even those family members who have come to stay and are awaiting the issuance of their residence card have been affected[37]. In some cases citizens already residing lawfully in a Member State have been denied the opportunity to apply from their country of legal residence[38].

### 2.2.3.2. Refusals to process the visa application with no opportunity to apply elsewhere

Some family members of EU citizens have not been able to lodge their application or been given the possibility to reapply or apply elsewhere for various reasons, such as:

- their residence permit was a paper document and not a stamp in their passport[39];
- they had a prior criminal conviction[40];
- there was insufficient time to process their application[41];

[36] **Malta**, **Spain**, **France** (ibid) and **Italy** e.g. A UK citizen was told that his Filipino parents, on a visit visa to the UK, should go back to the Philippines to apply for a visa for Italy and that only UK residents can apply for a visa in the UK.

[37] **France** (ibid); **Croatia:** The Russian spouse of a French national, both living in Norway, find that she cannot get a visa to travel with her husband to Croatia from the Croatian embassy in Oslo, because her Norwegian residence card is expired and is in the process of being renewed. She is told to apply from her home country, Russia. The fact the she has a receipt of application for renewal of her residence card will not do, and there is no sign that they will accept other factual evidence of her lawful residence in Norway; **Spain:** The consulate in France refused to accept the application of a non-EU family member who had applied for a residence card in France on the ground that she only held a certificate of application while awaiting her residence card.

[38] **Germany:** The German embassy in Bucharest informs the Turkish spouse of a Romanian national who is moving to Germany to start a job, that he can only obtain a visa for Germany from Turkey and that he must apply for a family reunification visa; **Germany:** A Serbian spouse of a Bulgarian national, with permanent resident status in Bulgaria, needed to apply for a type D visa in order to work in Germany. The German consulate in Sofia refused to process his application and directed him to the German consulate in Belgrade. A similar case was reported concerning the German consulate in Sweden; **France:** The consulate in London refused to process the application of a Tunisian, husband of a UK national, on the ground that his UK residence permit is a paper document and not a stamp in his passport.

[39] The Commission in its 2009 Communication clearly specifies that "the residence card must be issued as a self-standing document and not in the form of a sticker in a passport, as this could limit the validity of the card in violation of Article 11(1)" yet some YEA enquiries revealed that **French** consulates refused to process a visa application on this ground.

[40] The **Finnish** authorities informed the Nigerian de facto partner of a British citizen that he could not apply for a visa because of a prior criminal conviction in the UK.

[41] A UK citizen and his non EU spouse who wished to travel to **Switzerland** had been told to purchase flights as proof of travel plans. The Swiss consulate delayed and eventually refused to process the visa application on the ground that it could not be done in time. The couple incurred a financial loss as a result – they had initially paid for a date change and then could not use their flight tickets.

- the relevant embassy did not accept responsibility for processing the visa[42];
- their application was previously rejected by their EU spouse's home country[43];
- the EU spouse was not resident in the country of destination[44];
- their application would definitely be rejected[45]
- the citizens could not provide a certificate from the EU citizen's country of origin certifying that they were married[46]. ▶

▶ A visa exempt spouse of a UK national applied for a visa at the Spanish embassy in Nicosia – because, as the couple will be transiting through Zurich, they were (wrongly) told by the Swiss authorities that she had to have a Schengen visa issued by Spain. The UK national writes *"the Spanish Embassy has informed me that they will NOT grant a visa to my wife unless I can provide a certificate issued by the British High Commission certifying that we are married. The British Government does not provide such authentication or notarization of marriage certificates. [...] Despite providing an excessive amount of supporting documentation to the Spanish Embassy in Nicosia they will not accept my wife's visa application either as an individual or as a person married to an EU citizen and have stated that they will REFUSE to issue a Schengen visa for my wife".*

## 2.2.4. What happened to the free accelerated procedure?

Pursuant to Article 5(2) of Directive 2004/38/EC, non-EU family members of migrant EU citizens, who require an entry visa on the basis of Regulation 539/2001 and want to accompany or join their EU family member in another Member State, must be issued with a visa under an accelerated procedure and free of charge. A clear distinction must, therefore, be made between non-EU nationals who are not family members of EU nationals and those who are. Whereas the former do not have special rights to enter the EU, the latter do; therefore, they also have a right to obtain an entry visa[47].

There is ample evidence to suggest that this distinction is not always made and that family members of EU nationals who are not visa exempt are given no special treatment when applying for a visa. YEA has received **more than 500 enquiries** evidencing this problem since January 2015.

[42] The non-EU wife of a UK national living in Spain who wished to join her husband in Spain could not apply for a visa in Kabul, Afghanistan, because both the **French** and the **Spanish** diplomatic representations passing to the each other the responsibility for processing the entry visa.

[43] A Tunisian wife (resident in Tunisia) of a Swedish national (resident in Sweden) was told by the **French** and **Portuguese** consulates in Tunis not to apply for a Schengen visa to join her husband in either of these countries because Sweden had rejected her family visit visa twice. The **Irish** embassy in Sierra Leone is refusing to process the visa application of a non-EU husband of a UK national on the ground that he was previously refused a UK visa. He is told he must first successfully obtain a UK visa, even though the citizen does not need to travel to the UK. (The UK visa was previously refused on unlawful grounds and no opportunity to appeal was provided).

[44] **Swedish** and **Danish** consulates in Islamabad tell a UK national that in order for his Pakistani wife to obtain a visa to join him there he must first register as resident and she should then apply for a "facilitation visa". See also **sections 2.2.4.2.1** and **2.2.4.2.5** below.

[45] The Egyptian spouse of a UK national resident in Belgium was denied the possibility to apply for a visa to travel on holiday to **Malta** with his wife on the ground that his application would definitely be rejected as he had never travelled before. He was told he should travel to the UK instead.

[46] See case study. For more on this see **section 2.2.4.2.1** and **section 3.2.1.4** below and Annex 1.

[47] Case C-503/03 *Commission v. Spain* (par. 42). See also the Commission's 2009 Communication, section 2.2.1.

### 2.2.4.1. Difficulties in applying for a visa – contacting the consulate/visa centre – getting an appointment

The Commission, in its 2009 Communication, stated that Member States that use external services for processing visa applications must offer non-EU family members the possibility of direct access to their consulate[48]. Some MS do not provide for such a possibility. This has been reported several times in relation to **France**[49] and the **UK**[50], but citizens have also faced this issue when trying to obtain a visa for **Spain**[51], the **Netherlands**[52], **Belgium**[53], **Italy**[54] and **Germany**[55]. The consequence is that such family members cannot obtain the visa for free, as the service providers charge a fee for processing the application, and, as explained below, may not even be able to apply on the basis of an accelerated procedure.

▶ A British citizen writes:

*"I want to apply for a visa for my [Moroccan] wife for going with me to France only for 6 days and when I call the French consulate in Morocco for an appointment for the schengen visa of my wife [...] they say I need [to] go to one company, the name of it TLS, and when I call that company they say I need [to] pay money to get that schengen visa. So my question is, [is there] any possibility to get that visa in [the] consulate of France or [do] I need to [go] to that company?"*

◀

Moreover, obtaining a visa quickly and for free also means that family members should not have to pay for "premium" call lines to book their appointment and must be allocated one without delay[56]. Citizens have experienced difficulties in contacting some embassies[57] or their local visa application center[58] and delays (of up to 10 weeks) in obtaining an appointment[59] – when Article 9(2) of the Visa Code allows for two weeks.

---

[48] Section 2.2.1, second paragraph of the Communication reads: "Member States may use premium call lines or services of an external company to set up an appointment but must offer the possibility of direct access to the consulate to third country family members". See also the Schengen Visa Handbook (Decision C (2010) 1620 final) Part III, 3.2 (http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52009DC0313).

[49] 10 YEA enquiries evidenced this.

[50] 5 YEA enquiries.

[51] The **Spanish** consulate in Cairo, Egypt, refused to process the visa application of the Egyptian wife of a UK national, sending the citizen to VFS who in turn refused to apply the accelerated procedure and imposed a fee; BLS International, the service provider for the Spanish consulate in the UK, delayed over 4 weeks processing the visa application of a Turkish spouse of a UK national, withholding the travel document and provide no information on the reason for delay. No information could be obtained from the Spanish consulate either. Two more YEA queries were received with similar facts.

[52] The **Dutch** embassy in Islamabad did not accept an application of a family member of a Lithuanian national and required him to contact their service provider. The applicant did not receive a response within two weeks. Another YEA enquiry on similar facts was received.

[53] 1 YEA enquiry.

[54] 1 YEA enquiry.

[55] 2 YEA enquiries.

[56] Schengen Visa Handbook (Decision C (2010) 1620 final) Part III, 3.2.

[57] **Ireland:** Four YEA enquiries; **Cyprus:** One YEA enquiry; **Spain:** One YEA enquiry; **Portugal:** One YEA enquiry; **Greece:** One YEA enquiry; **UK:** Three YEA enquiries: The application form for EEA family permit to enter the UK was not accessible: the official links no longer permitted access to the form; A Belgian citizen has not been able to contact the UK authorities to obtain information on how to apply for an EEA Family Permit for her Moroccan spouse. No hotline was available, only appointments.

[58] **UK:** One YEA enquiry; **Italy:** One YEA enquiry; **Spain:** One YEA enquiry.

[59] **Spain:** 10 weeks; In one case the enquirer reported being told that since it was not possible to obtain an appointment at the Spanish embassy in time, she should apply via their visa processing centre and pay the relevant fee; **Denmark:** 7 weeks; **Malta:** 5 weeks; **Germany:** no appointment possible before date of travel; **Italy:** the interview was scheduled after the date of intended travel; **UK:** time needed to obtain an EEA Family Permit made application negated the purpose of travel; **Belgium:** no accelerated procedure available for family members.

Also, information regarding the status of the visa application can not always be easily obtained[60] and citizens have complained about being excessively charged for it[61].

Establishing where to apply for a visa is not always easy, especially when the applicant intends to travel to several Member States[62], or when the Member State they wish to travel to has no consulate in the country where the applicant resides[63].

### 2.2.4.2. Embassies do not allow family members of EU citizens to apply under the accelerated procedure even though they fulfill the conditions

Many non-EU family members have reported not being allowed to benefit from the accelerated procedure even though they fulfilled all the conditions in Directive 2004/38.

While the problem sometimes arises from the fact that external service providers are not aware of the rules, many citizens who have interacted with the consulates directly have faced the same issue.

#### *2.2.4.2.1. The reasons*

There seems to be widespread ignorance of the rules among consulates. Citizens report being told that "there is no such law as Directive 2004/38"[64]. When family members have expressly referred to Directive 2004/38 to claim their rights, they were either ignored[65] or told that it did not apply to them – for example, because their EU spouse was not a national of a Schengen country[66] or of the destination country[67]. The Swedish consular authorities have refused the accelerated procedure to family members on the grounds that the EU spouse was not resident in **Sweden**[68] or could not show an intention to move there. For example, an Iranian national who was refused a visa to travel to Sweden with his UK wife quotes the following reply received from a Swedish consulate in Turkey[69]: ▼

[60] **Italy:** One YEA enquiry; the **Netherlands:** One YEA enquiry.

[61] **UK:** the helpline to ascertain the status of their application cost £1.37 per minute.

[62] One YEA enquiry.

[63] **Lithuania:** There is no Lithuanian consulate in **Cyprus** and no publicly available information as to whether another Member State represents Lithuania in Cyprus for the purpose of issuing Schengen visas and no information on where an application should be lodged. The Lithuanian Consulate in Athens, Greece, has territorial responsibility for Cyprus. However, unless an application can be lodged remotely, the citizen would need to obtain a Schengen visa to travel to Greece in order to do so!

[64] One YEA enquiry concerning **Sweden** and **Denmark**.

[65] **Germany:** The German consulate in Cameroon refused to treat a family member's application on the basis of EU rules even though the citizen had made express reference to Directive 2004/38 during the application procedure. The visa was denied grounds which cannot be relied upon in the case of family members i.e. that the purpose of the trip was not credible and that the intention to leave the territory could not be ascertained.

[66] **Spain:** The Spanish embassy in the Dominican republic refused to apply the accelerated procedure to a Dominican spouse of UK national and his children on the ground that the EU spouse is not a national of a Schengen country.

[67] **Italy:** The Italian visa application centre in Vietnam told the Vietnamese wife of UK national that she is not entitled to the accelerated procedure as she is not a family member of an Italian national.

[68] 206327 A family member appealed his visa rejection from **Sweden** and the Swedish court ruled that in order for him to be entitled to rely on Directive 2004/38 his Norwegian wife had to be resident or moving to Sweden.

[69] The same response was given to a citizen in another YEA enquiry. This issue has also been reported as regards **Spain:** A UK national resident in Egypt and wishing to move with her Egyptian husband to Spain was told by the Spanish consulate that she should move to Spain first and register there before her husband could apply for a visa.

▶ *"The consulate's conclusion is that to be able to use the freedom of movement as a third country national married to an EU citizen travelling from a non-Member State according to the Directive 2004/38 the third country national needs to travel together or join the EU citizen that has an intention to move to Sweden. Furthermore the Consulate is under the opinion that the definition of intention to move Sweden must be more than an expression of will but should more consider a work offer or similar that can show that there is reasonable credibility of the actual intention to move to Sweden. [...] You can therefore not be considered to be affected by the Directive 2004/38."*

Moreover, while the concept of direct 'family member' in Article 2(2) of Directive 2004/38 is fairly straightforward, citizens still face difficulties proving their family link. When the family link cannot be proven, the family members cannot obtain their visa for free nor benefit from the accelerated procedure provided for in Article 5(2).

This arises in situations where national authorities:

- are ignorant of EU rules as regards who is considered a 'family member' under Directive 2004/38[70]; or
- adopt a restrictive interpretation of the rules – for example, the Irish authorities have based "dependency" on both financial or physical dependence and on the family member having lived in the same household as the EU national[71]; or
- do not accept the evidence of a family link provided by a citizen[72].

In the latter scenario, citizens who have marriage certificates issued in non-EU countries have faced problems getting them recognised when applying for visas to enter certain Member States, even if the certificates were apostilled (or legalised) and translated. This is a serious issue in some member states and is explained in more detail in **section 3.2.1.4** below as well as in Annex 1. A common reason for refusing to recognise a marriage certificate is that it has not been registered in the EU national's country of origin (even when this is impossible to do) or that a certificate from the home country attesting that the marriage is still valid has not been presented. Citizens' foreign marriage certificates have also been rejected because the apostille was placed on a certified copy and not the original[73], or because the marriage certificate was not from an EU country[74]. Visa service providers have also refused to accept foreign marriage certificates on invalid grounds – for example,

[70] **Cyprus:** An Irish national with permanent residence in Cyprus wished to have her dependent Syrian mother in law visit her and her husband in Cyprus. The Cypriot consulate (in Beirut) told her that her mother-in-law would not be considered as her family member and must follow the lengthy procedure for non-family members of first applying to the Ministry of Interior for a permit and then, if a permit is granted, applying for a regular entry visa at the Beirut consulate. The accelerated procedure would not be applied. **France:** The French consulate in Cameroon refused the visa application of a Swiss national's step-child claiming that Directive 2004/38 did not apply to him; The French embassy in Bangkok denied a visa to a 15 year old step child of a UK national, on the ground that no proof of dependence or being part of the EU national's family was provided; Despite the fact that France recognises civil partnerships of same sex couples as equivalent to marriage, the French consular services in Cambodia refused to recognise the same sex registered civil partner of a UK national as a "family member" under EU law and refused to process his application for free on the basis of an accelerated procedure.

[71] **Ireland:** The Chinese father of a UK national was required to demonstrate that he was dependent on his British son and that he had been living with him, before he could be granted a short stay visa for Ireland; Another enquirer reported that in order to prove a "durable relationship", the Irish authorities required evidence that the relationship has lasted two years. Three more YEA enquiries with similar facts were received.

[72] **Ireland:** The Irish authorities insisted that the UK citizen undergo a DNA test before considering whether to grant a visitor visa to his wife to enter Ireland.

[73] **Spain:** A UK national and his Kazakh wife wanted to travel to Spain from Cyprus, where they have a holiday home (in the northern part). The Spanish consulate in Nicosia, Cyprus did not accept an apostilled copy of their marriage certificate, requiring the original to be apostilled.

[74] See case study.

because the marriage certificate was not issued in the country of destination[75]. ▶

Such cases and several others indicate that the 'real' reason behind such obstacles to EU citizens' freedom of movement could be the desire to hinder or prevent family reunification. As explained below[76], several applications by family members are refused because the "intention to depart from the territory of the Member States before the expiry of the visa could not be ascertained". In the case of a Cameroonian wife of a UK national seeking a visa for Hungary, the refusal letter contained the remark *"It is assumed here that a covert family reunification is to take place"*. This seems to be a particular issue when the EU citizen and their non-EU family member do not reside in the same country (the non-EU national residing in their country of origin) and wish to meet in another EU country, usually for a short visit[77].

▶ An Irish national who married his Kenyan wife in Kenya writes:

*"The Spanish Embassy in Kenya says they won't accept visa applications from spouses of EU citizens unless the marriage certificate is from the EU. I don't see a requirement for this in the law as it just says 'spouse' with no qualification on the definition of spouse. Are they entitled to impose this condition?"*

### *2.2.4.2.2. The consequences*

As a consequence of Article 5(2) of Directive 2004/38 not being respected by the consular authorities family members are obliged to pay a fee for applying and to complete all sections of the Schengen visa application form, thus having to provide many unnecessary documents. They may also experience significant delays in having their applications processed and, most importantly, risk having their application rejected on invalid grounds. When their application is rejected they have no guarantee that the procedural safeguards provided for in Directive 2004/38 will be respected.

### *2.2.4.2.3. Excessive requirements and fees*

Since family members derive their rights from the mobile EU nationals all they should be required to prove is that:

- there is an EU national from whom they derive their rights;
- there is a family relationship (and, where applicable, dependency, serious health grounds, durability of partnership); and
- proof that they will be accompanying or joining the EU citizen in the country of destination[78].

[75] VFS Global in Doha, stated the Spanish Embassy would not accept the marriage certificate if it had not been issued by Spain. The couple had to apply for a normal tourist visa.

[76] See **section 2.2.4.2.5** below.

[77] For example, **Italy:** the Italian consulate in Algiers refused to apply the accelerated procedure to a non-EU spouse of a French national, despite the citizens providing evidence of their family link and copies of EU Directive 2004/38. They were told that the spouse had no special privileges and had to pay the visa fee and follow the normal tourist visa procedure; **Spain:** The Tunisian spouse of a Finnish national wished to join her husband on holiday in Spain. VFS and the Spanish consulate in Tunis informed her that she had to follow the regular procedure and pay the fee, despite the citizen referring to Directive 2004/38; Visas were refused to such family members wanting to meet their EU spouse in **Sweden** (five YEA enquiries); **France** (two YEA enquiries); **Malta** (two YEA enquiries); **Italy** (two YEA enquiries); **Greece** (one YEA enquiry); **Spain** (one YEA enquiry); **Luxembourg** (one YEA enquiry); **Austria** (one YEA enquiry); **France** (one YEA enquiry); **Belgium** (one YEA enquiry).

[78] See the Commission's 2009 Communication, section 2.2.1 and the Schengen Visa Handbook, Part III, 3.6.

As the Commission clarifies in its 2009 Communication: *"No other documents such as proof of accommodation, sufficient resources, an invitation letter or return ticket, can be required"*[79].

Despite this, citizens often report being asked to provide precisely these documents, as well as to comply with other excessive requirements, such as:

- providing proof that the EU citizen is resident in the host country (by way of utility bills, employment contract[80], etc.);
- the EU spouse having to attend a personal appointment[81];
- providing evidence of travel health insurance, valid even up to one year[82];
- providing a certificate of non-impediment to marriage[83];
- registering their marriage in their country of origin and providing recent marriage and birth certificates[84].

Moreover, even though Article 5(2) of Directive 2004/38 clearly states that family members should not be charged for the visa, citizens report having to pay fees amounting in some cases to hundreds of euros[85]. In a few cases, citizens had to pay over 1000 euros[86]. Where family members are required to apply via a private visa service provider, they have to pay the relevant service fee, which is added to the fee they have to pay for the visa, when the accelerated procedure is not applied. Hidden charges, such as having these extra documents officially translated, often raise the cost further[87].

A total of at least **242** enquiries[88], received by YEA in the period between January 2015 to June 2017, demonstrate the lack of compliance with Directive 2004/38 by requiring excessive documents and a fee for processing visa applications.

---

[79] Ibid.

[80] **France:** The French Embassy in the Philippines refused a visa to a non-EU spouse of UK national who was in the process of moving to and establishing his business in France on the ground that she did not provide evidence of her spouse being in France or intending to stay there and evidence that she is part of of his household; **Sweden** (three YEA enquiries); **Spain** (two YEA enquiries); **Ireland** (two YEA enquiries); **Belgium** (one YEA enquiry); **Italy** (one YEA enquiry).

[81] **Spain** (one YEA enquiry); **UK** (one YEA enquiry).

[82] **Italy:** A non-EU national resident in San Marino with his Italian wife was required to provide evidence of health insurance valid for a year in order to obtain an entry visa for Italy. Also **Spain** (one YEA enquiry); **Belgium** (one YEA enquiry); **UK** (one YEA enquiry).

[83] **Italy:** A UK national resident in Italy is told he must obtain a certificate of non-impediment to marriage ("nulla osta") from the Italian authorities as a precondition for allowing his Thai spouse to apply for a Schengen visa to join him in Italy.

[84] See **section 2.2.4.2.1** above and **section 3.2.1.4** below and Annex 1.

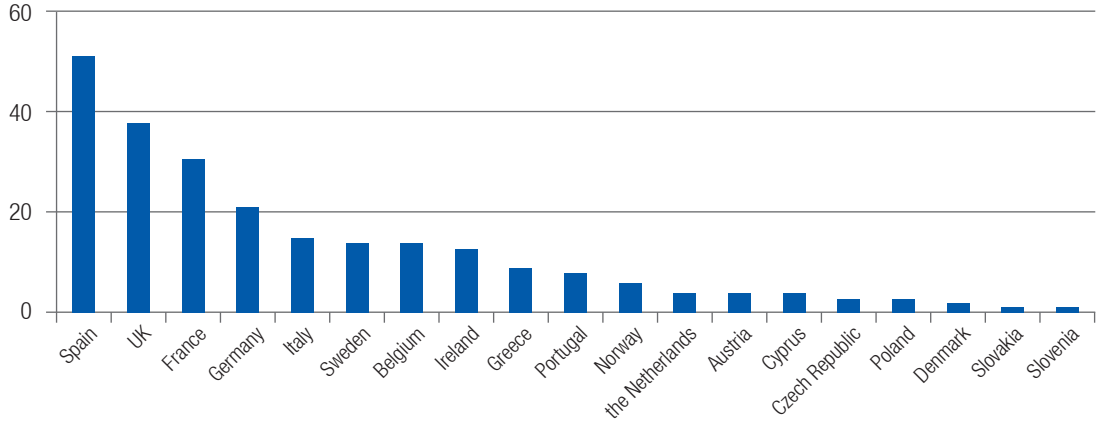
[85] **Germany:** €400 to investigate the authenticity of the marriage in Germany; **UK:** Six YEA enquirers reported the following fees: €529; €500; €200; €195; €180; €130; **France:** The Moroccan husband of a Spanish national working in France, who held a long term residence permit in Spain, was required to obtain a visa and pay €340 in order to join his wife in France. He should have been visa exempt on the basis of Article 6(1)(b) of Regulation 2016/399; **Spain:** The 18 and 20 year old Indian children of a UK national were charged 154GBP for Schengen visas for Spain and were told they had to pay this fee as they are over 18.

[86] **Ireland:** A UK citizen resident in Ireland claimed that the Irish consulate in Tehran had requested €12,000 to process his wife's visa application; **UK:** The Cameroonian wife of an Italian national who wished to accompany her husband to the UK had been required to pay a total amount of €2288 for a visa: €852 as an "Immigration Health Surcharge" and €1431 for "supporting documentation".

[87] Ireland: Visa applicants in Pakistan were required to provide their biometric identifiers irrespective of the type of visa for which they applied. The collection of biometric identifiers was outsourced with the result that a charge for this was levied on all applicants, on top of the visa service fee.

[88] Number of enquiries per country: **Spain (51); UK (38); France (31); Germany (21); Italy (15); Sweden (14) Belgium (14); Ireland (13); Greece (9); Portugal (8); Norway (6); the Netherlands (4); Austria (4); Cyprus (4) Czech Republic (3); Poland (3); Denmark (2) Slovakia (1); Slovenia (1)**.

## YEA enquiries received between January 2015 and June 2017 where citizens reported being asked to provide excessive documents and to pay a visa processing fee




### *2.2.4.2.4. Delays in issuing entry visas*

While Directive 2004/38 does not specify a timeframe for processing family members' visa applications, in its 2009 Communication, the Commission draws an analogy with Article 23 of the Visa Code[89] and states that it considers that "delays of more than four weeks are not reasonable"[90].

Despite this, non-EU family members often report delays of several months in the processing of their visa applications. In several cases delays of over a year have been reported. By far the most enquiries, and the longest delays, concern **Ireland** where this is a serious issue. In the period between January 2015 and June 2017, YEA has received at least **153** enquiries concerning Ireland alone, with delays of even almost two years reported. Given that most other countries are bound by Schengen rules and must comply with Article 23 of the Visa Code[91], this is less of an issue with Schengen visas. There have, however, been cases of citizens reporting delays of over four weeks and even several months when waiting for a Schengen visa[92]. The most notable is the case of **Spain**, where delays of 8 months and over one year have been reported[93]. Private

[89] Regulation 810/2009.

[90] Section 2.2.1 of the 2009 Communication.

[91] Pursuant to which applications must be processed within 15 calendar days. An extension of up to 30 days is permitted in individual cases which require further scrutiny, or in cases of representation where the authorities of the represented Member State must be consulted. An extension up to 60 days is only permitted in exceptional circumstances where additional documents are required.

[92] **Belgium:** A Dutch national living with his Kenyan wife in Belgium wished for her two minor daughters to visit Belgium over the Christmas holidays. The Belgian authorities have taken more than 60 days to process their visa application leading to cancelled travel plans and financial loss; In another enquiry a Belgian citizen returning to Belgium (Surinder Singh scenario), mentioned that his dependent Moroccan father could not benefit from the accelerated procedure when applying for a visa at the Belgian consulate in Morocco – he had to pay a fee and wait over four weeks. Nine more YEA enquiries on similar facts were received bringing to light waiting times of over two months; **Italy:** Six YEA enquiries; **Malta**: Two YEA enquiries – one reporting a waiting period of over three months; **France:** The French consulate in Morocco waited for an "OK" from all other Schengen countries before delivering a visa to the newly-wed Moroccan spouse of a Portuguese national residing in France who wants to join him there; Four other YEA enquiries were received – one reporting delays of over three months; the **Netherlands:** Five YEA enquiries; **Germany:** One YEA enquiry; **Austria:** One YEA enquiry; **Czech Republic:** One YEA enquiry; There have also been eleven YEA enquiring regarding the **UK** – one reporting delays of over five months.

[93] BLS International, the service provider for the Spanish consulate in the UK, delayed over 4 weeks processing the visa application of a Turkish spouse of a UK national, withhold the document and provide no information on the reason for delay. No information can be obtained from the Spanish consulate either. Seven other YEA enquiries revealed similar issues.

▶ A UK national writes:

*"My husband is a Syrian national currently residing in Turkey. In October 2015, he applied at the Swedish Consulate in Istanbul for a Schengen visa. We provided a copy of my passport, my husband's passport, a legalised translated copy of our marriage certificate, return plane tickets and hotel reservations for the first week in Stockholm. My husband stated in the application form that he intended on staying in Sweden for 2 months and that we'll be travelling together from Istanbul to Stockholm.*

*On the 5th November 2015, they refused the visa for the following grounds:*

*"There is no documentation that your wife is residing in another Member State other than United Kingdom. She has not shown any intention to move to Sweden. The consulates conclusion is that to be able to use the freedom of movement as a third country national married to an EU citizen travelling from a non-Member State according to the Directive 2004/38 the third country national needs to travel together or join the EU citizen that has an intention to move to Sweden. You can therefore not be considered to be affected by the Directive 2004/38. Your application will therefore be handled according to the visa code... Your application is rejected."*

*I'm aware that they cannot reject a visa application on these grounds. What options are available to me? I would like to re-apply but I'm worried they will reject again."*

service providers sometimes add to the delay[94]. The consequence is that citizens' travel plans are jeopardised and financial losses incurred.

### *2.2.4.2.5. Refusals on invalid grounds*

Finally, another serious consequence of family members' applications not being processed pursuant to Article 5(2) is that a visa may be refused on invalid grounds.

In particular, since family members have a right to receive a visa, they may only be denied one if:

- they fail to demonstrate that they are covered by Directive 2004/38; or
- the national authorities demonstrate that they present a genuine and sufficiently serious threat to public policy, public security or public health; or
- the national authorities demonstrate that there is abuse or fraud[95].

Family members cannot be denied an entry visa on any other grounds, such as not having sufficient funds or travel insurance, not providing employment details, not providing reliable information "regarding the justification for the purpose and conditions of the intended stay", or proving their "intention to leave the territory of the Member States before the expiry of the visa"[96]. Yet citizens report being denied entry visas precisely for such reasons. In the period between January 2015 and June 2017, YEA received at least **68 enquiries** from non-EU family members wishing to travel with or join their EU family member in a Member State, who had been denied a visa on such grounds[97].

Moreover, another fairly common ground for denying visas to family members is that the EU national is not resident or intending to reside in the country of destination. This seems to be a notable issue with **Sweden**, but has also been reported in other Member States[98]. ◀

[94] The **Dutch** consulate and service provider (Gerrys) (in Pakistan) took 33 days to process the visa application of a Pakistani spouse of a UK national.

[95] Schengen Visa Handbook, Part III, 3.8.

[96] Boxes 8 and 9 in the standard form for refusals, Annex VI of Regulation 810/2009 (Visa Code).

[97] **Spain** (7); **Sweden** (9), the **Netherlands** (3), **Germany** (6), **Hungary** (1), **Denmark** (1), **Austria** (2), **Luxembourg** (1), **France** (10), **Malta** (8), **Greece** (2), **Cyprus** (2), **Italy** (4), **Hungary** (3), **UK** (9).

[98] **Sweden:** The application of a Kenyan family member of a Norwegian national was denied because he was entered in the SIS as someone whose visa had been denied for Norway. The citizen appealed and the Swedish court ruled that in order for the citizen to be entitled to rely on Directive 2004/38 his wife must be resident or moving to Sweden. **Sweden:** the Iranian husband of UK national was denied a visa by the Swedish consulate in Turkey because the UK wife did not have a job contract in Sweden, a mere intention to move to Sweden as a job seeker was not accepted as sufficient evidence of intent to move to Sweden; **Ireland:** A visa to enter Ireland was refused on the basis that the EU spouse had not presented evidence of his intention to exercise his EU treaty rights in Ireland; **France:** A Polish national resident in UK wants to

As with visa exempt family members who were (wrongly) required to apply for a visa, visas have been denied to non-EU family members because their residence card or visa (issued by the Member State of residence or presence) had expired[99] or had fewer than three months validity left on it[100]. Such citizens can end up in a Catch 22 situation, as demonstrated by the following case. ▶

> ▶ *"I am a British national currently working and living in the UK. My partner of 10 years is currently in the UK on a Marriage visitor visa. We married in the UK on March 26th.*
>
> *In July we plan to move to Europe to look for work. We tried to apply for a Schengen Visa through the Belgium Embassy, but were told it would not be possible. On the date of application, it was 96 days before our intended date of departure so were told to return the following week as we could not apply more than 90 days in advance. Upon our return we were told it was not possible to apply as she had only 89 days left on her visa for the UK. They stated the application needed 60 days to process in Belgium, then a clear 30 days before we depart the UK. In order to apply for the visa we were told to return to her home country.*
>
> *Could you please clarify this information for me? Do we have no option but to return to my wife's home country for the visa?"*

Moreover, regarding denials on public policy grounds, the authorities must carry out an assessment in each individual case in order to determine whether the individual poses a genuine, present and sufficiently serious threat to public policy and public security[101]. As clarified by the CJEU, a visa may not be refused on the sole ground that an alert in the Schengen Information System (SIS) has been entered in respect of the applicant[102]. The Court noted that the States party to the Schengen Convention undertook by a Declaration of 18 April 1996 that they would not issue an alert for the purposes of refusing entry in respect of a person covered by Community law (which includes the non-EU family members of EU citizens) unless the conditions required by the latter are fulfilled, namely where the person constitutes a genuine, sufficiently serious and present risk to public policy.

Yet, citizens have found that such an assessment was not made when an SIS alert had previously been entered against them and found it difficult to have previous SIS alerts reversed even when a significant amount of time had passed[103]. This seems to be a particular issue in **Norway**[104].

meet her non-EU husband in France. He was refused a visa, despite providing evidence that they will be travelling together, on the basis that the EU spouse has no connection with France. **France:** Refusal by the French authorities to issue a Schengen visa to the non-EU spouse of an Irish national because the Irish national is not resident in France or has not expressed an intention to reside in France; **UK:** The UK authorities refused to issue a visa to the non-EU husband of a Slovenian citizen until she could demonstrate that she had been working in the UK for a period of three months.

[99] **Denmark:** An application was rejected because the non-EU family member did not hold a current residence card; Similar cases were reported regarding **France**, **Portugal** and **Hungary**.

[100] Cases reported regarding **France**, **Malta** and **Spain**.

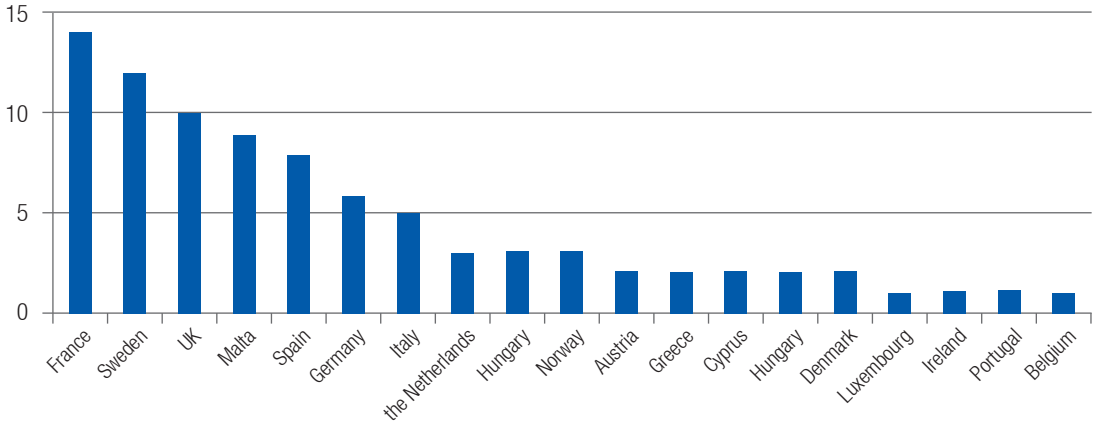
[101] Article 27(2) of Directive 2004/38.

[102] Cases C-503/03 *Commission v Spain* and C-33/07 *Jipa*.

[103] **Italy:** A non-EU spouse of an EU citizen cannot enter the Schengen area due to an exclusion order entered into the SIS by Italy several years ago.

[104] The non-EU husband of a Dutch citizen, against whom an SIS alert has been entered due to a previous criminal conviction in Norway, was facing problems when trying to enter the Schengen area. It is not clear if the person represented a current threat that justified the maintenance of the alert by the Norwegian authorities; In another enquiry a non-EU husband of an EU citizen, who had been banned from returning to Norway due to a previous illegal stay in the country, made a request to have the ban lifted. The six month deadline for a response has been breached; Another non-EU spouse of a Lithuanian national, who had been deported from Norway on criminal charges, was told that an alert had been entered against him for 2 years. He had been unable to have the alert lifted after this 2 year term ended and was thus unable to join his spouse in Norway; In other case, Norway applied a lifetime exclusion order against the family member of an EU national, on the ground that he provided false identity information during an asylum application. Norway was refusing to delete the respective SIS alert even if there was no evidence to suggest that the alert was justified on public policy grounds.

**Number of enquiries per country, received between January 2015 and June 2017, demonstrating visa refusals on invalid grounds**




A total of **87** YEA enquiries were received between January 2015 and June 2017, demonstrating visa refusals on invalid grounds.

### *2.2.4.2.6. Procedural safeguards are not respected*

Directive 2004/38 provides for certain procedural safeguards in the event where family members are denied their free movement rights. These include a reply that is provided in writing, is fully reasoned and includes information on how and within what time limit it can be appealed[105]. When it comes to the reasoning, as the Commission has clarified *"just indicating one or more of several options by ticking a box is not acceptable"*[106].

Yet, in several cases, applicants who had their visa application rejected, were either not given any reasons for the refusal[107] or given only vague reasons, by way of a box ticked in the standard refusal form[108]. In some cases, the refusal was only given orally[109]. In cases where abuse of rights was given as a reason for denial, a proper investigation was not carried out to determine whether the suspicion was founded[110]. When proce-

[105] Article 30 of Directive 2004/38.

[106] Section 3.6 of the 2009 Communication. This has been repeated in section 3.9 of the Schengen Visa Handbook.

[107] **France:** no reasons or appeal procedure were indicated for the denial of a visa to a non-EU spouse of a UK national by the French consulate in Pakistan. A further three YEA enquiries on similar facts were received concerning France; **Spain:** three YEA enquiries; **Austria:** one YEA enquiry; **UK:** An Italian citizen residing in UK wanted her mother to join her. After 3 weeks, the passport was returned without the UK entry visa and without any justification or explanation; Two other YEA enquiries on similar facts were received concerning the UK; **Italy:** A visa was refused without justification to an Egyptian husband of a Romanian national resident as a student in Romania; Three other YEA enquiries on similar facts were received concerning Italy; **Sweden:** five YEA enquiries; **Germany:** two YEA enquiries; **Hungary:** one YEA enquiry.

[108] **Cyprus:** An applicant was not given detailed reasons, but was simply told that the application was 'unreliable'. A potential suspicion of abuse of rights was not accompanied by an investigation; **Greece:** A British citizen proposed to meet his non-EU parents in Greece to spend the summer vacation there together along with his British wife and kids. The visa was refused because "information submitted regarding the justification for the purpose and conditions of the intended stay was not reliable"; **France:** two YEA enquiries.

[109] **Belgium:** A family member holding a visa issued by France was refused entry to Belgium without written reasons being notified to him; **Ireland:** one YEA enquiry; **Germany:** one YEA enquiry.

[110] **Cyprus:** The wife and child of an Irish citizen have been denied entry visas to Cyprus by the Cypriot consulate in Karachi, Pakistan. One of the grounds was that the marriage is not genuine (even though the couple have a child together and have lived in Canada together before); **Finland:** two YEA enquiries.

dural safeguards are disrespected, it is very difficult for citizens to enforce their rights by appealing the negative decision.

### 2.2.5. Travel documents withheld

Citizens who apply for entry visas have reported having their original travel documents withheld during the application process[111]. Even the travel documents of the EU family member have been withheld causing a major hindrance to the citizen's right to move freely in the EU[112].

### 2.2.6. Long term or family reunification visa required

Pursuant to Article 5(2) of Directive 2004/38 those family members who are not visa exempt, "shall only be required to have an entry visa in accordance with Regulation 539/2001". Regulation 539/2001 concerns only short term visas for stays of up to three months and transit visas[113]. Thus, as the Commission has already clarified in its 2009 Communication, Member States cannot require non-EU family members "to apply for long-term, residence or family reunification visas"[114].

Despite this, it appears to be a common practice in some Member States to require non-EU family members who wish to join their EU migrant family member and settle in the host country to obtain a long term, type D, visa. This seems to be a particular issue in **France** and **Germany**.

In **France**, citizens face the problem when they go to register and apply for an Article 10 residence card. They are told that their 'short term' visa is insufficient and that they should return to their country of origin to obtain a long term visa[115]. There seems to be little information, or 'warning', given by the French consulates that a long term visa

---

[111] **Italy:** The Tunisian husband of a UK national applied for a visa to join his wife who got a job in Italy. His passport had been detained and he had no response 25 days after submitting his application. Also six similar YEA enquiries were received concerning **Ireland**, five concerning the **UK** and one concerning the **Netherlands**.

[112] A non-EU national lived in the UK with her British husband who is a pilot. The couple travelled frequently to European destinations. The wife had been forced to travel to London to present her documentation several times per year to obtain the visas necessary to travel. Many Embassies had also insisted on holding her husband's passport to support the application for a visa. This was extremely inconvenient as her husband was required to have his passport to enter other countries as part of his work.

[113] Article 2 of Regulation 539/2001.

[114] Section 2.2.1 of the 2009 Communication. Also in Case C-157/03 Commission v Spain, the CJEU ruled that the national authorities cannot require the family members of an EU citizen to have to obtain a family reunification visa prior to taking up residence.

[115] **France:** The Filipina wife of a British citizen obtained a short stay visa so as to join her husband and live with him in France. Within 3 months after arrival she went to apply for a residence card at préfecture 82000. She was refused on the grounds that the short stay visa "is not good" and was asked to leave France within 3 months; **France:** A Maltese citizen working in France had been advised by the préfecture that, since they were unable to set an appointment to receive her Tunisian husband's application for a residence card within 6 months, he should return to Tunisia and apply for a long term visa from there. Not only was the delay excessive to handle the application for a residence card, a receipt of application should have sufficed to lawfully stay in France until his residence application was processed; **France:** A Spanish national resident in France wished for his Moroccan mother – visiting him under a short term tourist visa – to remain with him in France. The Préfecture told him that his mother should be classified into the category of foreigners who are in an illegal situation; **France:** A Chinese step-son of a UK national was denied a residence card because he was under 18 and was then also denied a 'circulation transfrontiere' which would have enabled him to travel in and out of France, because he entered France on a short term visa – See **section 3.2.5** below.

▶ *"I am Portuguese and I live in France. My husband is Tunisian. We requested a long term visa so he could join me in France. He was issued with a Schengen visa, so for a stay of 90 days only. In France I contacted the immigration authorities to request family reunification and they told me that since I was an EU national I had to request a long term visa for a spouse of an EU national at the French embassy in Tunisia.*

*I called the French embassy in Tunisia to explain to them what the immigration authorities told us and [to ask] why the embassy had not issued a long term visa, as requested, but issued a short term visa instead.*

*They replied that since I am not French they cannot issue a long term visa. That I should go to the immigration authorities and request family reunification.*

*We are being sent from one service to the other and we are not being given a solution. I would like to know what I need to do so my husband can stay in France with me."*

may be required in order to obtain a residence card in France[116]. This leads to Catch 22 situations for citizens when the French consulates and the immigration authorities in France contradict each other[117]. The following case[118] is illustrative. ◀

In **Germany** the problem lies in that consulates and regional immigration offices do not apply free movement rules uniformly. As regards consulates, several citizen enquiries revealed that German consulates refused to issue short term Schengen visas and required family members to apply for long term visas[119]. While other citizens were told by the consulate that no visa was necessary, they could not obtain a residence card in Germany and were forced to go back to their country of origin to obtain a long term visa[120]. Regarding, regional immigration authorities, they often tell family members who entered Germany on a short term visa to leave and re-enter on a long-term visa before they can apply for a residence card[121]. However, as the following case illustrates, the answer may differ depending on who you ask. ▶

[116] **France:** A Tunisian spouse of a German national, who entered France on a six month Schengen visa, tried to apply for a residence card but his application was not accepted and he was told by the prefecture that they were not aware of such visas; **France:** The South African husband of a UK national applied for a long term visa but the French consulate in London only issued him with short term one. The prefecture in France refused to issue a residence card on the ground that he only had a tourist visa and required the UK spouse to prove she had found employment within 2 months before he could be issued with a card and allowed to work. The family were planning for the husband to find employment first; **France:** The French consulate in Philippines required the non-EU wife of a Romanian national to provide return tickets in order to be issued with a short term Schengen visa, she was not given information on how to join her husband and not given the option to apply for a long term visa – even though this would (wrongly) be required when applying for a residence card in France.

[117] **France:** A US citizen who intended to join his EU spouse in France for 7 months, applied for a long term visa and was informed by the French consulate in the US that he did not require a visa at all. The prefecture in France then refused to issue a residence card to him and told him to obtain a long term visa from the US. The citizen informed the consulate of this response from the prefecture, but the consulate insisted on their position; **France:** The French embassy and migration information service in France, informed a French national resident in the Netherlands that her civil partner, who had been living with her for 2 years, would need a long term visa to enter France and that this visa (issued for one year) would not allow her to work.

[118] Translated from French.

[119] **Germany:** The Colombian wife of an Irish citizen wanted to move with her Irish husband and children to Germany. The German Embassy in Bogota required her to apply for a family reunification visa (which took six months to obtain and cost approx. 300 EUR) – despite Colombians being visa exempt; **Germany:** A Romanian citizen and her Ukrainian husband wanted to move to Germany. The German visa centre in Kyiv did not issue a Schengen visa, claiming that he must apply for a national long-term visa. He was told that if he applied for a residence card while on a short term visa he would be refused, sent back to the Ukraine and would have a stamp in his passport which would make it impossible for him to obtain another visa from any EU country; Enquiries with similar facts concerned conduct by the German Consulates in Edinburgh, in Havana, Cuba, in Pristina, in Tunisia, in Sri Lanka, in Bogota, Colombia, in Istanbul, Turkey and in Bucharest, Romania.

[120] **Germany:** A German citizen and her Mexican husband wanted to settle in Germany. The German Consulate in San Francisco applied Schengen rules and told him that he could enter Germany visa-free (as Mexican citizens are exempt from Schengen visa). The family could not register in Germany and the husband was forced to go back to Mexico and apply for the long term visa.

[121] See **section 3.2.1.2** below.

The same requirement to hold a long term visa in order to be issued with a family member's residence card has also been reported in **Belgium**[122] and in **Bulgaria**[123].

## 2.2.7. Visas issued with limited duration

Since family members have a right to accompany the EU migrant and stay in the host country with them unconditionally for up to three months, it follows that they also have a right to receive a visa for this duration, if they so request. A visa should not be limited arbitrarily or for reasons which are at odds with family members' rights under Directive 2004/38.

Yet family members who applied for a short term visa have reported receiving one with validity limited to less than three months and sometimes as short as 15 days. The most common grounds for such a limitation has been that the family member's residence permit will expire in less than three months from the end of the 90-day period of permitted stay in the Schengen area[124]. This is at odds with both Directive 2004/38 and the Schengen rules. First, pursuant to Article 5(2) of Directive 2004/38, family members can travel with, or join, the EU migrant in the EU irrespective of whether or not they hold a residence card issued by another Member State. Second, pursuant to Article 6(1)(a)(i) of Regulation 2016/399 (Schengen Borders Code), it is the applicant's travel document, i.e. the passport, that must be valid for three months after the date of departure, not their residence card.

▶ A Hungarian national, resident in Hesse, Germany wanted his Serbian wife to join him. His wife was visa exempt (due to the EU-Serbia Visa Facilitation Agreement of 2009 (codified in Regulation 539/2001) thus she should have been able to enter visa free and apply for a residence card in Hesse.

However, the Hessian authorities refused to issue her a residence card. The state's immigration authorities and even the German Embassy in Belgrade were not aware of the visa facilitation agreement and demanded her to enter Germany on a national long-term visa. The YEA advice received by the Hungarian citizen was ignored by the immigration authorities.

The citizen subsequently called the immigration offices of other German states and reported to YEA that some had confirmed that his wife did not need a visa, while others did request one. This case points to an obvious fragmentation of how German immigration offices across the country handle free movement rules and a lack of training of German immigration personnel.

[122] **Belgium:** The mother of a British citizen living in India was told she had to apply for a Category D national family reunification visa in order to be able to join her British daughter who supported her financially and who intended to take up residence in Belgium; **Belgium:** A UK national resident in Belgium who wanted his Nigerian husband to remain with her in Belgium had been told that he had to return to Nigeria and obtain a type D visa; **Belgium:** A Romanian national resident in Belgium wanted her Surinamese husband to join her in Belgium and was under the impression that he needed a type D visa in order to settle in Belgium.

[123] **Bulgaria:** The Turkish spouse of a Dutch national resident in Bulgaria had been told he could not apply for a residence card because he only had a type C visa (albeit multi-entry and valid for 10 years). He had been advised to go back to Turkey and obtain a type D visa before applying for a residence card; **Bulgaria:** A Swedish national's Chinese wife tried to apply for a long term visa for Bulgaria but this could not be issued on the basis of an accelerated procedure. She had to apply for a short term one which could be issued earlier but was told she would not be able to get a residence card in Bulgaria if she entered on the short term one; **Bulgaria:** The US husband of a Bulgarian had been required to obtain a long-term visa to move with his wife to Bulgaria, despite holding an Art. 10 residence card from the Czech Republic. The *McCarthy* case not applied.

[124] **Belgium** and **France:** The non-EU husband of a British citizen lawfully residing in the UK was informed that he could not be issued with a visa with a full 90-day validity because his UK residence permit would expire less than three months after the end of the 90-day period of permitted stay in the Schengen area; **Italy:** The non-EU wife of a British citizen residing in the UK was issued a visa only valid for two months on the basis that her UK residence permit would expire in 2 months; **Greece:** The non-EU wife of a British citizen was informed that she could not be issued a visa with full 90-day validity because her residence permit would expire before the end of this 90-day period; **Sweden:** The non-EU wife of a British citizen residing in the UK was informed by the Swedish consulate in London that she could not be issued a visa with full 90-day validity because her UK residence permit would expire before the end of this 90-day period; **Germany:** The German consulate would only issue a visa to the wife of a British citizen residing in Gibraltar valid up to one month before the expiry of her residence card. Moreover, the problem was compounded by the fact that the Gibraltar authorities only issue residence permits to non-EU family members with a limited validity of 6 months.

▶ A UK national writes:

*"Arrived at Dublin airport on 15th December with my Turkish husband [...]. The immigration officer that dealt with us explained that she didn't know much about our treaty rights. She then consulted a colleague and issued my husband with a stamp for the duration of one month, valid until 15th January and told us to report to the local garda station to register. It was my understanding that he should have been given the 3 months, like myself. [...] with it being over Christmas and new year, I have struggled to find work [...]. I understand it can take a week to get a reply/confirmation letter from the INIS in Dublin, and I'm sure they need all the paperwork (two payslips, etc.) before sending the letter. I believe the one month is physically impossible for me to organize all this [...]. I'm worried that my husband will have to return to Turkey, [...] When we arrived we went to the garda office as the immigration officer told us to [...] and they told us the one month was normal, so I'm unsure they would extend his visa. I'd like to have something to show them and help understand our rights as the last few weeks have been very stressful for me in trying to get somewhere to live, finding employment and thinking about sending the EU1 form asap and forwarding any missing paperwork once I have them. If we had the extra time then it would be possible for me to do all this. At the moment we have just over a week to go and I still haven't found employment. If my husband has to return to turkey then I would consider leaving Ireland due to the unfairness and the cost.*

*Would you be able to help with advice and to clarify the rights so we can solve this issue.*

*If I have 3 months as a UK citizen then surely my husband should be able to reside with me for that duration?!"*

Citizens have also had visas issued with a start date after the date of reserved travel booking[125] or had the visa validity term limited arbitrarily without any reasons given[126]. Some have even been told that *"As a general rule, for EU family members, this Consulate grants 15 days long Schengen Visas"*[127].

A further problem, which has arisen in **Ireland**, is that family members who enter Ireland on a visa issued by a consulate abroad have then had the visa term limited upon entry. The border control staff, being insufficiently aware of family members' rights under Directive 2004/38, have placed a stamp of a one month duration in the family member's passport, which also included a statement that the citizen is not allowed to work. The following case is illustrative: ◀

Besides this time limitation causing problems and stress to the EU citizens who find it very hard to find a job and complete all necessary formalities in one month, the added problem is the express prohibition of the family member's employment mentioned on the passport sticker. While the Irish Department of Justice seem to recognise family members' EU rights to reside in Ireland unconditionally in the first three months and be able to work during that time, and while they accept that the border control officials were wrong to place such stamps in their passports, in practice family members with such a visa limitation cannot easily find employment as employers do not want to take the risk of hiring them[128].

[125] **Italy:** A Thai family member of a UK national was told by the Italian embassy in Thailand that her visa would be refused if she did not provide flight details and an itinerary. After the applicant provided a travel booking, she was issued with a visa with a date of validity that began after the booked date of travel.

[126] **Italy:** The non-EU wife of British citizen applied for a 20 day multiple entry within 6 months Schengen Visa for Italy. Instead she was issued a 15 day single entry visa within 1 month. The citizens writes: *"In addition, the treatment was [...] discriminatory with statements such as a 'visa is a courtesy and not a right' and laughing off the inconvenience caused stating that the* 'visa was free anyway'".

[127] **Spain:** This was the reason given by the Spanish consulate in London which granted a 15 day single entry visa to the Thai wife of a UK national, that did not cover the five week duration of their intended stay; **Spain:** The same Spanish consulate issued only 15 or 30 day visas to a Russian wife of a UK national. The citizens, who intended to move to Spain eventually, found this time insufficient for purchasing a house in Spain. They were told that a longer visa would only be granted if they purchased a property in Spain.

[128] This became evident in the case of a non-EU spouse of a UK national who received a one month stamp at border control in Ireland which stated that they are not allowed to work. The EU national found it hard to get a job and complete all administrative formalities within such a short period and complained to SOLVIT. SOLVIT informed the citizen that while the Irish DoJ is aware of their rights and the spouse had the right to reside and work in Ireland in the initial three months, it would be up to the individual employer whether they would hire them and that *"many employers will be wary of employing non-EU nationals with no work permit or no permission from the Department of Justice in case the individual later turns out to have been illegal and this would leave the employer open to possible legal action"*.

## 2.2.8. Unprofessional conduct of embassy staff

Article 39 of the Visa Code provides that Member States must ensure that applicants are received courteously and that consular staff must fully respect human dignity in the performance of their duties and not act in a discriminatory manner.

Despite this, citizen enquiries reveal that consular staff as well as external visa service providers do not always treat applicants with courtesy. Citizens describe situations where they have been intimidated by consular staff after trying to question unlawful demands made by the consulates[129].

## 2.2.9. Detention and delays at the border

A further consequence of immigration staff not applying Directive 2004/38 is that EU citizens and their family members may face long delays or detention at border crossings. Citizens have reported being detained upon their return to their EU country of residence because they did not have a residence card (as their residence application was still pending)[130] or when travelling to another EU country on the grounds that they did not have a visa, even though they held an Article 10 residence card and were thus visa exempt[131]. Citizens report being harassed and kept in detention for several hours[132] and being threatened to be sent back on the grounds that they did not have an entry visa, when in fact they were visa exempt[133] or because of an old SIS alert against them[134].

## 2.2.10. Denied entry/exit

While entry and exit can only be denied to family members of EU nationals on public policy grounds, or if there is evidence of abuse of EU rights or fraud, citizens have reported being denied entry at border control on the grounds that they did not have a visa[135] – even when

[129] **Ireland:** The non-EU wife of an Italian citizen was subjected to abuse and discriminatory treatment by Irish immigration officials when returning to Ireland; **Germany:** The German Embassy in Pristina refused a visa to the Kosovar husband of a Romanian citizen what wanted to relocate to Germany, claiming that he must apply for a national long-term visa. When the couple questioned these demands, the Embassy officials intimidated the couple, denied them any legal appeal of the consular decision, threatening that if they came back, the Embassy would issue a permanent Schengen entry ban not only for the Kosovar husband, but even for the Romanian enquirer; Unprofessional conduct by staff was reported in relation to **Belgium**, **Spain**, **Portugal**, **France**, **Italy**, **Greece** and **Norway**.

[130] **Spain**.

[131] **UK** and **Germany**.

[132] **Germany**, **Latvia** and **Estonia**.

[133] **Greece**.

[134] **France:** A Tunisian national, travelling with his UK wife on a weekend to Paris, was delayed at border control upon exit from France and was told that if he ever re-entered he would be deported to Tunisia (even if he lived in the UK). No reasons were given besides that there was a 'red mark' next to his passport details on system. The French authorities failed to check the nature of the alert. (The citizen had previously applied for asylum in Austria but was denied. He later married his UK spouse has since resided in the EU on the basis of Directive 2004/38).

[135] **Spain:** The non-EU wife of an EU citizen (both living in Gibraltar) was stopped at the border and threatened with arrest for being in Spain without a valid visa. **Spain:** A non-EU wife of a British citizen travelling with her UK spouse was refused entry into Spain by Gibraltar authorities despite the fact that she was able to produce documentation proving her family links;

they were visa exempt[136]. Family members arriving with a visa were denied entry on the grounds that "they pose a migration risk"[137]. One citizen reported being denied exit when wanting to join his EU wife who had relocated to another Member State[138].

When citizens face problems at border control, they have no way of enforcing their rights when they are being infringed by a border guard. There is no EU service or national service that can provide immediate assistance in such situations. Yet entry denials at the border are one of the most traumatic consequences of the misapplication of Directive 2004/38 as citizens find themselves at the discretion of border officials, with their travel plans jeopardised and irrecoverable financial loss incurred. The decision may not be given in writing, so citizens have no way of challenging it in the future.

## 2.2.11. Airlines not aware of family members' EU rights

A further hurdle that EU citizens and their family members face when wishing to travel within the EU is the lack of awareness among airline staff of family members' rights under Directive 2004/38. As a result, citizens have been denied boarding on invalid grounds.

As evidenced by several enquiries, airline staff are not always aware of the visa exemption in Article 5(2) of Directive 2004/38 and have denied boarding to citizens who held a family member's residence card (pursuant to Article 10)[139] but also a permanent residence card (pursuant to Article 20)[140].

In some cases airlines have denied boarding on the grounds that the family member's passport did not have a minimum 3 month validity period beyond the intended period of stay in the Schengen area, even if the citizen held a residence card issued by the country of destination where they resided[141], or that they did not have a return ticket, despite holding a valid Schengen visa.

---

[136] **Bulgaria:** The non-EU husband of an EU citizen was refused entry to Bulgaria despite holding a residence card of family member of an EU citizen issued by the UK; **Poland:** Polish border control refused a family member of a Norwegian national residing in Poland, who had been issued with an EEA residence permit, the right to re-enter Poland, suggesting he should be reapplying for a new visa every time he re-enters; **Spain:** Nigerian family members of a UK national, with residence documents from Gibraltar, were denied entry into Spain; **Germany:** The German police impeded the transit of a foreigner in possession of a valid Greek residence permit; **Ireland:** A British citizen travelled to Ireland with his US spouse. The Irish authorities provided her with an immigration stamp which required her to register within 30 days. She failed to do so and the couple returned to the UK. The UK authorities required that she returned to the US and would not permit her to travel back to Ireland; **UK:** A UK citizen and her non-EU husband living in Germany returned to the UK for vacation. The husband, despite holding a valid German residence card, was refused entry by border agents at Calais; **UK:** the Non-EU spouse of a Belgian national, resident in Belgium with an Art. 10 residence card was denied entry to the UK at Calais on the ground that she did not have a visa; **Italy:** The non-EU spouse of an EU national accompanying the EU national was stopped at the airport without a visa and refused entry to Italy.

[137] **Belgium:** The non-EU family members of a British citizen resident in Belgium had obtained Schengen visas in Bangladesh. They were refused admission to Belgian territory on the grounds that they posed a migration risk in Belgium. The Belgian authorities were proposing to expel them.

[138] **Greece:** the non-EU husband of a Greek citizen lived in Greece with a residence permit. He wanted to relocate to Germany to reunite with his wife, but he was denied exit from Greece.

[139] 22 YEA enquiries were received evidencing this. For example: A Dutch citizen living in Germany wanted to fly with British Airways from London to Amsterdam with his non-EU wife. She was not permitted to board because she still had the old green paper residence card (valid) and not the new plastic residence card; A Chinese *de facto* partner of a Czech national with an Art. 10 residence card was told by the UK embassy that she did not require a visa (following the *McCarthy* ruling), however she was denied boarding by the air-carrier because her residence card was issued by her partner's country of nationality.

[140] 6 YEA enquiries were received evidencing this.

[141] A non-EU spouse of a Dutch citizen holding a residence card issued by the Spanish authorities was refused travel back home to Spain with his wife on the basis that his passport did not have a minimum period of validity of three months beyond the intended period of stay in the Schengen area (Easyjet).

As airlines are often liable to pay fines if they transport a passenger without the correct travel documents, they err on the side of caution and deny boarding, even in situations when the citizen has every right to travel to the country of destination.

## 2.3. EU nationals

EU nationals can generally travel in the EU without problems with a valid passport or national identity card. There are, however, still some obstacles hindering EU nationals' freedom of movement. EU citizens have faced difficulties obtaining new travel documents from their consular authorities when resident in another Member State and have had some problems getting through border control. Confusion about the applicable rules has also been reported.

### 2.3.1. Difficulties obtaining travel documents

An obstacle to EU citizens' free movement arises when EU citizens who reside abroad need to renew or obtain new national identity documents and are not able to do so easily or within a reasonably short timeframe. This has affected citizens' travel plans, especially those needing to obtain passports for their children, who were unable to do so within reasonable timeframes[142].

### 2.3.2. Excessive border checks and identification requirements

While pursuant to Article 5(1) of Directive 2004/38, EU nationals can exit their own Member State and enter other Member States with either a valid passport OR a national identity card, citizens who comply with this requirement have been asked to provide further evidence of their identity and, in some cases, had their journeys interrupted.

#### 2.3.2.1. Own nationals denied exit

Dual national children, when exiting one of their countries of origin with a passport issued by the other country, have at times been denied exit.

This is a recurring issue in **Poland**, where Polish nationals who held only a passport issued by another Member State[143] have been allowed entry but then denied exit from Poland because they did not have a Polish passport. Pursuant to Polish law, a Polish national is

[142] **Hungary:** Hungarian citizens reported delays of more than 6 months in obtaining passports for their children. As a consequence, the citizens were not able to travel home to Hungary with the children during the summer holidays; **Portugal:** A Portuguese national resident in the UK had great difficulty contacting the Portuguese consulate in London and obtaining an appointment for renewing her and her minor daughter's Portuguese ID cards and obtaining a passport. (This situation occurred at a time when the staff of the Portuguese consulate in London were fighting the Portuguese Government, complaining about poor salaries that were allegedly inferior to the minimum wages in England); **Belgium:** Belgian citizens have experienced serious difficulties and impediments in obtaining travel documents; A Belgian citizen faced difficulties in contacting the Belgian embassy in Paris to apply for renewal of his identity card; **Romania:** Romanian citizens reported facing serious difficulties and impediments in obtaining new travel documents from the Romanian embassies. Also **Sweden:** A child with dual German-Swedish nationality sought to apply for a Swedish travel passport. He was required to prove his identity, but the Swedish authorities refused to recognise his German identity card.

[143] In most cases, **Ireland**.

required to present a Polish passport to exit Poland[144]. Dual national minors born outside Poland have been most affected by this. Children born to Polish parents acquire Polish nationality automatically but long administrative procedures discourage parents from obtaining the Polish documents for children born abroad. Thus, such dual national minors have been denied exit from Poland when travelling with a passport issued by another Member State. Parents are forced to obtain Polish identity documents for their children for the sole purpose of being able to exit Poland[145].

This has also arisen in **Italy**, where dual Italian/Belgian children wishing to travel to the UK were denied exit from Italy on their Belgian passports and told that they needed Italian passports (costing 120 EUR) in order to travel outside the Schengen area.

### 2.3.2.2. Excessive requirements by airlines

EU citizens have also faced excessive identification requirements at airport check-in, with airline staff requiring to see more than one identification document[146].

### 2.3.2.3. National identity cards not accepted

Moreover, some EU citizens travelling only with their national identity cards have had difficulties getting them accepted and have been required to provide passports to prove of their identity[147].

This affects **Greek** and **Hungarian** nationals who still carry paper ID cards. While these ID cards remain valid, citizens face difficulties having them accepted. For example, a case was reported where the British authorities confiscated a Greek ID card, saying that it was not in good condition and it may have been forged and in another instance a Hungarian national was detained for an hour by the Austrian border police before being allowed entry and later received a fine of €100 for having travelled with an invalid travel document.

Moreover, **French** citizens, whose national identity cards were issued between 2 January 2004 and 31 December 2013, have had the validity of their ID cards extended automatically by 5 years. While the French authorities are preparing a change towards a new, more secure model of ID card, the old cards have not been physically altered and cannot be replaced[148]. Thus, many French nationals hold an ID card with an expired date mentioned on it. France has informed other EU countries of this measure and has received confirmation from some that French identity cards showing an expired date will be accepted. Other Member States have not, however, provided a response, which leaves French nationals risking being denied entry if they do not also carry a valid passport[149].

---

[144] 'Article 3 and 14(1) of Ustawa z dnia 2 kwietnia 2009 r. o obywatelstwie polskim. Also Passport Document Act of 13th July 2006 which sets out the right of Polish nationals to obtain a passport which confirms their identity and entitles them to travel.

[145] 9 YEA enquiries were received evidencing this.

[146] During a journey from Stockholm to London, an EU citizen was asked to identify himself during a check-in procedure with more than one document (passport and identity card and credit card) and was asked about how long he proposed to stay in the UK. The citizen writes: *"When I asked for an explanation for all this I was told that Italians and Romanians travelling towards London need to present more than 1 ID and being double checked"*; Another EU citizen was asked for excessive amounts of documents by Lufthansa staff prior to boarding an intra-EU flight. He was also asked to show his boarding pass upon entry to Ireland by the Irish immigration authorities; A Romanian national could not use his Romanian ID card to check in online with Easyjet.

[147] A Portuguese national resident in the UK who only had a national ID card and no passport, was required to provide alternative evidence of her identity when entering the UK and also when dealing with UK government and private entities.

[148] *http://www.diplomatie.gouv.fr/fr/services-aux-citoyens/documents-officiels-a-l-etranger/article/extension-de-la-duree-de-validite-de-la-carte-nationale-d-identite*

[149] Five YEA enquiries were received evidencing this.

One citizen reported facing difficulties when entering **Portugal** with a valid Czech identity card. She reported being told that "Czech republic is not country" and having to explain that the Czech Republic is in the EU.

## 2.3.3. Confusion about the rules

Citizen enquiries demonstrate that EU citizens are sometimes confused about entry rules.

### 2.3.3.1. The notion of valid travel documents

EU citizens sometimes wonder whether they can use documents other than a passport or identity card for travel. For example, citizens have enquired whether a driver's licence[150], or their registration certificate, when it is issued in the form of a card[151] or a foreign issued travel document[152], would be acceptable as a travel document.

### 2.3.3.2. Obligation to carry a travel document

Citizens are sometimes not aware that they must carry their identity documents when crossing Schengen borders even if there generally are no border checks. In one case, UK tourists were fined 100 EUR by Austrian police for failure to carry their passports on them while on a round trip by boat between Vienna and Bratislava. The citizens were under the impression that a UK driver's licence and photos of their passports should be sufficient and were not aware that they should carry their passports with them.

### 2.3.3.3. Travelling with expired travel documents

EU citizens have also wondered whether they would be allowed entry to other EU countries or back to their own country when their travel document had expired or was about to expire[153]. There are no EU rules in relation to this, with each Member State adopting its own policy[154].

### 2.3.3.4. Travelling with minors

Another area of confusion where no EU rules exist is that of travelling with minor children without one or both of their parents. Citizens are confused about formalities and

[150] **Ireland:** Irish nationals that were not able to get their passports issued in time for booked travel to Portugal were wondering whether any other form of ID, such as a driver's licence would be acceptable (This was in 2015, prior to the introduction of the passport cards in Ireland).

[151] **Estonia:** EU citizens resident in Estonia believed that they can use their Estonian identity cards as travel documents. The Finnish border guards are conducting spot checks, issuing fines for border offences.

[152] A Lithuanian/Russian dual national who does not have a Lithuanian or Russian passport was wondering whether he could travel to Sweden and Finland with a US issued travel document and US permanent resident card.

[153] Three enquirer wondered if they could return to **Portugal** on expired passports; A **Danish** resident on holiday in the Netherlands asked whether he could still travel on his certified travel document which was about to expire. A German national whose passport was about to expire was wondering whether he would be able to travel from the US to **Spain**; A **French** national with a passport that expired less than 5 years ago wondered if he could travel on it to the UK from France; A **Swedish** family resident in Denmark wished to travel to Sweden to renew their expired passports. They were stopped by the Danish frontier police and told they could not drive to Sweden with expired passports.

[154] The number of enquiries in relation to this issue have decreased since the 'Your Europe' website has been updated to include a section on travelling with expired travel documents.

whether parental permission is required. While some Member States insist on the presentation of a letter of consent from parents, others impose no such requirement and citizens who did not know the rules in advance have been denied entry[155].

# 3. Obstacles to Residence

## 3.1. In a nutshell

This section outlines the problems that citizens report facing when trying to reside in another EU Member State, as evidenced by enquiries submitted to YEA between January 2015 and June 2017[156]. Namely:

- The difficulties in obtaining residence documents (**Section 3.2**);
- The problems and Catch 22 situations that arise when residence documents or national identification numbers are made a prerequisite to completing essential administrative formalities (**Section 3.3**); and
- Instances when citizens are (or feel) discriminated against on the basis of nationality (**Section 3.4**).

## 3.2. A long and difficult road to... a residence document

While for some citizens obtaining a residence document is fairly straightforward, especially when they are coming to work in another Member State and already have a permanent work contract to show, for others, things are not so simple. Citizens face hurdles before even beginning the application process. Then once they arrive at the immigration office ready to submit all their documents, they are not allowed to apply because their documents are not deemed sufficient, even though they should be. Once they manage to apply, they could be facing unreasonable delays in getting their residence documents, way beyond the six months permitted in the legislation. At the end of the process, they may receive a residence document with limited validity, or be denied the right to residence for no valid reason, or even be ordered to leave the territory within a short period of time and without the procedural safeguards of Directive 2004/38 being respected.

### 3.2.1. Red tape and other hurdles before even beginning the application process

Citizens who arrive in their host Member State sometimes have to wait a long time to even get an appointment to register. In some countries, non-EU family members are

[155] **Romania:** A Belgian/Romanian dual national, resident in Belgium and married to a Belgian national, tried to enter Romania with her minor Belgian son. Upon arrival in Romania, the border patrol officer denied them entry on the basis that an authorisation of the father was required to be able to travel with her child; A **Greek** national wishing to take his teenage students on a trip to the UK wonders if any extra documents are required; A **Belgian** national resident in Ireland was wondering whether her husband needed additional documents to take their daughter to Israel via the UK; An **Italian** national resident in the UK and travelling to Italy with her minor daughter wondered whether her parents could bring the child back to the UK and whether any specific formalities are required.

[156] Although some of the long standing issues go back well before this period and are documented as such in the relevant sections.

not allowed to apply for a residence card on the grounds that they entered the country on a short-term, instead of a long-term, visa. Many citizens report being required to provide evidence of a set amount of minimum financial resources in order to be able to apply, when this is expressly prohibited by Directive 2004/38. Others get turned away because their non-EU marriage or birth certificate is not accepted, while de facto partners face difficulties convincing the authorities of their "durable relationship". Finally, a new issue since Brexit, is the inability of UK nationals to apply for permanent residence documents in France.

#### 3.2.1.1. Long waits for an appointment to register

This has been a particular issue in **France**, where a waiting time as long as 9½ months has been reported[157]. These delays have caused particular problems to non-EU family members who are not always able to obtain an appointment before their entry visa expires – one citizen was told to return home and apply for a long term visa, since no registration appointment was possible within six months[158]. This has also been reported as an issue, albeit to a lesser degree, in **Spain**[159] and **Germany**.

#### 3.2.1.2. Non-EU family members who enter on a short term visa are told to return home and obtain a long term visa before being allowed to apply for a residence card

As explained in **section 2.2.6** above, some Member States require family members to obtain long-term or family reunification visas instead of short term visas when the purpose of their travel is to settle in that country. Not all family members are, however, warned that a long term visa is a requirement for obtaining a residence permit. Those who, for whatever reason, enter the host Member State on a short term visa, then face problems when applying for a residence card and are even told to return to their country of origin and obtain a long term visa, before submitting their application for a residence card.

This has been reported in several cases in **France**[160] and **Germany**[161], but has also

[157] 5 YEA enquiries evidence this. For example: a Maltese citizen working in France has been advised by the préfecture that, since they are unable to set an appointment to receive her Tunisian husband's application for a residence card within 6 months, he should return to Tunisia and apply for a long term visa there. Also see **Section 3.2.5**.

[158] 3 YEA enquiries.

[159] One enquirer mentioned that an appointment was given one month after the requested date and 2 days after non-EU spouse's visa expired. The spouse believed he had to leave **Spain** and reapply for a visa.

[160] Six YEA enquiries concerned France, For example: A US spouse of a German national wishing to stay in **France** for 7 months applied for a long term visa in the US – the French consulate in the US told him he did not need a visa, but when applying for a residence card in France he was told he needed a long term visa in order to obtain a residence card and that he had to go back obtain one from the US; The Filipina wife of a British citizen obtained a short stay visa so as to join her husband and live with him in France. Within 3 months after arrival, she went to apply for a residence card at préfecture 82000. She was refused on the grounds that the short stay visa "is not good" and was asked to leave France within 3 months. See also **section 2.2.6** above.

[161] **Germany:** A Turkish husband of a Romanian worker, who entered Germany on a short term Schengen visa, was told his application for a residence card would not be accepted unless he left Germany and reapplied for a long term family reunification visa on the basis of German law; **Germany:** A Croatian citizen and her Serbian husband wanted to move to Germany. The husband was not allowed to apply for a residence card at the local foreigners' office who claim that he can only lodge his application on a national long-term visa. They insisted that he should leave Germany and re-enter the Schengen area on a long term visa; **Germany:** A German citizen and her Mexican husband who wanted to settle in Germany were told by the German Consulate in San Francisco that he could enter Germany visa-free (as Mexicans are visa exempt under Schengen rules for short term entry). The husband could not register in Germany and was forced to go back to Mexico and apply for the long term visa. See also **section 2.2.6** above.

arisen in **Belgium**[162] and **Bulgaria**[163]. This practice is contrary to Articles 5 and 10 Directive 2004/38[164] as well as to the CJEU's case law[165].

### 3.2.1.3. Set amount of minimum financial resources as a precondition to applying for a residence document

Article 8(4) of Directive 2004/38 expressly prohibits Member States from laying down a fixed amount which they regard as "sufficient resources" that an EU national must have in order to be able to stay in their country for more than three months. The authorities cannot require an EU citizen to demonstrate having an income higher than the threshold below which nationals are eligible for social assistance or higher than the level of the social pension. Several enquiries have revealed that this is not always respected[166].

This has been a particular issue in **Italy**, where the "going rate" seems to be around €5,800 and has been imposed as a prerequisite to registration on retired EU nationals and students.

Another problem, elaborated in more detail below[167], is the lack of flexibility on the part of the national authorities regarding the origin of the financial resources. There seems to be a reluctance and/or unwillingness to accept evidence of sufficient resources when this comes from a non-EU spouse, a partner or another family member.

### 3.2.1.4. Non-recognition of foreign marriage and birth certificates

This has been a serious, ongoing issue for several years in **Spain** as well as in **Italy**, **Portugal** and **France** and it is explained further in Annex 1. EU nationals and their family members, whose marriage or birth certificates have been issued by a non-EU

[162] **Belgium:** A UK national resident in Belgium who wanted her Nigerian husband to remain with her in Belgium was told that he must return to Nigeria and obtain a type D visa; In another case a Belgian commune refused to accept a residence card application from the Nigerian husband of a Portuguese national resident in Belgium, on the ground that he did not have an entry visa. The citizen's visa had expired and his passport has been lost. Pursuant to the CJEU's judgment in *Metock* this should have been irrelevant.

[163] **Bulgaria:** The Turkish spouse of a Dutch national resident in Bulgaria was told he could not apply for a residence card because he only had a type C visa (albeit multi-entry and valid for 10 years). He was advised to go back to Turkey and obtain a type D visa before applying for a residence card. See also **section 2.2.6** above.

[164] Pursuant to Articles 5(4) Member States must give family members who arrive without the requisite entry documents every opportunity to obtain them, or to prove by other means that they are covered by the right to residence before turning them back. Article 10 includes an exhaustive list of the documents that may be required to issue a family member with a residence card which does not include an entry visa.

[165] Case C-157/03 *Commission v Spain* where the Court held that national authorities cannot refuse non-EU family member's application for a residence card because they failed to obtain a visa at the consulate of their home country prior to arrival; Also C-459/99 MRAX and C-127/08 *Metock*.

[166] **Italy:** an enquirer who was a part-time worker reported having to show €5,000 per year in the last 5 years; in two other enquiries students required to show €5,800 in bank account; similar requirements were also reported by a pensioner; **Belgium:** €2000 was required from self-sufficient persons; a student had to show €1,300 per month; **Spain:** A minimum salary of €426 was imposed on a Romanian worker in order to be granted residence; **Spain:** A couple had to show a certificate from the Bank of Spain stating they earned > €8,500; **Greece:** €4,000 had to be had in a bank account, no other evidence accepted; **Austria:** at least €50,000 was required of a self-sufficient person; **Austria:** €2,800 was required of pensioners otherwise they had to leave; **Germany:** A Polish student was told that his US wife could only receive a 5 year residence permit if he provided evidence of earning at least €400/month; **Cyprus:** €1,200/month was required to issue a residence card to a 5 year old child of permanent residents; **UK:** The non-EU spouse of an EU citizen was refused a residence card in the UK on the basis that her EU spouse did not have resources amounting to GBP 1000.00 per month. (In the UK, the level above which a person is no longer eligible for social assistance (Employment & Support Allowance) corresponds to around £72.40 per week for a single person aged over 25 or £113.70 per couple per week. This equates to £313.73 per month for a single person and £492.70 per month per couple).

[167] See **section 4.3** below.

country, have been facing serious difficulties when trying to apply for a residence document for their non-EU family members[168]. Besides requiring these documents to be apostilled or legalised, the national authorities also often require that:

- The documents are registered in the Member State of the EU citizen's nationality, or that some sort of evidence is presented that the home Member State recognises the marriage as being valid. This adds an administrative step that is, at best, complicated and, at worst, impossible to fulfil. In countries where such registration or recognition is possible, obtaining the relevant document may take several months[169] and often both citizens have to be present in person. Some citizens have reported arriving at a dead end when their country of origin cannot provide such a document, either because such a registry of marriages does not exist (as, for example, in the UK) or, in the case of same sex marriages, because the country of the EU national's origin does not recognise such marriages.
- The marriage or birth certificates (and their apostille or legalisation) must be dated in the last 90 days. This requirement adds a significant administrative cost when the documents are not recent as they must be reissued in the relevant non-EU country – a process which may again be time consuming and costly.

The straw that breaks the donkey's back is that citizens are often given 10 days to bring the relevant documents and are told that if they do not provide them in this timeframe their application will be rejected. 10 days is often an impossible timeframe to comply with, given the complexity of the procedures that must be completed. In some cases, non-EU family members have reported being issued with temporary residence documents, which state on them expressly that they have no right to work.

As a consequence of the above policy, non-EU family members:

- that entered on a short term visa fear that they must leave the country or bear consequences for overstaying their visa;
- cannot work in Spain – temporary residence cards are not accepted by employers;
- in the case of same-sex marriages, cannot benefit from EU free movement rules to obtain a residence document as a family member of an EU citizen, even though Spain does recognise same-sex marriages.

As explained in section 2 above, this same issue has affected non-EU family members' entry rights. However, cases have been reported where family members who needed an entry visa managed to obtain one at a Spanish consulate abroad with their apostilled or legalised marriage/birth certificates and were then denied a residence card in Spain because the certificate was not registered in the country of the EU citizen's origin and/or because it was older than 90 days.

#### 3.2.1.5. *De facto* partners have difficulty proving a "durable relationship"

Some de facto partners reported not being allowed to apply for residence documents because of lack of proof of a 'durable relationship', despite providing extensive

[168] **16** cases have been reported on residence rights and **30** on entry rights in the January 2015 – June 2017 period in Spain alone. See Annex 1 for more detail.

[169] Time frames of over 1½ years have been reported in **Hungary**, upto 1 year in **Italy** and in **Spain** itself and upto 8 months in **Germany**.

evidence of communal life and in one case even having a child together. This has been an issue in **France**[170] as well as in **Spain**[171].

#### 3.2.1.6. UK nationals struggling to obtain permanent residence documents in France after the Brexit vote

Even though EU law continues to apply fully to UK nationals during the period of the Brexit negotiations, UK nationals wishing to obtain a permanent residence document in **France** have been, either:

- facing unnecessary administrative hassle[172]; or
- not allowed to apply at all and told that all applications from UK nationals were suspended until the outcome of the Brexit negotiations is known or because France was in a state of emergency[173], or told that no such cards were required[174]; or
- more recently, issued with temporary residence cards when applying for (and having a clear right to) a permanent one[175].

### 3.2.2. Excessive requirements

Once the application process starts, it does not always go smoothly. Excessive requirements, beyond those permitted by Directive 2004/38, are obstructing the process of obtaining a residence document by EU citizens and their family members. Those mobile EU citizens who do not have a fixed and permanent employment contract (such as the self-employed, interim workers, jobseekers, students, pensioners and other self-sufficient persons) face particular difficulties proving their right to residence in their host Member State. Excessive requirements are reported especially by EU citizens whose non-EU family members are applying for a residence card. Moreover, citizens who have obtained the right to permanent residence are being told to jump through additional administrative hoops beyond those provided for in Directive 2004/38.

#### 3.2.2.1. Workers

Directive 2004/38 provides that in order to issue EU workers with a registration certificate, Member States may only require to see a valid national ID card or passport and evidence that they are employed or self-employed[176]. Several **self-employed** citizens,

---

[170] Three YEA enquiries highlighted this. One enquirer mentioned that only certain documents, like utility bills accepted, child's birth certificate with both names on it was disregarded as irrelevant.

[171] Enquirers reported having difficulties proving their relationship without it being legalised but were told that in order to enter into a registered partnership in Spain one of them had to be a Spanish national or resident in Spain for >10 years); Another enquirer mentioned that the city of Barcelona had eliminated the local register of de facto unions thus making it difficult to prove a "durable" relationship.

[172] A pensioner mentioned being referred by their local préfecture to a préfecture of a regional capital (not necessarily easy for a retired person to reach; Another enquirer was told to book another appointment, as the appointment time slot was insufficient to process their application; Another UK national was asked to provide unnecessary to documents, such as medical certificates.

[173] A pensioner was told by her prefecture (Vendee) that the right to apply for residence cards did not exist anymore due to emergency measures and that the issuance of such cards was prohibited by the military.

[174] Four YEA enquirers mentioned this.

[175] Generally cards were valid for 5 years but in one case a one-year renewable card was issued. 8 YEA enquirers reported such difficulties.

[176] Article 8(3).

however, reported being required to provide evidence of sufficient resources[177] and/or health insurance[178], despite providing clear evidence of being self-employed. Other excessive requirements included having to provide tenancy agreements, statements of accounts stamped by an accountant[179], evidence of divorce (from 20 years ago)[180] or being told that they had to provide evidence of working as an employee[181].

Those **employed** have also reported being asked to provide evidence of sufficient resources and private health insurance in order for their non-EU family members to be issued with a residence card[182] or having to provide a confirmation certificate from the tax office that the citizen had deposited their employment contract there[183]. Those working part-time[184] or on interim contracts[185] faced particular problems, especially as regards their non-EU family members' obtaining residence documents, as such employment was not accepted as sufficient evidence of them being a "worker".

### 3.2.2.2. Job-seekers

Pursuant to Directive 2004/38 and CJEU case law, jobseekers are allowed to stay beyond the initial three months up to at least six months, and cannot be expelled, if they are actively looking for a job and have a genuine chance of finding one[186].

---

[177] **France:** A self-employed IT professional who paid all her contributions and taxes in France was denied registration by her prefecture on the ground that her income, amounting to €700/month was not sufficient. Additional income that she had from Poland was not taken into account; **France:** A family member was denied the opportunity to apply for a residence card in France because the EU spouse (a freelancer) could not provide a work contract or evidence of sufficient resources; **Germany:** A British citizen lived in Germany as an artist on a very low income. His non-EU wife was earning the bulk of the family income. The German authorities questioned his right of free movement because he was not earning enough; Two similar cases were reported concerning Cyprus.

[178] **France** and **Cyprus**.

[179] **France:** A certificate of accommodation was required even though a rental contract in both names and landline bills in the non-EU spouse's name were provided; A similar issue arose in **Cyprus**.

[180] **Cyprus**.

[181] **Ireland** The non-EU spouse of a Bulgarian national applied for a residence card in Ireland. The couple were self-employed. The wife had also worked for a period of time. However, the Irish authorities issued them with residence documents of six months duration and refused to issue a five year residence card unless the couple can demonstrate that the EU wife was actually employed. **Finland:** (see case study in **Section 3.3.6** below).

[182] This issue arose in **France**, **Germany**, **Cyprus**, **Finland** and **Ireland**. For example in Ireland a French university researcher was required to provide payslips for the past three months to support his request for his non-EU wife (and their 18 month old French national son) to join him in **Ireland**.

[183] **Greece**.

[184] **Sweden:** The family member of a part-time worker in Sweden was denied a residence card (18 months after applying) because his EU spouse's salary was considered too low. The EU spouse was working full time at the time when he applied but later cut down her hours to take language classes; **Germany:** A Czech family lived in Germany for three years. The father worked part-time as a fireman, the mother was on maternity leave. They were expelled on the grounds that the citizen did not work there, his part time work contract was not accepted. They were given one hour to pack and were then taken to the border with their baby by the police.

[185] **Belgium:** Two interim workers reported being told that evidence of such work was not sufficient and they had to provide a contract lasting at least three months in order to be allowed to stay; **France:** A Belgian national who had a one year contract was required to show an open ended contract so that their family member could get a residence card in France, because that family member had entered on short stay visa; **France:** An EU national, who had been working on weekly and monthly contracts in France for over a year, was required to present a contract of at least 3 months duration in order to be able to register his non-EU family member; **France:** A family member of an EU worker on an interim contract was denied residence in France; **Austria:** A UK national moved to Austria with her Turkish husband and was told she had to be working full time in order for her husband to be allowed to work. Once she presented evidence of full time employment she was told that she needed to be working for at least 3 months before her husband had the right to work. **Norway:** An EU citizen working and paying taxes in Norway for the past year wanted to have his family reside with him there. However, as his work contract was renewable every three months, the authorities were not convinced that he could support his family in Norway.

[186] Recital 9 and Article 14(4)(b) and Cases C-292/89 *Antonissen*, C-67/14 *Alimanovic.*

Citizens looking for a job in another EU country have reported being denied registration until they find a job and provide evidence of working[187], and being told that they are not allowed to stay unless they find a job within a set time period[188]. One jobseeker in **Flanders** was even told that he had to find employment in a Dutch speaking company. A catch 22 situation was reported in **Poland**, where an Italian national wanted to start his own business but was not granted authorisation to do so because he could not provide evidence that he was resident in Poland. He could not register and obtain a residence document unless he proved he was working. Moreover, a jobseeker in **Belgium** was denied a registration certificate because she could not show that she had a separate bedroom from her co-tenant (who was her *de facto* partner).

▶ A German national writes:

*"I have lived in Sweden and worked in Denmark for the past 6 years. I arrived in Sweden in 2010 and have registered and lived there up until now. I have applied for a permanent staying permit but have been refused. The Swedish Immigration Agency gave the reason for the refusal that I have not worked 5 years continuous to have sufficient assets for me and my family. I have worked in Denmark for the past 5 years and have submitted my pay slips covering this periods. Please kindly advise me because I have appealed against their decision in the Swedish Immigration courts".*

### 3.2.2.3. Students, pensioners and the self-sufficient

Directive 2004/38 provides that, in order to be issued with a registration certificate, students need to declare that they have sufficient resources and must show evidence of health insurance, while pensioners and those who are self-sufficient must provide evidence of sufficient means and comprehensive sickness insurance[189].

Paradoxically, while workers are being asked to provide evidence of sufficient resources, **self-sufficient persons** are told to prove they are working in order be issued with a residence document. Citizens report that national authorities do not seem to be aware of the right to residence on the basis of sufficient resources[190].This seems to also affect frontier workers, who are denied a residence card in their country of resi-

[187] **France:** Three UK job-seekers reported that they and their family members were refused registration in France unless they could provide 3-6 months of payslips – evidence of being offered training with a job prospect at the end was not sufficient. **Ireland:** A non-EU family member was denied a residence card in Ireland because her EU spouse lost his job and was a job seeker. She was asked to provide her spouse's employment contract, proof of address by way of rental agreement and a letter from the tax authorities in order for her to be accepted.

[188] Two job seekers in **Belgium** reported being told that they had three months to find a job otherwise they could not stay in Belgium; A Dutch job seeker in **Belgium** received an order to leave the territory in one month after not being able to find a job for six months. He was living with his sister and was due to start a training via the Belgian job center; A Greek national was told to leave **Belgium** if he did not find a job in 4 weeks; A Spanish job seeker applied for a residence document after residing in **Finland** for 3 months and provided evidence of financial resources and health insurance. His application was refused and he was orally threatened with expulsion on the ground that he was not employed; A Bulgarian citizen worked less than one year in **Germany** and sought alternative employment. She received a letter requiring her to prove that she had sufficient resources to continue to live in Germany. On meeting with the foreign office, she was given two weeks to find a new job.

[189] Article 8(3).

[190] For example, in **Germany:** the American wife of a self-sufficient EU national was refused a residence card in Germany because the EU national did not have a work contract – he was working mostly outside Germany and his income from other sources was not accepted as evidence. She wished to reapply after her EU spouse obtained a work contract but a new appointment with the immigration authorities not possible before the expiry of her Schengen visa – this caused significant stress to the couple; **Sweden:** Bulgarian job seekers were refused residence in Sweden despite the applicant's brother providing a guarantee to support for the whole family; **Spain** a freelance translator who moved to Spain and wished to set up as self employed there was not given the opportunity to register as a self sufficient person, even though she had evidence of sufficient resources – she was told to come back and provide evidence of working by way of invoices, other evidence such as registration for tax and social security – evidence of her work in the UK was not accepted; Further similar enquiries came from citizens wishing to move to **France** (3 enquiries), **Italy**, **Spain** and **Finland**.

dence because they cannot provide evidence of working there[191]. The following case is illustrative: ◀

As regards **students**, besides being asked to show evidence of a set amount of minimum financial resources[192], they are also asked to provide proof of accommodation[193], or other excessive documents such as birth certificates, police records and fiscal numbers[194].

The following case demonstrates the problems such citizens face, especially when trying to obtain a residence card for their non-EU family members. ▼

▶ "I am trying to get some information regarding getting a 5 year residence permit for my wife, who is a US citizen (I'm Polish).

We moved to Germany last year as masters students [...]. Before my wife's 3 months were up, we went to the immigration office in Berlin to apply for a residence permit for her. We were not yet employed at the time, and they told us we would have to come back when we have work. They issued her a 6 month residency permit and said they could give her a 5 year permit when I have a job that pays 400 Euros a month or more.

I began working on a freelance contract (as a writer for a language school) last month, but I haven't received any payments that would total 400 Euros in a month yet, but my wife's permit was expiring soon so we went back to talk to the immigration office again. My wife is currently working as an online English teacher for a company based in Beijing, China. Her income is about 1200-1400 Euros per month.

The immigration officer became very angry when he saw my freelancing contract and it seemed he was trying to tell me that I am not allowed to undertake this kind of employment in Germany and am breaking the law by doing so. I'm pretty sure that is not true as the tax office issued me a tax ID number specifically for freelancing purposes and the company I work for has hired me legally. It is my understanding that as an EU citizen, I am allowed to take up freelancing work in Germany.

We were also told that my wife's contract doesn't count as employment because the company is not based in Germany. She received a 4 month extension on her residency permit and now we have to try again in September.

When we moved here, we thought that getting her a residence permit as the spouse of an EU citizen would be a simpler process, but we feel like the Berlin immigration office keeps changing the rules on us."

[191] **Sweden:** A family member of a frontier worker was refused a permanent residence card in Sweden; **Belgium:** A Frontier worker resident in Belgium but working part time in the Netherlands and another working in the UK and returning to his wife in Belgium on the weekends were denied residence cards on the ground that they could not provide evidence of working in Belgium; **Belgium:** A Dutch frontier worker who came to reside in Belgium with his family was given an order to leave the territory within 30 days as he did not provide all required documents within 3 months. Some documents were impossible to obtain within a short timeframe (e.g. his daughter's birth certificate from the US – which the authorities required to be recent) and as regards evidence of health insurance he did not seem to have been informed of the rules that he could remain insured in the Netherlands and provide a from S1 as evidence of comprehensive healthcare cover. He was trying to find out how to take insurance in Belgium and was being told by the mutuelles that that was not possible. Also in **Italy:** the municipal authorities refused to register a German national who planned to reside in his house in Italy for 2 weeks each month and work the rest of each month in his private practice in Germany.

[192] **Italy:** one enquirer reported being required to provide a work contract with a minimum salary of €500/month or a health insurance contract for €5000; another enquirer had to show €5,800 in a bank account; **Belgium:** €1,300 per/month was required; **UK:** a declaration of sufficient resources was not accepted, bank statements required.

[193] This was reported as regards **Portugal** and **Italy**. In the latter, a student was required to provide 1 year lease.

[194] This was reported as regards **Portugal** and **Belgium**.

### 3.2.2.4. Dependant family members who are also EU nationals

EU nationals who are neither working, nor have sufficient resources in their own right, can reside in another Member State as a family member of an EU national who is lawfully resident[195]. Citizens in this category, who had no intention of taking up employment, have reported facing difficulties proving their right to residence[196].

### 3.2.2.5. Other excessive requirements

Citizens have also reported being asked to provide birth certificates, not always easy for them to obtain[197], to show evidence that they deregistered from their previous country of residence[198], evidence of insurance[199], a passport, despite already having provided a national ID card[200], utility bills and registration of a tenancy agreement[201], rental agreement in the names of both spouses[202], and even a certificate of celibacy[203].

### 3.2.2.6. Excessive requirements after 5 years of residence

After five years of lawful, uninterrupted residence in their host Member State, EU nationals and their family members have the right to remain there indefinitely and unconditionally[204]. Articles 19 and 21 of Directive 2004/38 provide that upon receiving an application for permanent residence national authorities can check the duration of residence and that continuity of residence "*may be attested by any means of proof in*

[195] Article 7(1)(d).

[196] **Belgium:** A Greek wife of a Greek national working in Belgium, who had no intention to take up employment herself, was told to wait for ten days in order to find out whether the Belgian authorities will accept her application and give her a national ID number. She was told that if she were to receive this number she would have to present them within a month with a CV, proof of registration at the registry of the Ministry of Employment and proof that she is seeking employment. Her request to be registered as an EU family member was rejected and she was told that unless she seeks employment she cannot reside in Belgium; **Italy:** A British wife of a British national working in Italy had to provide a rental contact and letters from the landlord and from her husband expressing their consent to her residence at the said address. **France:** A German, de facto partner of a German national working in Germany had to provide evidence that she resided with him in France. Bank accounts and children's school reports were not accepted. All utility bills were in her partner's name. She was not issued with a residence card, as a result she could not register her car in France, which was necessary for her daughter to take driving lessons.

[197] **Italy:** A Romanian citizen in Italy was required to provide a birth certificate with a translation performed exclusively by an Italian notary; **Italy:** A Slovak worker had to provide a birth certificate in Italy; **Belgium:** A Belgian commune required birth certificates from a US/UK couple in order to "validate" their apostilled US marriage certificate. (The US national could not obtain a birth certificate as she was a refugee from Vietnam); **Belgium:** A Dutch national was asked to provide an apostilled birth certificate and an official document regarding his civil status in order to be registered in Belgium – he was told that these were required because of Belgian rules on the population register. **France:** A Chinese family member applying for a residence card in France was required to provide a birth certificate which was very difficult to obtain; Three other enquiries on similar facts were reported concerning France and Belgium.

[198] **Belgium:** A German student in Aachen who wanted to register in Belgium was told he had to de-register in Germany; **Spain:** A non-EU family member was required to prove that she had terminated her residence in the UK in order to register in Spain. An enquiry on similar fact concerned the **Netherlands**.

[199] **France**.

[200] **France**.

[201] **Ireland**.

[202] **Ireland** and **Cyprus**.

[203] **Luxembourg:** An Irish jobseeker in Luxembourg had to provide a certificate of celibacy from Ireland, which was impossible to obtain as Ireland does not issue such certificates.

[204] Article 16 of Directive 2004/38. In certain cases, as outlined in Article 17 of the Directive, the right to permanent residence may be acquired earlier than in five years.

*use in the host Member State*". As regards the "lawfulness" of residence during those five years, as the burden of proof is on the applicant at the time of application, there is nothing precluding the Member States from requiring proof that during the relevant five years the citizens was satisfying the residence conditions of Article 7(1) of Directive 2004/38. What Member States cannot do, however, is require such evidence for more than the relevant five year period – or accept only a certain type of proof or impose other arbitrary requirements.

Despite this, citizens who have acquired the right to permanent residence on the basis of Directive 2004/38 and have applied for a permanent residence document, have reported needing to provide evidence of:

- Sufficient resources[205] (in some cases by way of a minimum set income or bank account deposit[206]) or healthcare cover[207] – at the moment of applying for the permanent residence card and going forward;
- Working[208] or having paid social security contributions[209] during the five years – even though the citizen had sufficient resources during that time. (This is a particular issue in **Italy**);
- Knowledge of the local language and culture[210]; and
- Notarised confirmation from neighbours attesting to the continuity of residence[211].

Citizens also reported having to go through the entire application process again (and having to prove that they satisfied the residence conditions) when trying to have their

---

[205] This was reported as regards **Ireland**, **France** and **Sweden**. In the latter a student was refused a permanent residence card on the ground of a lack of sufficient resources because she had claimed family benefits – her non-EU spouse's income was not taken into account.

[206] **Greece:** where an EU citizen resident there for the last 33 years (and owning properties) was required to provide a certificate showing that she had at least €4,000 in her bank account when applying for a renewal of her residence card which had been expired for some time; The same amount of €4,000 was also required of an 18 year British national who was a permanent resident in Greece and who needed to obtain a permanent residence card so he could apply for a driver's licence; In **Cyprus** proof of monthly income of €1,200 was required to issue a residence card to 5yr old child of parents who already had permanent residence status; Two similar cases were reported regarding **Italy**.

[207] **France:** where evidence of health insurance was required from a family member of a Portuguese national living in France since 1966; **Italy:** A dependant EU citizen was granted a permanent residence card in Italy. The same day a municipality official went to the citizen's house to retract the certificate of permanent residence unless private health insurance was obtained by the citizen.

[208] In **Italy**, a Romanian national had to prove 10 years of residence and that she was working; Also in **Italy**, the Italian authorities refused to let a UK national apply for a permanent residence card because he could not provide evidence of a continuous work contract or being registered as self employed in the last five years. Instead the citizen provided evidence of lawful work, and was being paid each time he completed a job. This was not accepted as being 'continuous' work and was not taken into account as being evidence that the citizen had sufficient resources. A further four enquiries on similar facts concerned **Italy** and two the **UK**.

[209] **Italy:** A Romanian citizen resident in Italy for 10 years, and working intermittently (in the 'voucher' system), was refused a permanent residence card as she could not provide evidence of 5 years of social security contributions. This prevented her from accessing healthcare in Italy which she was in need of.

[210] While this requirement can be imposed on non-EU nationals who are not family members of EU nationals and applying for the status of long term resident pursuant to Directive 2003/109, it cannot be required within the scope of Directive 2004/38. **Italy:** A family member had to attend Italian classes in Italy and demonstrate civil and cultural knowledge; **Czech Republic:** An EU citizen had to prove knowledge of Czech in the Czech Republic.

[211] **Romania:** A German national had to provide this evidence when applying for a permanent residence card in Romania, despite having provided evidence of his continuous self-employment. He had difficulty in obtaining such evidence from neighbours.

permanent residence card updated after a change of address within **Italy**[212] or when returning after spending time in another Member State[213].

Moreover, it appears that in **France** there is a requirement that the five year period of lawful residence must have been completed immediately preceding the date of application. The portal of the French administration, on its page outlining the conditions for acquiring a permanent right of residence as an EU citizen in France[214], makes repeated references to "les 5 années précédentes". Citizens are required to provide evidence that they have been lawfully (and not just continuously) resident in France in the 5 years preceding their application. This same issue has been reported in **Belgium**[215] and **Italy**[216].

In **Malta**, citizens who have the right to permanent residence, have reported needing to provide proof that they are working in order to be able to access healthcare.

In **Spain**, a Croatian national resident there since 2010 was told that she must complete 5 years from the date of Croatia's accession to the EU in order to be able to apply for permanent residence[217].

### 3.2.3. Delays, delays and more delays

Directive 2004/38 provides that EU citizens must be issued with a certificate of registration immediately which must state their personal details and the date of registration[218]. As regards non-EU family members, they must be issued with a certificate of application immediately and then with a residence card, no later than six months from the date they submit their application[219]. As pointed out in the Commission's guidance for better transposition and application of Directive 2004/38[220], this "maximum period of six months is justified only in cases where examination of the application involves public policy considerations". As regards permanent residence documents, Directive 2004/38 provides that these must be issued to EU nationals "as soon as possible"[221] and to their family members again, within six months of the submission of their application[222].

---

[212] **Italy:** A Romanian national resident in Italy since 2002 and holding a permanent residence card, moved to Rome and was told that his card was no longer valid because it was issued by another municipality. He could not get his residence card amended because he could not show a permanent job contract or €5,000 in a bank account. **Italy:** A Polish national resident in Italy for 10 years was told that her move to a different municipality 'reset' her residence time and she had to wait another 5 years before applying for a permanent residence card; Also in **Spain** citizens reported having to reapply for a permanent residence card upon changing address.

[213] **Belgium:** A Greek pensioner, who was a permanent resident of Belgium, but frequently spent time in Greece, found out that she was deregistered by her commune when she requested a '*composition de menage*'. Her pension was also not paid for this reason. She was told she had to re-register as resident.

[214] *https://www.service-public.fr/particuliers/vosdroits/F22116*

[215] An EU citizen resident in Belgium for 11 continuous years was told he could not apply for permanent residence as a subsequent 18 month long absence (for work in France) had "reset" his residence period. Also, in another case, a Belgian commune refused to take into account the first six months of residence as only a temporary card was held by the family member during that time.

[216] A pilot resident in Italy for 10 years was denied a permanent residence card because he had stopped working in the previous two years.

[217] This is contrary to the CJEU's judgment in Cases C-424/10 *Ziolkowski* and C-425/10 *Szeja* – See also **section 4.9** below.

[218] Article 8(2).

[219] Article 10(1).

[220] COM(2009) 313 (*http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52009DC0313*).

[221] Article 19(2).

[222] Article 20(1).

It is evident, given the number of enquiries received on this issue, that Member States do not always respect these rules and recommendations. Delays in processing applications and issuing residence documents have been a long standing issue flagged by citizens in their enquiries to YEA. In particular, in the period between January 2015 and June 2017, delays in processing applications and issuing documents have been reported in **215 enquiries**, namely as regards:

- **Registration certificates** to EU nationals – at least 16 enquiries[223] – with delays over 15 months mentioned in **Austria**[224];
- **Certificates of application** to non-EU family members – at least 18 enquiries[225];
- **Residence cards** to non-EU family members – at least **156 enquiries**[226], with **Ireland**, **Sweden** and the **UK** accounting for 46, 45 and 41 enquiries respectively.
- **Permanent residence documents**[227] – at least 25 enquiries[228], with the **UK** and **Sweden** accounting for 12 and 6 respectively.

The consequences of these delays are manifold, especially for non-EU family members who have faced expiring visas and the inability to work, to travel visa-free in the EU, to open a bank account and to obtain a personal identification number (which is essential to daily life in several countries[229]). Many have been dismissed or fear dismissal for this reason[230]. Moreover, certificates of application or temporary residence cards have been issued containing an express restriction on the right to work[231].

The difficulties are exacerbated when national authorities retain original passports, resulting in citizens being unable to leave the country while their application is being processed. This used to be a serious issue in the **UK**[232], but has also been reported several times in **Ireland**[233].

---

[223] Number of enquiries per country: **Belgium** (4); **Sweden** (3); **Ireland** (3); **France** (2); **Austria** (2); **UK** (1); **Germany** (1).

[224] Also, in **Austria** a Croatian national had to provide four months of payslips in order for this wife and children to be issued with registration certificates. These were needed to apply for family allowance.

[225] Number of enquiries per country: **Ireland** (5); **UK** (5); **France** (2); **Malta** (2); One in each of **Sweden**, **Germany** and **Belgium**.

[226] Delays up to 2 years have been reported regularly in Sweden. The Swedish migration agency website has an online tool which provides for an estimated time frame to a decision. This indicates that family members of EU nationals must wait for longer than 18 months to obtain a decision on their residence card application (*https://www.migrationsverket.se/English/Private-individuals/Moving-to-someone-in-Sweden/Time-to-a-decision.html*). Delays of over 1 year have been reported in the **UK**. In **France** over 18 months was needed to process application from family member of a researcher. Number of enquiries per country: **Ireland** (46); **Sweden** (45); **UK** (41); **France** (8); **Spain** (3); **Malta** (2); **Denmark** (3); **Greece** (2); **Germany** (2); **Czech Republic** (1); **Norway** (1) **Portugal** (1).

[227] Issued to EU citizens and to non-EU family members.

[228] Number of enquiries per country: **UK** (12); **Sweden** (6); **Cyprus** (4); **Belgium** (1); **Ireland** (1); **France** (1), **Czech Republic** (1).

[229] See **section 3.3** below.

[230] **UK** (6), **Ireland** (4).

[231] **UK** (2); This was also a problem in **Spain**, as explained in **section 3.2.1.4** above and Annex 1.

[232] Prior to the introduction of the passport return service in February 2017, original passports had to be provided, copies were not accepted. These were then withheld during the application process for periods of as long as six months. This created serious difficulties for people who may have needed to travel in the meantime. YEA received at least 23 enquiries in relation to this since 2015. In one case The UK authorities would only return the passport of a family member whose application was refused in the event where he returned to his country of origin, Canada, preventing the couple from travelling to Ireland. In another case the UK authorities retained the passports submitted with the application for a residence card for five months, and advised the couple that if they sought return of the passports, this would serve to cancel the residence card application. The non-EU citizen was not given any assurance by the authorities that he could return to the UK if he travelled out of the country while his application for a residence card is pending.

[233] At least five YEA enquiries evidence this.

## 3.2.4. Residence documents issued with limited validity

Once citizens receive their residence documents, they are not always what they expected them to be. EU citizens and their family members have reported being issued residence documents with limited validity or being issued with temporary documents when they applied for, and were entitled to, a permanent one.

### 3.2.4.1. EU nationals

Regarding documents issued to EU nationals, Directive 2004/38 is silent on their period of validity. It merely specifies that **registration certificates** must include, among other things, the date of issuance[234]. The implication, presumably, is that their validity period is to be open-ended, but this is stated neither in the Directive nor in the Commission's 2009 Communication[235].

Despite this, EU citizens report being issued with registration certificates with limited validity. For example:

- a Belgian worker in **Bulgaria** has reported that for two years he received residence documents with annual validity and was then issued with a document valid only for six months. This was because his open-ended job-contract had a six month probation period[236]. As a result, he could not obtain a driver's licence (as a 5 year residence document was required for that)[237].
- A self-sufficient, self-employed Bulgarian national resident in **Ireland**, could only receive registration certificates valid for six months at a time. Only evidence of fixed employment would enable her to obtain a residence document with longer duration.
- A Czech student mentioned that the residence document he was issued with in **Croatia** was limited to the duration of his studies and a French pensioner, with sufficient means, also complained about the prospect of having to renew a residence document every six months in **Croatia**. The relevant webpage of the Croatian Ministry of Interior mentions that EEA nationals are issued with a registration certificate valid "up to 5 years"[238].

Directive 2004/38 is also silent as regards the period of validity of **permanent residence documents** that EU nationals can request after five years of lawful, continuous residence[239]. It is true that permanent residence cards for EU nationals are optional, but this should not be a reason to deny them or limit their validity in any way if the EU national has clearly acquired the right to permanent residence. This would be at odds with the very purpose and spirit of Directive 2004/38.

As mentioned above[240], this has been an ongoing issue since Brexit in **France**, where UK nationals have been issued with temporary residence cards when applying for (and

[234] Article 8(2).

[235] The Commission's Your Europe website does state that registration certificates must be valid indefinitely (*http://europa.eu/youreurope/citizens/residence/documents-formalities/registering-residence/index_en.htm*). This would be in line with the principle that these documents are merely evidentiary and not constitutive of EU citizens' rights. A main purpose of Directive 2004/38 was to do away with residence cards for EU nationals and the mistaken impression generated that it is the card the gave the EU citizen the right to residence and not the other way round.

[236] This was in 2016, long after transitional arrangements for Bulgarians in Belgium ended, thus no restrictions should have been placed on Belgians in Bulgaria.

[237] Which is a separate violation of Article 25 of Directive 2004/38.

[238] *http://stari.mup.hr/120032.aspx*

[239] Article 19(1).

[240] See **section 3.2.1.6** above.

having a clear right to) a permanent one. But Brexit aside, other EU nationals have faced this issue in France as well. For example, a Romanian national lawfully resident in France since 2006 has been trying to obtain a permanent residence document for several years and has each time been issued with a document with annual validity. This issue was also reported in **Malta**[241] and **Belgium**[242].

### 3.2.4.2. Non-EU family members

As regards non-EU family members, the Directive does set out clear rules on the validity of their residence documents. Residence cards are to be valid for five years from the date of issue or "for the envisaged period of residence of the Union citizen, if this is less than five years"[243]. Permanent residence cards must be valid for 10 years and renewable automatically[244].

Despite these rules, non-EU family members of mobile EU citizens have had the duration of their residence documents limited:

- to the length of their EU spouse's employment situation, even though no intent was expressed by the EU national that they wished to leave prior to the end of five years[245];
- to the remaining period of validity on their passport[246];
- or, for no apparent reason[247].

## 3.2.5. The right to residence is denied without a valid reason

Pursuant to Directive 2004/38, a right to residence[248] can only be denied on public policy, public security or public health grounds or, if there is abuse of rights, such as a marriage of convenience or fraud[249]. Despite these rules, national authorities can be quite "inventive" when it comes to reasons for refusing a residence document. Here are some of the most striking examples:

- A 14 year old Chinese stepson of a UK national working in **France** was refused a residence card on the grounds that he was under 18[250]. He was told he could only

[241] Where a pensioner was issued with a temporary residence card instead of a permanent one to which he was entitled. This lead to him having to provide additional documents to the health authorities to prove his entitlement to public health care.

[242] Where a French national has not been able to obtain confirmation that her residence card issued for 5 years was a permanent one.

[243] Article 11(1).

[244] Article 20(1).

[245] In **France**, one enquirer reported having their residence card limited to one year and another to six months; An enquirer in **Ireland** had his card limited to six months. For more on this see section 4.12.

[246] In **Ireland**, where a family member's residence card was limited to less than 2 years. When, upon the renewal of his passport, the family member requested a new residence card – as his current one had his old passport number on it and thus could not be used for visa free travel – he was told that he would be issued with one with the same validity. He could only re-apply for a new one 3 months before the expiry of his current card; In **Cyprus**, where a family member who applied for permanent residence card was issued one valid for 5 years only based on the validity date of her passport.

[247] In **Germany** to one year in one case and to three years in another case where a citizen's same sex partner in a civil partnership had a residence document issued to them in a different format; In the **UK** (pre-Brexit) to five years instead of 10 for a permanent residence card.

[248] Article 27.

[249] Article 35.

[250] This results of the way France transposed Directive 2004/38: residence cards are required and delivered only to 18+ or 16+ who intend to work in the country.

apply for a document allowing him to travel in and out of the country, a '*circulation transfrontiere*'. This was in turn refused by the Prefecture de Police because he had entered France on a short term Schengen visa and because none of his parents were EU nationals (step-fathers were not accepted). The police gave two options:

1. going back to China to apply for a long term family or student visa (a long term visa was not issued the first time as the consulate in Beijing insisted it was not needed for applying for a residence card); or
2. staying in France until the age of 18, without leaving the country, and then applying for a residence card as an adult!

- The adult children of an Italian worker, aged 22, 23, and 24 (the latter being disabled and completely dependent on her father), were refused residence cards in **Germany** because they were over 21 years old. No attempt was made to examine their individual circumstances or dependency on their father.
- An American spouse of a UK national residing in **France** was denied a residence card on the grounds that "she lives on a boat". She was told she had to have a fixed place of residence[251].
- The Belgian authorities refused[252] to recognise a child guardianship order made by the UK courts in respect of a British citizen who is a legal guardian to her nephews as a result of the mother's mental health. The Belgian authorities are thus refusing to register the two children as residents of **Belgium** (their application was being processed for over 18 months) and have refused to accept that the two children are the citizen's dependents for tax purposes.
- A Bulgarian national, whose Bulgarian husband worked in **Slovenia**, came to join her husband and also to look for a job. Their 8-year old child remained with his grandparents in Bulgaria to finish the school year. The citizen was refused a residence card on the grounds that she left her son in Bulgaria.
- A UK national resident in **Denmark** for 35 years, whose wife and children are Danish nationals, moved to Sweden for three years during his daughter's studies there. He then returned and got a job with a local council in Denmark. Three years later, he got arrested while at work and told he had no right to work in Denmark. He was later deported and prohibited from entering Denmark for six years, a situation which is having serious consequences for his family.
- The Argentinian wife and baby of an EU student were refused residence in **Sweden** because the EU spouse was enrolled on a course that was under one year long – they were told they had to go back to Argentina and had no right to be Sweden[253].

## 3.2.6. "You are required to leave the territory…"

### 3.2.6.1. Expulsions on economic grounds

Member States may deny EU nationals and their family members the right to residence if they no longer satisfy the conditions in Article 7(1) of Directive 2004/38 and become an "unreasonable burden" on their social assistance system[254]. Expulsion, however, can-

[251] In the meantime her Schengen visa expired as the first appointment to register was available 3 months after entering France. The citizen needs to return to the US for personal reasons and fears not being able to return and obtain a residence permit in France due to having overstayed her Schengen visa.

[252] In breach of Article 21(1) of Regulation 2201/2003 on jurisdiction, recognition and enforcement of judgments.

[253] For more on the issue in Sweden see **section 3.3.1** below.

[254] Article 14(1) and (2).

not be an automatic consequence of the EU citizen or their family member seeking social assistance. Their individual circumstances must be examined before concluding that they have become an "unreasonable burden". Moreover, EU nationals who are workers, self-employed or active jobseekers who demonstrate that they have a genuine chance of finding a job, cannot be expelled on economic grounds and neither can their family members[255].

Despite this, EU nationals and their family members continue to have their residence rights denied and to be threatened with expulsion on economic grounds[256].

This is still an ongoing problem in **Belgium**[257], where several jobseekers reported being told to leave or being served with an expulsion order if they did not find a job in a certain period of time[258] and where frontier workers had trouble proving their right to residence and faced expulsion for not providing all the requested documents within 3 months[259].

EU nationals also reported being threatened with deportation or, even deported, on economic grounds from **Germany**[260], **Austria**[261], **Finland**[262] and **Norway**[263].

---

[255] Recital 16 and Article 14(4).

[256] See also the European Parliament's study of the Obstacles to the right of free movement and residence for EU citizens and their families, Chapter 9 (*http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2016)571375*).

[257] Ibid, Chapter 9, pages 122 and 124.

[258] See **Section 3.2.2.2** above.

[259] See **Section 3.2.2.3** above.

[260] A Luxembourg citizen lost his job in **Germany**, but was financially supported by his German fiancée. The German authorities issued him with a deportation order; A Polish pensioner moved to **Germany** to live with her son (a naturalised German national) due to old age and health issues. As her Polish pension only covered part of her living expenses, she applied for welfare benefits, upon which the German authorities issued her with a deportation order, claiming she had forfeited her right of free movement; A Czech family lived in **Germany** for three years. The father worked part-time as a fireman, his mother was on maternity leave. They were expelled on the grounds that the citizen did not work there, his part time work contract was not accepted. They were given one hour to pack and were then taken with their baby to the border by the police; A Romanian citizen residing in **Germany** with her Hungarian registered partner received a letter requesting her to leave the country within a few weeks. She claims to have resided in Germany legally for a year and a half, her registered partner has been working legally in Germany for 20 years and she has followed all rules necessary. She does not understand on what grounds she could be expelled.

[261] A minor child of a Bulgarian worker was given a few weeks to provide evidence of health insurance otherwise she would have to leave **Austria**. The Bulgarian authorities refused to issue a form S1 on the ground that (a) this is only issued to adults and (b) the child was still registered as resident in Bulgaria. The Austrian health insurer then required Form E104 to co-insure the child with her mother in Austria, however as least 3 months are needed to obtain this form from Bulgaria. The mother is the sole carer of the child who goes to school in Austria. She fears the child will be deported if Form E104 cannot be obtained on time. The Austrian authorities seem to be disregarding the fact that pursuant to Article 28(3)(b) of Directive 2004/38 minors cannot be expelled unless there are "imperative grounds of public policy"; A Romanian pensioner who received social support assistance was refused an extension of his right to stay in **Austria**; A Greek national who was self-employed for 2.5 years now was a job seeker – the local authorities were not sure he could keep his right to residence and receive a social allowance in **Austria**. The authorities were not aware of Article 14 of Directive 20043//EC which is not transposed into Austrian law; A retired Slovak citizen was living in her motorhome in **Austria** for two years. After her partner died she was served with an expulsion order on the grounds of insufficient income; A Romanian citizen living and working in **Austria** was temporarily unable to work. While he was in hospital, he received an expulsion order. Article 7(3)(a) of Directive 2004/38 on the retention of worker status was not applied.

[262] **Finland:** A German family where both spouses were jobseekers was served a deportation order in Finland because none of them had a job, even though the husband was attending a training school and the wife had previously worked but was on maternity leave while waiting for a vacancy at a language school; **Finland:** A Spanish job seeker applied for a residence document after residing in Finland for 3 months and provided evidence of financial resources and health insurance. His application was refused and he was orally threatened with expulsion on the ground that he was not employed.

[263] A Spanish citizen applied for benefits in **Norway**. She was threatened with expulsion. She was divorced but she fulfilled the requirements to remain on the territory (as she had been a victim of domestic violence).

### 3.2.6.2. Expulsions on public policy grounds

Article 27 of Directive 2004/38 expressly establishes that the personal conduct of the individual concerned must represent a "genuine, present and sufficiently serious threat" to society and that previous criminal convictions should not in themselves constitute grounds for restricting EU citizens and their family members' free movement rights.

A Swedish national, who had exercised her free movement rights by residing in other Member States, reported being hindered from returning to her home country to reside close to her children because her husband's deportation order from **Sweden** is of indefinite duration. The husband had been deported from Sweden in 2000 after serving a sentence for a drug offence and had since then resided in Germany and Spain and held clean criminal record certificates from both countries. The Swedish courts have been refusing to lift his deportation order. It does not appear that an assessment, pursuant to Article 33(2) of Directive 2004/38, has been made in order to establish whether the husband could be considered a "current and genuine" threat. Such issues have also been reported in the **UK**[264].

## 3.2.7. What happened to procedural safeguards?

Pursuant to Directive 2004/38[265] any denial of residence must be justified and the citizen must be given an opportunity to appeal. Citizens have reported being issued with decisions denying them the right to residence which were unsubstantiated[266].

Another problem is the long waiting time after an appeal of a negative decision[267]. There is no provision under EU law setting a time limit on issuing decisions in response to an appeal of a decision to deny residence rights under EU law.

# 3.3. Residence documents and national identification numbers as a prerequisite to exercising rights and completing administrative formalities

Possession of a residence document "may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality", as long as the citizen can prove their entitlement by any other means. This much is made clear in Article 25 of Directive 2004/38, which codifies various CJEU judgments

[264] A Hungarian citizen living in the **UK** since September 2014 with his wife had travelled many times to the UK previously. He was self-employed in the UK and his wife was in employment. He was refused entry to the UK at a London airport because of his criminal record in Hungary, whereas he had already served his sentence. Later he received a deportation order; In another case UK authorities issuing a removal decision against a Polish citizen simply on the basis of his past criminal conviction from Poland; In a further case, the UK authorities detained a Latvian citizen in the UK on the basis that he was illegally working there.

[265] Articles 30 and 31.

[266] **Belgium:** A self-sufficient Italian citizen was denied residence in Belgium, no deadline for providing missing documents was given and no motivation for the residence denial was provided; **France:** a refusal to issue residence card to a family member in France was not given in writing with due motivation; **Spain:** A citizen resident in Spain for over 40 years was denied a permanent residence document without any reasoning; **Spain:** An American citizen, married to a French citizen who submitted all the requested documents, had her application for a residence card refused in Spain four times without a reason.

[267] **Ireland:** The decision to issue the residence card to an extended family member dependant on the EU national in Ireland was delayed and ultimately refused. The applicant appealed but received no response to his appeal, resulting in him overstaying his temporary residence card. This caused him a problem with his employer who required a residence permit in order for the family member to continue working; This same issue was reported in two cases in **Norway**.

in which the Court was categorical on this issue[268]. Moreover, while there is nothing wrong in principle with a Member State having a population registry and issuing national identification numbers to its residents, such a registration system should not become a disproportionate obstacle to EU citizens' free movement rights, nor should it lead to discrimination against EU citizens.

The reality on the ground, however, is often much different. Residence cards and/or national identification numbers are often a prerequisite for administrative formalities that are so crucial that it is impossible to have a normal life in the country without completing them. This section outlines the difficult situations that citizens find themselves in when they are unable to obtain such residence documents or national identification numbers.

### 3.3.1. The saga of the *personnummer* in Sweden

With the exception of, perhaps, only the UK, in no other EU country are EU citizens and their family members facing more difficulties when trying to exercise their EU right to residence than in Sweden.

Despite action already taken by the Commission[269] and the resultant change in Swedish legislation[270], citizens still report facing many difficulties in their daily life as a result of being unable to obtain a personal identification number ("*personnummer*").

It is not an understatement to say that life is made very difficult indeed for anyone who is unable to show evidence that they will be working in Sweden for over a year or unable to provide an S1 Form from their country of origin, evidencing that that country will ultimately cover their healthcare costs in Sweden. Such citizens are not able to obtain a *personnummer* and this number seems to be a prerequisite for undertaking all of the following activities in Sweden:

- renting accommodation;
- opening a bank account;
- obtaining a credit card;
- taking out a mobile phone subscription;
- taking out a subscription with an internet service provider;
- collecting mail at the post office;
- obtaining medicine at a pharmacy;
- demonstrating medical coverage when seeking treatment at a clinic or hospital;
- registering a vehicle;
- being eligible for municipal services, such as garbage collection;
- registering for free language classes[271];

[268] Cases 48/75 *Royer* par. 50; 85/96 *Martinez Sala* par. 53; C-459/99 *MRAX*, par. 74; C-138/02 *Collins* par. 40. Also since the Directive, the Court repeated this in C-215/03 *Oulane* par. 17-18.

[269] Infringement Case 2007-4081. The case was closed on 23 July 2014 without the matter being referred to the Court of Justice.

[270] That should allow EU nationals to access healthcare without a *personnummer* Förordning om ändring i förordningen (2013:711) om ersättningar för vissa kostnader för gränsöverskridande hälso- och sjukvård, SFS 2015:882 (Ordinance amending Ordinance (2013:711) on the reimbursement of certain costs for cross-border healthcare, SFS 2015:882, 10 December 2015) (*http://rkrattsdb.gov.se/SFSdoc/15/150882.PDF*).

[271] YEA has received a significant number of enquiries evidencing this. In 2017 (1 enquiry); In 2016 (7 enquiries); In 2015 (8 enquiries). This refusal is in breach of the Swedish Education Act and the Alien's Act which provide foreigners with the right to follow courses, even without a personal number.

- signing an employment contract; and
- registering children in school or at kindergarten.

Moreover, and most importantly, employers refuse to hire applicants unless they have a *personnummer*, which leads many citizens into a Catch 22 situation as they cannot obtain a *personnummer* without a job[272].

The cause of the problem is twofold:

1. Pursuant to the Swedish Population Register Law[273], only those who can show they will be resident in Sweden for over a year can obtain a *personnummer*. Thus, jobseekers, students enrolled on courses lasting no more than one academic year (for example Erasmus+ participants), workers with a fixed-term contract of less than one year, homemakers, persons in pre-retirement as well as pensioners, may be refused the *personnummer* on this basis. Even Swedish nationals who decide to exercise their free movement rights and reside in another EU country for part of the year can find themselves deregistered and their *personnummers* cancelled[274].
2. The Swedish tax authority ("*Skatteverket*"), which is responsible for issuing the *personnummer*, checks that the EU citizen and their family members satisfy the residence conditions in Article 7(1) of Directive 2004/38 before issuing the number[275]. When it comes to citizens who do not work and who must provide evidence of "comprehensive sickness insurance", the only way, in practice, of satisfying this requirement is by providing an S1 Form from their home Member State[276]. The EHIC is never accepted and the conditions set by the *Skatteverket* in order for private health insurance to be considered sufficiently "comprehensive" are such that no private health insurance product can fulfil them. Many citizens have reported trying to provide evidence of private health insurance only to have it rejected as insufficient[277].

A temporary number may be issued to those who can show they will reside in Sweden for at least six months. This, however, is little consolation as, besides the fact that it can only be requested by a public authority, it is a number in a format different to the *personnummer*. Thus, it is not always accepted and computer systems do not always recognise it.

While a population registry is a legitimate way of keeping track of a country's residents, and many countries do have one, it should not become a disproportionate obstacle to EU citizens' free movement rights, nor should it lead to discrimination against EU citizens. The Swedish measures are, however, both:

---

[272] For example, a UK jobseeker was told by employers that they would not hire him unless he had a *personnummer* and the *Skatteverket* refused to issue him with one unless he had a job.

[273] Swedish Population Register Law 1991 (Folkbokföringslag (1991: 481), §3 provides: "*After moving to Sweden, a person is expected to register with the official population register (folkbokföras). A person is considered a resident in Sweden when they are likely to be routinely spending their leisure time (either nightly/daily) in the country for at least one year. …*"

[274] A Swedish/German couple were living, working and paying taxes in Sweden as musicians but are now resident part of the time in Germany. The Swedish authorities threatened to deregister them from the population register, cancelling their *personnummers* which would have dramatic consequences for them as they work with local authorities and would not be able to invoice without a *personnummer*.

[275] As there is no longer an obligation for EU citizens to register with the immigration authorities and obtain a residence document in Sweden, the immigration authorities no longer examine whether EU citizens satisfy the residence conditions of Directive 2004/38.

[276] See the *Skatteverket's* webpage outlining the requirement for self-sufficient persons: *https://www.skatteverket.se/servicelankar/otherlanguages/inenglish/individualsandemployees/movingtosweden/citizenofeueeacountry/youareselfsufficient/youaremovingbyyourself.4.3810a01c150939e893f41fe.html* – the same applies to students.

[277] In 2017 (2 enquiries); In 2016 (4 enquiries); In 2015 (2 enquiries).

- Disproportionate –
  - the *Skatteverket's* health insurance requirements go beyond what is necessary to ensure that an EU citizen holds comprehensive sickness insurance and does not become an unreasonable burden on social assistance – an EHIC should be sufficient in the case of temporary residents such as students, and private insurance policies should be acceptable within reason.
  - Moreover, the above provision of the Swedish Population Register Law – which outright excludes temporary residents from the population registry – defies logic. If the legitimate objective of a population registry is to keep a record of the country's residents, why exclude a whole section of society from it, making life unnecessarily difficult for them?

and

- Discriminatory – it is only EU nationals who have to provide evidence of health insurance or a long-term work contract to be able to obtain a *personnummer*, Swedish nationals do not have to jump through such hoops.

To add insult to injury, and in outright violation of Article 25 of Directive 2004/38[278], the *Skatteverket* informs EU citizens that if they do not "have the right of residence" under EU law – as interpreted by them and affected by the Population Register Law – they can obtain a *personnummer* if they can provide a residence permit, of at least one year's duration, obtained on the basis of Swedish national immigration rules. Thus, many EU citizens, who should be able to benefit from the right to residence pursuant to Directive 2004/38, are told they do not qualify for it and must obtain a residence permit on the same terms as non-EU nationals.

In the period between January 2015 and June 2017, YEA received a total of **165 enquiries** from citizens affected by these measures[279].

## 3.3.2. The residence cards problem in France

There is no requirement for EU nationals to register in France. Nonetheless, French legislation goes beyond Directive 2004/38 and provides for the possibility for EU nationals to apply for a residence document at their local prefecture, even before they complete a five year residence period and obtain the right to permanent residence in France[280].

However, many enquiries received by YEA over the last years attest to the fact that French prefectures refuse to issue a residence document to EU nationals, whether before[281] or after[282] they have resided in France for five years, on the grounds that EU na-

[278] Which states that the completion of an administrative formality cannot be subject to the possession of residence documentation.

[279] 122 enquiries in relation to the requirement to provide the S1 Form (see **section 4.1** below), 16 enquiries where the *personnummer* was a prerequisite for language classes (see footnote 317 above) and 27 enquiries that revealed various other difficulties that EU nationals faced as a result of the above Swedish measures. Further evidence of this problem has come to light in an investigation carried out by the swedish news source, The Local Sweden (*https://www.thelocal.se/tag/the+local+investigates+swedish+id*).

[280] Articles R121-10 – R121-12 Code de l'entrée et du séjour des étrangers et du droit d'asile. See also the webpage of the French administration (*https://www.service-public.fr/particuliers/vosdroits/F16003*).

[281] **France:** A German pensioner was denied a registration certificate in France on the grounds that EU citizens do not need one. His German insurer would not issue an S1 Form without it; **France:** A German resident in France was refused a residence document by the Paris prefecture on the grounds that such documents are no longer provided to EU nationals prior to 5 years of residence. The citizen was even told to make a written declaration saying that she was not requiring one.

[282] **France:** A Spanish citizen was denied a permanent residence card on the ground that EU citizens do not need one; **France:** A Dutch national resident in France for 35 years could not have her permanent residence card renewed on the ground that she no longer needed one. The Family Benefits Fund (CAF) required her to provide one in order to receive a disability benefit; The same issue was reported in a further 3 enquiries.

tionals are not required to have one in France. As explained in **section 3.2.1.6** above, this has particularly affected UK nationals resident in France, but other EU nationals have also been unable to obtain residence cards. The reason for this is not clear.

As there is no registration requirement in France, prefectures do not issue any other document attesting to the fact that the EU citizen resides in France lawfully. The inability of citizens to obtain a residence document when they request one results, in essence, in the reversal of the burden of proof when they are faced with a situation where they are required to prove their lawful residence.

EU citizens report facing many difficulties because they cannot provide a residence document or any official document attesting that they reside in France. In particular:

**a.** The Family Benefits Fund, "*Caisses d'Allocations Familiales (CAF)*", requires EU citizens to present a residence card as evidence of lawful stay in France in order to continue receiving family or disability benefits. The Fund actually ends the payment of benefits if the EU national cannot provide a residence document, even in the case of nationals with the right to permanent residence. This is a serious issue in France and the subject of at least **25** YEA enquiries between January 2015 and June 2017[283].

**b.** In order to continue receiving the guaranteed minimum income (*"Revenu de Solidarité Active" (RSA)*) a Portuguese citizen who arrived in France in the 1960s had to provide a residence card, which he no longer had.

**c.** In order to be eligible for a scholarship, a Spanish student who was born and had always resided in France, was required to provide a residence document,

**d.** The French unemployment services (*"Pôle Emploi"*) refused to register a Romanian national who had been working in France before becoming unemployed. He was required to submit a residence card.

**e.** A Spanish worker was asked to present a residence card in order to benefit from a special social housing scheme for workers.

**f.** A bus company that runs training for bus drivers required a residence document from a Spanish citizen so he could take part in the training and obtain the relevant certificate he needed to get a job.

**g.** A German national was unable to register her car in France because she could not provide any evidence of residence in France (all house bills were in the name of her de facto partner).

## 3.3.3. Spain

### 3.3.3.1. The problem of the NIE

Many EU nationals who wish to work in Spain are caught in the following Catch 22 situation. They apply for a registration certificate and a foreigner's identification number (Numero de Identificacion de Extranjero "NIE"). The NIE is required by employers in order to hire people, it is necessary to set up as self-employed and register with social security and access services such as opening a bank account. However, if the citizen applies as a jobseeker, self-employed or a worker, the immigration authorities require evidence that the EU national is already working in order to issue them with the registration certificate and, subsequently the NIE. It seems that these EU nationals are not being offered the alternative to register as self-sufficient, when they generally are. They

[283] In 2017 (7 enquiries); In 2016 (8 enquiries); In 2015 (11 enquiries).

are told that they should be able to work without the NIE, when in practice that is not the case as employers refuse to hire them if they do not have one[284].

#### 3.3.3.2. The problem of the driver's licence

A registration certificate is required in order to obtain a Spanish driver's licence or to obtain a replacement one. Citizens can end up in a Catch 22 situation when an employer requires a driver's licence in order to hire a worker, the worker needs to apply for one but the immigration authorities will not issue a registration certificate without proof the citizen is actually working. The citizen is thus not able to apply for the driver's licence and not able to work.

#### 3.3.3.3. The problem of the disability certificate

Spanish social security authorities appear not to be issuing disability certificates to non-registered residents. An Italian citizen who has a disability status in Italy moved to Spain. He was required to provide evidence of his disability status by the Spanish social security authorities in order to obtain rebates from his employer. However, he was not able to obtain it without a registration certificate.

### 3.3.4. The problem of the CPR in Denmark

A similar problem to that faced by EU nationals in Spain who cannot obtain the NIE is being faced by non-EU family members who cannot obtain a personal number (CPR) in Denmark.

In breach of Article 25 of Directive 2004/38, Danish registration rules make it compulsory for non-EU family members of EU citizens to hold a residence card in order to obtain a CPR[285]. Non-EU family members who do not hold a personal number cannot register for work, open a bank account, register for health insurance and the EHIC, or access any public services, such as register in the civil registry as residing at a particular address and register their address officially at the postal service. Employers hesitate to hire someone without a CPR as they are not convinced that the citizen is legally resident if they do not have one.

### 3.3.5. The requirement to prove residence in another Member State in order to obtain the S1 Form from the competent Member State

Citizens who require the S1 Form as evidence of "comprehensive sickness insurance" in order to be able to register in the host Member State often arrive at a dead end when

[284] For example: A UK national wanted to set up as self-employed but could not do that without a NIE; A French national wanted to work in France – he had a professional qualification – but was not able to sign up to lists for interim work without a NIE – the national authority refused to issue him with one unless he had a work contract. The citizen was self sufficient as he was supported by his parents; A Spanish employer required a NIE to hire an Italian job seeker – he could not get a NIE if he did not have a work contract for at least three months and a salary of 600€. The immigration authorities insisted that he should be able to work with his ID but the employer refused to hire him; A self-employed UK national could not obtain a registration certificate without providing evidence of invoices – she could not start working unless she had a NIE – she could not get the N E without a registration certificate. She faced a long delay to get a new appointment. The civil servant was rude and accused her of fraud for suggesting she could register as a worker because she had an actual job offer that she was considering. See also EP's Comparative Analysis on Obstacles to the right of free movement and residence (p. 64).

[285] Bekendtgørelse af lov om Det Centrale Personregister (*https://www.retsinformation.dk/Forms/R0710.aspx?id=191719*).

their home country refuses to issue it to them unless they provide a registration certificate from the host Member State as evidence that they actually reside there.

This is a problem most often faced by citizens trying to obtain a personal number in Sweden, but has also been reported by those trying to register in Portugal, France, Greece and Austria. The countries that have denied their own nationals the S1 Form for this reason are: **Romania**[286], **Hungary**[287], **Spain**[288], the **Netherlands**[289], **Italy**[290], **Bulgaria**[291], **Croatia**[292], **Lithuania**[293], **Portugal**[294], **Poland**[295], **Slovakia**[296], **Germany**[297] and the **UK**[298].

### 3.3.6. Catch 22 situations

▶ A UK national writes:

*"I am currently living in Finland – having been here for less than three months. I am normally a resident of the UK – which is where I was born.*

*I would like to continue my stay in Finland, and therefore I have been looking to start my own business here. However, I have come across a problem:*

*1. In order to start a business, I need to have a Finnish bank account – to log on to the page with which I register as a sole trader.*

*2. In order to get a bank account, I need to "register as an EU citizen" which gives me an ID number, which I can then open a bank*

*HOWEVER,*

*3. In order to register as an EU citizen, I need to be able to prove that I am self-employed – which of course I am not able to do, for the above reasons...!*

*Please help me with this!"*

Further situations were reported where a residence document was a prerequisite to completing administrative formalities, which has led to citizens having to go round in circles. In particular:

- In **Portugal**, a residence certificate is necessary in order to be issued with a tax identification number. A UK citizen who was refused this tax number by the tax authorities as he did not have a registration certificate, could not execute a tenancy agreement as the real estate agencies requested a Portuguese tax number in order to do it. But it was impossible to obtain a registration certificate without evidence of a Portuguese address.
- In **Italy**, a blind, 89 year old, dependant mother of a German national was required to provide evidence of pension payments to an Italian bank account. She needed a fiscal code card ("codice fiscale") to open a bank account. No fiscal code card could be obtained without a residence document.
- In **Poland**, an Italian citizen wanting to establish himself as self-employed, was not granted the authorisation to do so because he was not resident in Poland. He was not allowed to register as a resident because he did not have a job. ◀

[286] (6 enquiries)
[287] (5 enquiries)
[288] (3 enquiries)
[289] (3 enquiries)
[290] (2 enquiries)
[291] (2 enquiries)
[292] (1 enquiry)
[293] (2 enquiries)
[294] (2 enquiries)
[295] (1 enquiry)
[296] (2 enquiries)
[297] (1 enquiry)
[298] (1 enquiry)

### 3.3.7. Other difficulties

Even if one does not end up going round in circles, the requirement to show a residence document still hinders citizens from completing administrative formalities, as shown by the following examples:

- In **Cyprus**, an EU couple resident there for 10 years was required to show a residence document for their 5-year-old disabled child in order to be considered for social benefits. The immigration authorities required proof of a €1,200 monthly income in order to issue a residence permit to the child even if the parents had acquired the right to permanent residence.
- In **Belgium**, a jobseeker in the process of having his professional qualifications recognised was required to produce a residence permit.
- In **Austria**, a Croatian citizen who applied for the family allowance was informed that it would only be paid to him if he provided the registration certificates of his wife and children. The authorities informed him that registration certificates would only be issued if he provided at least four months of pay slips. As a result, the payment of the family allowance would be delayed. The citizen had evidence that the children were enrolled to start school in Austria and were registered as his dependants for social security purposes.
- In **Slovakia**, a returning Slovak national, who had exercised his free movement rights by residing in Ireland, was required to provide his Irish registration certificate as evidence of his residence in Ireland, in order for his Russian wife to obtain a residence card on the basis of EU law. The citizen had not applied for one when he resided in Ireland.
- In **Bulgaria**, a five year residence card was required to obtain a driver's licence, a Belgian worker whose registration certificate was wrongly issued with limited validity (due to a probation period in his work contract), could not obtain a driver's licence.

## 3.4. What happened to equal treatment?

EU nationals and their family members who are exercising their free movement rights by residing in another Member State are to "enjoy equal treatment with nationals of that Member State within the scope of the Treaty"[299]. Direct discrimination on the grounds of nationality is prohibited[300] and any indirect discrimination must be objectively justified and proportionate.

Nonetheless, besides the discrimination EU citizens and their family members are faced with when they cannot obtain a national identification number or when they must present a residence document in order to be able to access public and private services or even to be able to work, citizens report many other instances where they are not being treated equally with the nationals of their host Member State.

[299] Article 24 of Directive 2004/38.

[300] Article 18(1) TFEU.

Most reported cases related to **France** and the inability of EU nationals resident there to obtain healthcare cover[301], social security benefits[302] or welfare benefits[303] on the same terms as French nationals. Citizens, however, also reported having been discriminated against in:

- **Finland**, where an EU citizen's wife was denied a living allowance and housing benefit on the grounds that her EU spouse, who was self employed in Finland, had to be resident in Finland for five years before they could apply for such benefits;
- **Spain**, where a French national claimed he was denied hospital care due to him not being Spanish, even though he was affiliated with Spanish social security;
- **Ireland**, where a UK national was excluded from a scheme to assist the elderly insulate their homes as she was not in receipt of the winter fuel allowance paid by the Irish authorities. She was, however, in receipt of the winter fuel allowance paid by the UK authorities;
- **Romania**, where the Romanian authorities refused to provide non-Romanian nationals with a Romanian national insurance card even though they lived and worked in Romania and paid all required taxes and insurances; and where a student from Italy, who tried to take advantage of the student fare when purchasing a train ticket in Romania, was told that "the reduction applies only to Romanian students";
- **Italy**, where a Croatian national was denied social assistance despite being entitled to it and faced racist, threatening behaviour from a social assistant, who used false documents to remove the citizen from the town hall register;
- **Croatia**, where a Croatian student, studying in Austria, was not allowed by the student services to work as a student in Croatia because she was not studying there;
- **Sweden**, where a British national, who had previously worked there and was lawfully residing in Sweden, complained of discriminatory treatment by the Swedish employment agency which informed him that his application has been held back in order to provide others a chance of work;
- **Cyprus**, where a Lithuanian single mother, legally working and residing in Cyprus for five years, complained about facing discrimination and great delays in having her application for child and single parent benefit processed;
- **Austria**, where the Austrian authorities refused to pay care allowance to dual Austrian/Croatian nationals who care for their elderly parents in Austria, just because the father received a small Bosnian pension (they were told that the Bosnian authorities should be competent); and where a UK national, who moved to Austria

[301] A Romanian citizen working in **France** for three months was asked to provide a social security number in order to register for healthcare cover. This number was refused to him on the basis of his nationality; An American spouse of a Belgian citizen working in **France** was refused healthcare cover as her husband's family member and was told she had to be covered in her own name, which meant having to first obtain a residence card – which would take some time and for which, the citizen was informed, proof of health insurance was required.

[302] A Romanian citizen employed in France, with an indefinite employment contract, could not benefit from a tax deduction in respect of his daughter who was living with his wife in Romania – he was considered as having non-marital single status.

[303] A discriminatory delay of six months was imposed by the local social assistance services for the payment of the top-up to work-related income ("Revenu de solidarité active" (RSA)) to a Dutch national, who had acquired the right to permanent residence in **France**. One of the reasons invoked for the delayed payments was the fact that she was Dutch; A UK national, who was a part-time worker in France was also denied the RSA on the ground that his part-time employment did not suffice to regard him as a migrant worker entitled to equal treatment as a resident in France; A **French** student housing organisation "Centre régional des oeuvres universitaires et scolaires" (CROUS) refused to help an EU student with finding accommodation, based on the fact that the citizen was neither French nor had been resident in France for at least two years.

with her Turkish husband, was told she had to be working full time in order for her husband to be allowed to work. Once she presented evidence of full time employment, she was told that she needed to be working for at least 3 months before her husband had the right to work;

- **Portugal**, where EU nationals who change their address are obliged to obtain a new registration certificate and pay a 15 EUR fee, while Portuguese nationals in the same situation are charged only 3 EUR and also have the option of making the change online for free; and
- **Lithuania**, where the online e-governance gateway for access to the majority of public services is available only to Lithuanians as only they are able to identify themselves due to the use of simplified registration procedures and documents issued solely for use by Lithuanian citizens. ▶

▶ The non-EU spouse of a Romanian national working in Lithuania writes:

*"When attempting to use the e-government service portal for Lithuania*. I was informed that it was only available to Lithuanian citizens despite having registered my residence card with one of their banking partners.*

*When I inquired directly (*epaslaugos@ivpk.lt*) I was told that "You can`t use the electronic services. Please order the service directly." [...]*

*The e-government services portal is the main way Lithuanians interact with the government. The non-electronic means are poorly documented and hard to use. Is this a case of discrimination due to nationality?"*

* (*https://www.epaslaugos.lt/portal/login*)

# 4. The Need for Clarification

It is understandable that there was never an intention to fully harmonise all aspects of free movement and that precisely for this reason the legislative provision adopted on the basis of Article 21(2) "*with a view to facilitating the exercise of [free movement] rights*" is a Directive, rather that a directly applicable Regulation. It is, therefore, also, understandable that some concepts in Directive 2004/38 are intentionally left vague in order to leave a margin for interpretation that can be used by Member States to better reflect their national identities.

That said, however, as the Court made clear, "*the margin for manoeuvre which the Member States are recognised as having must not be used by them in a manner which would compromise attainment of the objective of Directive 2004/38/EC, which is, inter alia, to facilitate and strengthen the exercise of Union citizens' primary right to move and reside freely within the territory of the Member States, and the practical effectiveness of that directive.*"[304]

Moreover, not all "grey areas" are intentional and providing some clarity, in the form a new Communication, would not necessarily equate to hampering the Member State's margin of discretion.

A new Communication on clarifying certain "grey areas" in Directive 2004/38 is needed for the following reasons:

- Evidence suggests that Member States take advantage of loopholes in the Directive to arrive at results that are contrary to its very purpose and that can be at odds with EU citizens' fundamental rights, in particular the right to healthcare and the right to a family life (enshrined in Article 7 and 35 of the Charter on Fundamental Rights of the EU);

[304] Case C-184/99 *Grzelczyk* par. 70 et seq.

- Member States sometimes ignore the guidance that has already been provided in the Commission's 2009 Communication, thus further emphasis must be placed on those issues; and
- There have been many CJEU judgments that affect citizens' free movement rights since 2009 and, if they are not to be codified in new legislation, the principles contained therein should at the very least be included in a new Communication on Directive 2004/38.

Mobile EU citizens report facing many difficulties when trying to exercise their EU right to residence as a result of some of the "grey areas" in the Directive. Their lives would be made easier if some clarity was provided. The enquiries submitted to YEA between January 2015 and June 2017 suggest that clarity would be most welcome on the following **15 issues**:

## 4.1. Satisfying the "comprehensive sickness insurance" condition

### 4.1.1. The problem

Economically inactive persons, who reside in a Member State with a residence based healthcare scheme[305] and where no possibility exists to pay healthcare contributions, may end up without any healthcare coverage and may also be unable to obtain a permanent residence document. This has been a particular problem in the **UK** and **Sweden**, and has also been reported in **France**, **Spain** and **Italy**.

### 4.1.2. The root cause

This issue arises as a result of the parallel existence of two differing concepts of "residence" in EU law, namely:

- "Lawful" residence under Directive 2004/38; and
- Factual or "habitual" residence used to determine the competent Member State for social security coordination purposes under Regulation 883/2004306, without any clarification or indication on which takes precedence when overlap occurs.

In particular, when an economically inactive person moves their residence to another Member State, in order to lawfully reside there pursuant to Directive 2004/38 they must have sufficient resources and comprehensive sickness insurance[307]. There is no definition in the Directive itself as to what constitutes "comprehensive sickness insurance". Some clarification is provided in the Commission's 2009 Communication[308], but

[305] Where healthcare is financed entirely or, to a large extent, by taxes, as opposed to social security contributions.

[306] This issue is also analysed in the 2016 Fresco Analytical Report on Access to healthcare in cross border situations (*http://ec.europa.eu/social/BlobServlet?docId=17130&langId=en) (see sections 2.1 – 2.4*).

[307] Article 7(1)(b).

[308] (COM(2009) 313) (*http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52009DC0313*). Here sickness insurance is defined as "*Any insurance cover, private or public, contracted in the host Member State or elsewhere, is acceptable in principle, as long as it provides comprehensive coverage and does not create a burden on the public finances of the host Member State. In protecting their public finances while assessing the comprehensiveness of sickness insurance cover, Member States must act in compliance with the limits imposed by Community law and in accordance with the principle of proportionality*". There is, therefore, no explanation of what would be considered as "comprehensive" coverage.

Member States are largely given discretion on how to interpret this – and sometimes, as the case of **Sweden** demonstrates, choose to blatantly ignore it[309].

As long as the economically inactive person can provide evidence that their home Member State will cover the cost of their healthcare – for example, in the case of most pensioners who can provide an S1 Form[310], or students who can present the EHIC – there is generally no issue[311].

The problem arises when the citizens cannot provide evidence of coverage by their home Member State. This can be the case for self-sufficient persons in pre-retirement, students who transferred their residence to the host Member State and cease to be covered by their home Member State and anyone else who is required to, but for some reason cannot, present evidence of being covered by their home Member State. Those who previously worked but are now involuntarily unemployed and no longer in receipt of unemployment benefits will also be affected, as will economically inactive family members with retained rights of residence and workers who do not satisfy the nationally-imposed definitions of work, such as working periods and minimum earnings[312].

Pursuant to Regulation 883/2004 these persons are subject to the legislation of their country of residence, meaning the country where they habitually reside and where their centre of interests is located[313]. Pursuant to Article 4 of Regulation 883/2004, they are entitled to equal treatment with nationals of their host Member State, also as regards healthcare coverage.

In Member States that have a contributions based health scheme, this does not become an issue since, generally, there is a possibility, or even an obligation, to contribute to social security in order to be entitled to healthcare. Thus, economically inactive mobile EU citizens are able to have access to healthcare on the same terms as economically inactive nationals[314].

However, in Member States with a residence based national health system (NHS)[315], or those with a hybrid system[316], where entitlement to healthcare is based on legal residence in the country, one can quickly arrive at a "chicken and egg" situation.

---

[309] See **section 3.3.1** above.

[310] And those receiving other long term benefits such as, for example, invalidity pensions from their home Member State.

[311] Although there is still evidence this is not the case. For example, in **Sweden** only S1 Form is accepted as evidence of comprehensive sickness insurance (*http://www.skatteverket.se/servicelankar/otherlanguages/inenglish/individualsandemployees/movingtosweden/citizenofeueeacountry/youarestudying/youaremovingbyyourself.4.3810a01c150939e893f4157.html*) (the private insurance cover described as an alternative is not offered by any insurance company in Sweden); Cases where a student's EHIC was not accepted were reported in **Italy**; **Italy** also refuses to issue S1 Form to pensioners who do not reside or pay taxes in **Italy**; **Spain** refuses to issue the EHIC (which normally has a 2 year validity date) to those unemployed or with temporary work contracts, as well as to students over the age of 26 whose parents are unemployed or interrim workers. If such citizens move abroad, they are often issued with a Provisional Replacement Certificate, valid for up to three months only (7 enquiries were receive in relation to this).

[312] See section 4.1 of the 2015 Fresco Comparative Report on the concept of worker (*http://ec.europa.eu/social/BlobServlet?docId=15476&langId=en*).

[313] Article 11(3)(e) of Regulation 883/2004, Article 11 of Regulation 987/2009.

[314] See 2016 Fresco Analytical Report (section 2.3.3.2).

[315] Such as the **UK** and **Sweden**, where healthcare is financed exclusively from taxes.

[316] Such as **France** where healthcare is financed to a large extent from taxes and partly from social security, or **Spain** where healthcare and social security are entirely separate with the former financed entirely from taxes and the latter from contributions.

### 4.1.3. The "chicken and egg" situation

Whereas, on the basis of Article 4 of Regulation 883/2004, inactive mobile EU citizens should be entitled to access national health system on the same basis as inactive nationals, i.e. without making any specific healthcare contributions, it is sufficient for a Member State to interpret the "comprehensive sickness insurance" requirement of Directive 2004/38 restrictively for these citizens to be unable to have access to public healthcare.

A Member State can decide that access to their NHS cannot be considered as evidence of "comprehensive sickness insurance" and that private insurance is required in order to be "lawfully" resident. This is the case in the **UK**[317], **Sweden**[318] and **France**[319]. The problem, however, is that in countries with an NHS, private insurance is not something that is widely available or generally accessible. It will be costly and the cover provided will not necessarily be as extensive as under the NHS. It may even be impossible to have certain treatments done privately (either because their cost is prohibitive so private insurance will not cover them or because private insurance will not cover pre-existing conditions) and the geographical coverage of private clinics may be limited. This can result in a situation where no private insurance policy available on the market will satisfy the "comprehensive sickness insurance" criterion, as is the case in **Sweden**.

As a result, economically inactive mobile EU citizens may be left either with no possibility to access the national health system[320] or, even if they can get access to healthcare[321], they will not be able to obtain a residence document because they have not satisfied the "comprehensive sickness insurance" condition in Directive 2004/38. Although, a residence document should not be essential when living in another Member State, as has been explained in **section 3.3** above, life without one can be very difficult indeed.

### 4.1.4. The evidence

YEA has received numerous enquiries from citizens which demonstrate that, despite any action previously taken by the Commission, this issue remains a problem for mobile EU citizens to this day. In particular, only in the period between January 2015 and June 2017, there were at least:

---

[317] The CSI requirement has been a major problem for self-sufficient EU nationals applying for permanent residence in the UK. YEA has received at least 39 enquiries on this issue since 2015 with the number increasing each year. Many citizens had been relying on the NHS during their initial five years of residence but who were informed of the CSI requirement only upon applying for permanent residence. Those who could not provide evidence (by way of form S1) that their home Member State was covering their NHS healthcare costs and who did not have private healthcare coverage during their initial five years of residence, were denied permanent residence on the grounds that they did not have CSI. This came as a surprise to many as EU nationals are not required to obtain a registration certificate in the UK. No mention of the CSI is made on the relevant UK government website which outlines the formalities for EU citizens who wish to reside in the UK (*https://www.gov.uk/eea-registration-certificate*). The CSI requirement is only mentioned in the Home Office guides to the application forms, thus only those EU nationals who voluntarily applied for a registration certificate after arrival would have been made aware of the CSI requirement prior to the end of their five year residence period.
See also: *http://europa.eu/rapid/press-release_IP-12-417_EN.htm*

[318] See **section 3.3.1** above.

[319] And has been the subject of repeated complaints to the European Commission. See, for example, *http://www.europarl.europa.eu/meetdocs/2009_2014/documents/peti/cm/929/929916/929916en.pdf*

[320] As is the case in France.

[321] As in the UK where the state does not limit access to the NHS.

- **122** enquiries in relation to **Sweden**[322];
- **39** enquiries in relation to the **UK**[323];
- **9** enquiries in relation to **France**[324];
- **6** enquiries in relation to **Italy**;
- **4** enquiries in relation to **Spain**.

### 4.1.5. The current state of play

Currently, neither Directive 2004/38 nor Regulation 883/2004 make reference to each other. It is, thus, not clear which "residence" concept takes precedence. Does one have to be "lawfully resident" on the basis of Directive 2004/38 first, meaning that, at least for the first five years the citizen burdens neither the national "social assistance system"[325] nor the national health care system? Or can Article 4 of Regulation 883/2004 be relied upon so that access to the national health care system is considered as satisfying the "comprehensive sickness insurance" requirement from the moment that there is a shift of "habitual" residence?

As the above evidence suggests, some Member States take the former view, while the Commission takes the latter[326]. The CJEU has not been particularly helpful in providing clarity. In the one case, C-308/14 *Commission v UK*, where the Court had the opportunity to do so, it largely dismissed this as a non-issue, stating that Article 11(3)(e) of Regulation 883/2004 is merely a conflict rule determining the applicable social security legislation, whereas the legal residence requirement is simply one of the conditions for being entitled to a social benefit[327] – and Member States are free to determine what those conditions are. The Court, therefore, applying the same reasoning as it did to Special Non-Contributory Benefits (SNCBs) in *Dano* and *Brey*[328], seems to suggest that – at least as regards family benefits, which were the subject matter of that case – the Directive comes first. One must first be lawfully resident, (i.e. either working or having sufficient resources and sickness insurance) and only then can one claim family benefits.

Applying this reasoning to healthcare, however, is problematic. This is especially so in the case of economically inactive persons, since they must prove that they have "comprehensive sickness insurance" in order to have the right to reside in their host Member State. If they cannot provide evidence of coverage by their home Member State – because, pursuant to Regulation 883/2004, that State is no longer the "competent state" in their case – and if they cannot rely on Article 4 of the Regulation 883/2004 in order to access the NHS in their host country, then what are they left with? Private health insurance seems like the only possibility – except, as the case of Sweden demonstrates, that may not even be a realistic possibility. And if it is, it will not be without serious limitations, as explained above.

---

[322] **19 enquiries in 2017**; **56 enquiries in 2016** and **48 enquiries in 2015**.

[323] In 2017 (24 enquiries); In 2016 (9 enquiries); In 2015 (6 enquiries).

[324] In 2017 (6 enquiries); In 2016 (1 enquiry); In 2015 (2 enquiries).

[325] This is the wording used in Recital (16) and Article 14 of Directive 2004/38.

[326] As evident from the stance the Commission has taken as regards complaints against France, Sweden and the UK.

[327] Child benefit and Child tax credit in that case.

[328] Cases C-140/12 *Brey* and C-333/13 *Dano*, concerned SNCBs (a top-up to a pension and a subsistence benefit to a jobseeker), expressly listed in Annex X of Regulation 883/2004, which are financed exclusively by national taxation. They thus have an element of "social assistance", to which reference is made in Directive 2004/38. On the other hand, the judgment in *Commission v UK* marks the first instance that the Court takes this approach in relation of "pure" social security benefits.

Healthcare warrants a different treatment to SNCBs, or even to other social security benefits. If one is denied a top-up to a low pension, or a jobseekers' subsistence benefit, or even a family benefit – while this would negatively affect their financial situation – the denial of the benefit will not necessarily leave them without any resources and would not necessarily lead to a denial of a right to residence. They could still reside in the host country with whatever resources they have and without burdening the national "social assistance" system (or, if the Court so wishes, the national "social security system"). If, however, in Member States with a residence based NHS and where private health insurance is not a viable alternative, an economically inactive citizen is unable to rely on the NHS and/or is not given the opportunity to financially contribute to it, they may find themselves in a situation where they cannot access healthcare at all, which means they cannot satisfy the "comprehensive sickness insurance" criterion and can thus be denied the right to residence.

The irony is that even self-sufficient persons, with more than enough resources to reside in the host Member State without being a burden, may be denied the right to residence because they are not able to satisfy the "comprehensive sickness insurance" condition, when private health insurance is either unavailable to them or not considered as "comprehensive" enough. This is a result that is completely contrary to the very purpose of the Directive.

Needless to say that measures or policies which lead to citizens not being able to access healthcare are at odds with Article 35 of the Charter on Fundamental Rights of the EU, which acknowledges the right to healthcare as a fundamental right. Moreover, when economically inactive EU migrants are left with private health insurance as the only possible way of accessing healthcare, while economically inactive nationals can rely on the NHS, we are faced with a situation of outright direct discrimination on the basis of nationality.

There is, to date, no Court judgment dealing with this precise issue. Given the direction the Court has recently been taking[329], it will not be surprising to see a further shift away from its previous reasoning that Member States should exercise a "*degree of financial solidarity*" and that "*Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality [...]*"[330].

The Court's *Commission v UK* judgment has, in a way, paved the road for other Member States with residence based national health schemes to go the way of the UK and Sweden – and there are currently many[331].

### 4.1.6. Time for action

It is, therefore, high time for the Commission to provide some much needed guidance and clarification on this issue before more "damage" is done. While the latest Proposal for an amendment to Regulation 883/2004[332] has gone some way towards this goal

[329] Cases C-140/12 *Brey*, C-333/13 *Dano*, C-67/14 *Alimanovic*, C-299/14 *Garcia Nieto* and more recently in C-308/14 *Commission v UK*.

[330] C-184/99 *Grzelczyk*.

[331] CY, DK, EL, FI, IE, IS, IT, LV, MT, PT, SE and UK all have residence based schemes, France and Spain have hybrid systems and as explained above are both already applying a restrictive definition of "comprehensive sickness insurance".

[332] COM(2016) 815 final.

and is a welcome development[333], that Proposal only just entered the legislative pipeline and it is not yet clear when and – most importantly – in what shape it will come out. Given the turn the discussions in the Council have taken, things do not look at all promising[334].

Guidance is needed now, in the form of a Communication on Directive 2004/38, encouraging Member States to respect EU citizens' fundamental right to healthcare, as enshrined in Article 35 of the EU Charter on Fundamental Rights, either:

1. by allowing economically inactive EU citizens to rely on their national health system in order to satisfy the residence condition in Article 7(1) of Directive 2004/38; or, at the very least,
2. by putting in place a system whereby economically inactive nationals can pay into the national healthcare system in a proportionate manner.

Such a clarification will not tamper with the Member States' margin of discretion. Member States will still have full discretion on what type of healthcare system they have. The Directive, for all its vague terms, did intend for self-sufficient economically inactive EU citizens to still be able to move in the EU.

A clarification on this issue is, therefore, much needed so that self-sufficient, economically inactive EU citizens can take full advantage of their free movement rights in the EU. This would send a clear message to the Member States that, despite the mounting lack of "financial solidarity" among Member States in the current times, the Commission will stay true to its role as guardian of the Treaties and guardian of the rights that EU citizens derive from them.

## 4.2. The right of non-EU family members to stay in the host MS beyond the expiry of their entry visa term, if the residence application process is still ongoing

A major stress for EU nationals and their family members is when they cannot complete the application process for the residence card before the non-EU family member's entry visa expires. As explained above, this can be the case when appointments for registration are difficult to obtain[335], or when the authorities doubt the authenticity of a couple's foreign marriage certificate and require further documents[336], or generally when an application is refused for whatever reason and the citizen is in the process of reapplying.

---

[333] With Recitals 5(b) and 5(c) providing that:
"*(5b) Member States should ensure that economically inactive EU mobile citizens are not prevented from satisfying the condition of having comprehensive sickness insurance cover in the host Member State, as laid down in Directive 2004/38/EC. This may entail allowing such citizens to contribute in a proportionate manner to a scheme for sickness coverage in the Member State in which they habitually reside.*
*(5c) Notwithstanding the limitations on the right to equal treatment for economically inactive persons, that arise from the Directive 2004/38/EC or otherwise by virtue of Union law, nothing within this Regulation should restrict the fundamental rights recognised in the Charter of Fundamental Rights of the European Union, notably the right to human dignity (Article 1), the right to life (Article 2) and the right to healthcare (Article 35).*"

[334] See the Council's Progress Report from 2 June 2017, page 6: "*[...] the Presidency is proposing to delete Recital 5b on comprehensive sickness insurance, to delete Recital 5c referring to the Charter of Fundamental Rights [...]. The Working Party reached a broad agreement on this approach*" (*http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_9524_2017_INIT&from=EN*).

[335] **Section 3.2.1.1** above.

[336] **Section 3.2.1.4** above and Annex 1. For example, 199332, where the application for a family member's residence card in **Denmark** is taking a long time due to the authorities checking the authenticity of the couple's non-EU marriage certificate – but the authorities still require the wife to register before her visa runs out, which is unlikely to be possible.

Even though such citizens should have nothing to fear – the Court has made it clear in *Metock* that prior lawful residence in a Member State cannot be made a precondition to a right to residence and that it is irrelevant "*when and where their marriage took place and [...] how the national of a non-member country entered the host Member State*"[337] – when citizens are faced with an expiring visa they often believe that they have to return to the non-EU national's home country and reapply for a new visa[338]. It does not help when national authorities tell them to do just that, or even threaten them with deportation for overstaying their visa term[339]. Moreover, citizens who need to briefly exit the host Member State during the application process fear that they will not be allowed back in if their visa term expires before their return while their residence application is still pending[340]. Such citizens have been told to reapply for a visa before returning[341] and retained at border control upon their return if they did not have a new visa[342].

Many EU citizens and their family members would be very grateful if there is clear guidance outlining that they are not required to take the illogical step of leaving the country to reapply for an entry visa simply because the residence card application process is taking too long or that they should not have to reapply for a new visa if they briefly exit the host Member State while their residence application is pending.

## 4.3. The concept of "sufficient resources" and their origin

Sufficient resources can come from anywhere. At least this is what the Court has held and the Commission repeated in its 2009 Communication[343]. The evidence of sufficient resources cannot be limited and resources from a third person, including a non-EU national spouse, must be accepted[344].

---

[337] Case C-127/08 *Metock*, par. 80 and 99.

[338] The American wife of a self-sufficient EU national was refused a residence card in **Germany** because the EU national did not have a work contract – he was working mostly outside Germany and income from other sources was not accepted as evidence. She wished to reapply after the EU national obtained a work contract but a new appointment with the immigration authorities not possible before the expiry of her Schengen visa – this was the cause of significant stress to the couple.

[339] The Moroccan husband of a self-employed/self-sufficient UK national had his application for a residence card rejected three times in **Spain**. Each time the applicant inquired whether he could stay beyond his visa term while reapplying and each time he was told this would not be a problem. Despite this he has had his passport taken away when reapplying and was threatened with deportation for overstaying his visa term; The **Bulgarian** authorities denied the right to stay to non-EU family members (wife and child) of a British worker: they were required to leave the territory because they entered Bulgaria without a visa; A non-EU spouse of a Greek national who applied for an Article 10 residence card in **Sweden** was threatened with expulsion if his entry visa was not handed in to the authorities within one week.

[340] A German-Brazilian married couple who live in **France** wanted to know if the Brazilian citizen required a visa to re-enter France after a short stay in Brazil or if his preliminary residence card would be sufficient.

[341] A non-EU family member of Bulgarian national who applied for a residence card in **Ireland** needed to travel with her spouse to Bulgaria for a short visit. As her temporary card would expire before her return she was told she had to apply for a new entry visa to enter Ireland.

[342] A German citizen and his non-EU spouse were retained upon their return to **Spain** because she did not hold a Spanish residence card (the application was pending).

[343] See **section 2.3.1** of the 2009 Communication.

[344] C-424/98 *Commission v Italy*, C-408/03 *Commission v Belgium* C-86/12 *Alokpa and Moudoulou*, C-200/02 *Zhu and Chen*, C-218/14 *Singh* where the Court repeated "*that a Union citizen has sufficient resources for himself and his family members not to become a burden on the social assistance system of the host Member State during his period of residence even where those resources derive in part from those of his spouse who is a third-country national*" (par. 77).

Despite this, enquiries from citizens received by YEA reveal that Member States are still confused about, or ignorant of, this principle. The lack of clarity in this area also leads to confusion among citizens about what their rights are[345]. This particularly affects EU citizens who are not working but who wish to rely on the (current or potential) income of their non-EU spouse in order to obtain residence documents in the host Member State. These citizens end up in a Catch 22 situation when they need to rely on their non-EU spouse's employment in order to prove sufficient resources, but the non-EU spouse cannot work when the employer requires a residence card as a condition to employment. The authorities, in turn, will not issue this residence card unless the EU spouse proves sufficient resources or provides evidence that they themselves are employed. This issue has arisen in **France**, the **UK**, **Sweden**[346], **Ireland**[347], **Germany**[348] and **Spain**[349].

The Member States should be informed of the latest case law of the Court to eliminate any confusion on the matter and to make clear the non-EU spouse's resources or evidence of current or potential employment can and should be taken into account when assessing the EU national's right to residence and processing the respective applications.

## 4.4. Permanent residence cards and the visa exemption

Article 5(2) of Directive 2004/38 specifies that the visa exemption applies to those who hold "the residence card referred to in Article 10". However, the same facility is not expressly provided for holders of permanent residence cards issued pursuant to Article 20 of the Directive. The Commission's 2009 Communication is silent on this issue. The Schengen Visa Handbook does, however, specify that "the same visa exemption must be extended also to those third country family members who hold a valid permanent residence card issued under Article 20 of the Directive"[350].

While most Member States will accept presentation of a permanent residence card in lieu of a visa, evidence suggests that this is not always the case. This mainly concerns family members with permanent residence cards issued in the UK who cannot rely on

[345] A Bulgarian national wished to move to **Belgium** with her Turkish husband, who had a job offer there. She did not intend to work as she had a baby. Neither she nor the husband's future employer could find any information confirming that the husband could start working in Belgium immediately without needing a work permit.

[346] **Sweden:** A permanent residence card was refused to a student, her non-EU husband's income was not taken into account, the authorities considered her claiming family benefits as an indication that she had no sufficient resources; Bulgarian job seekers were refused residence in **Sweden** although the inquirer's brother provided a guarantee to support the whole family.

[347] An EU national and their non-EU spouse who were self-sufficient in **Ireland** were issued with resident documents valid only for six months because the EU wife could not provide evidence that she was employed in **Ireland**; An Indonesian wife of a Bulgarian job seeker in Ireland, who had found a job in Ireland first and was working and paying taxes, was refused a residence card on the ground that the EU husband was not economically active. The husband was a registered job seeker and enrolled in on the Insight Training Course.

[348] A British citizen lived in **Germany** as an artist on a very low income. His non-EU wife was earning the bulk of the family income. The German authorities questioned his right of free movement because he was not earning enough; A self-sufficient Bosnian husband of an Italian student in Hamburg was denied the right to live and work in **Germany** on the grounds that the EU spouse is not employed and does not have a steady monthly income.

[349] A German national who was unemployed and wishing to reside in **Spain** was told by a lawyer that in Spain his non-EU wife's resources would not be eligible to count for the determination of his resources and that he had to provide evidence of his own resources.

[350] Part III(A)(2).

their residence card to benefit from the visa exemption under Schengen rules[351]. Citizens in such situations report that, while they were able to rely on the visa exemption provided for by Article 5(2) when they held an Article 10 residence card, they have been unable to travel visa free since obtaining their permanent residence card[352].

This policy is applied by both immigration authorities and airlines. Some citizens have even been denied boarding. For example, a Polish national and her Moroccan husband, who held an Article 20 residence card, were denied boarding on an Easyjet flight from the UK to Poland on the grounds that the Moroccan spouse did not have a visa. The Polish consulate later confirmed to them that the husband would now require a visa, despite having previously been visa exempt when holding an Article 10 residence card, on the grounds that he no longer had the status of family member but had a permanent residence card because he was resident in the UK for five years. Easyjet also reiterated the visa requirement[353].

This is a gap in Directive 2004/38, which some Member States have interpreted in a way contrary to the purpose and spirit of the Directive. Surely the legislator did not intend for family members with Article 20 permanent residence cards to see their rights diminished when it comes to travelling with their EU spouse in the EU. Reiterating this in a new Communication on Directive 2004/38 would be welcome to avoid such narrow interpretations of citizens' free movement rights.

## 4.5. Applying the Surinder Singh case law

The Commission, in its 2009 Communication, does explain that "*EU citizens who return to their home Member State after having resided in another Member State and in certain circumstances also those EU citizens who have exercised their rights to free movement in another Member State without residing there* (for example by providing services in another Member State without residing there) *benefit as well from the rules on free movement of persons*" and does refer to the relevant case which established these principles[354].

It appears, however, that some Member States do not apply these rules correctly, whether intentionally or for want of understanding. The **UK** is the obvious example. Currently, a large proportion of citizen enquiries relating to the UK come from UK nationals who are returning to the UK with their non-EU family members after having exercised their free movement rights in another Member State. Since 2015, YEA has

[351] A non-EU family member could not rely on his UK permanent residence card to travel to Bulgaria; A non-EU family member holding a permanent residence card issued by the UK (EEA4) reported that immigration officials and airline staff in various Member States did not recognise his card.

[352] For example: A Mongolian national holding a UK family member's permanent residence card issued by the UK, was required to obtain a visa to enter **Spain** with his Spanish partner and pay a visa fee, whereas he travelled visa free when he had a 5 year residence card; A non-EU national sought to travel to **Ireland** with his UK wife. However, he was advised by the Irish authorities that a visa was required as his permanent residence card was not acceptable in the same way that a residence card issued under Article 10, Directive 2004/38/EC is.

[353] Another enquiry, revealed the lack of awareness of Directive 2004/38 displayed by airline staff. The EU spouse of a Polish citizen holding a permanent residence card issued by the UK authorities was denied boarding of a flight from the UK to Croatia on the basis that her residence card did not bear the words "family member of an EU citizen". The Croatian implementing rules (Article 166 of the Croatian Aliens Act 2011) only refer to the visa exemption in respect of residence cards but not permanent residence cards.

[354] Cases C-370/90 Singh, C-291/05 Eind and C-60/00 Carpenter.

received at least **58 enquiries** bringing this issue to light[355]. There is, however, evidence that several other Member States[356] could also be reminded of the rules. Here is a good example as to why: ▼

▶ *"I am a German citizen, I have been married to a Colombian citizen for over 3 years (August 3rd, 2012) and we have lived in the UK for the last 2 years. I exercised my treaty rights in the UK under the Directive 2004/38/EC.*

*We decided to come back to Germany, my husband doesn't speak German and he is still working for the same company based in the UK, as he works from home.*

*Before we left the UK we contacted the EU and we got a call back informing us that the German government is not supposed to ask my husband for the German Language test, as we already exercised treaty rights in another EU country.*

*We were advise to proceed and request his residence card in Germany as we would be covered by the Surinder Singh Act.*

*We arrived in Germany on February 27th / 2016, I already registered my husband in the Sindelfingen Anmeldeamt and there was no problem, I was advised that I had to wait a couple of days for his registration to go through and then I can call back to arrange an appointment to get his residence card here in Germany.*

*I tried to call several times and 3 days later I finally got in touch with the Auslaenderbehoerde and spoke to Mrs. [X] she advised that my husband can stay for only 3 months in Germany, he has to present the German language test and he needs to get a job within the next 3 months in Germany to be able to stay, otherwise he will need to leave; she was very rude and didn't allow me to talk at all, also got very personal by saying that I do not*

[355] These citizens, seeking to rely on the Surinder Singh case law in order to bring their family members back to the UK with them must show that they: (a) had transferred "the centre of their life" to their host Member State; and (b) satisfy the conditions of residence in Article 7(1) of Directive 2004/38 upon their return to the UK (Regulation 9 of the The Immigration (European Economic Area) Regulations 2006). This restrictive interpretation of the Surinder Singh case law, imposes upon returning UK nationals requirements beyond those of Directive 2004/38 (which is applied by analogy to returning own nationals) and is not compliant with the CJEU's judgment in Case C-456/12 *O & B* where the Court held that "Residence in the host Member State pursuant to and in conformity with the conditions set out in Article 7(1) of that directive is, in principle, evidence of settling there and therefore of the Union citizen's genuine residence in the host Member State" (par. 53 of the judgment). See also the letter sent by the European Commission to a citizen complaining about this issue (*http://2xsoic30m4ba2ervd35c9n41-wpengine.netdna-ssl.com/wp-content/uploads/2014/08/EU-Commission-letter-anon.pdf*).Those unable to satisfy these conditions must then satisfy the stricter conditions of the national UK immigration rules (which include financial and language requirements). Thus they risk being denied their EU free movement rights. Several such family members have had their applications for an EEA family permit rejected or have been denied entry at the border.

[356] A returning **German** national's non-EU spouse was only granted him a 1 year residence card instead of a 5 year one on the basis of Surinder Singh rules; A returning **Irish** citizen, whose non-EU wife held a residence card from Spain was told to present evidence of the fact that he had been working in Spain during their residence there and also evidence of their integration into Spanish life. These requirements do not reflect those set out by the Court of Justice of the EU in the O and B case; The **Finnish** authorities disregarded the Surinder Singh rules in the case of a returning Finnish national and her husband who held a family member's card from Austria; The Austrian authorities insisted on applying national immigration rules to the residence application of the Indian spouse of a returning Austrian national; Family members of EU citizens returning home after exercising their free movement were required to undergo cumbersome national immigration procedures in **Germany** and **Lithuania**; A non-EU spouse of a **Lithuanian** citizen returning home after exercising free movement rights was denied his rights under Surinder Singh and Directive 2004/38; The dependent Moroccan father of a Belgian national returning to **Belgium** could not benefit from the accelerated procedure when applying for a visa at the Belgian consulate in Morocco. A fee was imposed and the delay was over four weeks; A French citizen returning to **France** faced difficulties in asserting rights under Directive 2004/38/EC for his non-EU partner.

*have a job and how do I expect to live in Germany without a job (having into consideration that we have been in Germany for only a week), then she just hanged up on me, I tried calling her back but she didn't answer the phone as the previous days.*

*Straight after I spoke to her, I decided to get in touch with her manager, I proceeded to talk to Mr. [Y} , but for my surprise his behavior was exactly the same as hers, while shouting "I don't have time" more than 5 times and telling me that if I needed any information I need to get an appointment, but as I replied to him: that was the reason why I was there to talk to him, because I was not given an appointment and was not going to have one assigned to me, he started listening to me but while I was talking to him he kept on saying that he didn't have time to take care of my concern; so he confirmed the same information that Mrs. [X] provided me with; I believe that an entity that is taking care of foreigners should have qualified personnel with enough education, knowledge and patient to deal with people and not the opposite as I can see it is this Auslaenderbehoerde.*

*I feel like my rights and my husband rights are not being honored and I am being disrespected in my own country.*

*I would like the EU and Solvit to step in and help us out with this situation and hopefully get in touch with them and remind them of my rights as a EU citizen who exercised treaty rights in another EU state.*

*As of now we have not been able to do anything for him, like his driving license, insurance, etc. which needs to be done as soon as possible, and also to give us advice on how to proceed for us to be able to stay in my country.*

*Thank you very much for your attention and help."*

Moreover, much water has passed under the bridge since the initial cases of *Singh*, *Eind* and *Carpenter*. The Court has since made clear that:

- there is no need for the EU spouse to have been working in the host Member State in order to take advantage of the Surinder Singh route when returning home with their non-EU family member – as long as residence was genuine and the residence conditions of Directive 2004/38 were satisfied, that is sufficient (Case C-456/12 *O & B*);
- *Carpenter* (which concerned the provision of services in another Member State while residing in the home one) also applies to workers – their non-EU family members must be granted a right to residence if the refusal to grant such a right would discourage the worker from effectively exercising his rights under Article 45 TFEU (C-457/12 *S & G*);
- these principles also apply as regards entry formalities and not just residence rights – when an EU national who is resident in another Member State is travelling to their home country with their non-EU spouse, and that spouse holds a family member's residence card on the basis of Directive 2004/38, they should be exempt from the visa requirement as they would be when travelling to other Member States (Case C-202/13 *McCarthy*, par. 41-42).

For all the above reasons, it is time to elaborate and update the guidance given to Member States on how to apply the *Surinder Singh* rules to their own returning nationals and their family members.

## 4.6. Dual nationals

According to the Court, when an EU national falls within the scope of EU law as a result of exercising their free movement rights (or because their situation entails a relevant cross-border element), then the fact that they also happen to be a national of the other Member State involved does not "remove" the EU law connection and does not make their situation "wholly internal"[357]. Equally, as the Court recently made clear in C-165/16 *Lounes*, when an EU national exercises their Treaty rights by moving to another Member State and then acquires the nationality of that state, they do not lose their EU law connection. Thus, their non-EU family members should benefit from EU law when it comes to obtaining a right of residence in that country.

Prior to the Court's judgment in *Lounes*, the UK had ceased to apply EU law to EU nationals as soon as they naturalised as UK nationals[358] and refused to apply EU law when considering their family members' residence applications. In the period between January 2015 and June 2017, YEA received at least **23** such enquiries as regards the **UK**. This same issue has, however, been reported in **Sweden**[359] and **Cyprus**[360].

It would, therefore, be helpful to provide clarity on this issue to the Member States, incorporating the principles contained in *Lounes* in a new Communication.

Another interesting question is what happens if it is the non-EU family member that acquires the nationality of the host Member State and wishes to rely on EU law to have a dependant relative join them and their migrant EU spouse in the host Member State? This situation arose when a Spanish national and his Ukrainian spouse moved to **Ireland**, pursuant to Directive 2004/38. The Ukrainian spouse's mother visited them in Ireland several times and each time had her visa issued on the basis of Article 5(2) of Directive 2004/38 as the dependant mother-in-law of a Spanish national. When the Ukrainian wife acquired Irish nationality, the Irish authorities denied her mother an entry visa on the grounds that it is her daughter, now an Irish national, who must sponsor the visa application, which must be processed on the basis of Irish immigration law. The Irish authorities claimed that there was no longer an EU law connection.

There is, however, no justification for treating such situations as 'wholly internal' since, like in the above scenario where the EU national acquires the nationality of the host Member State, the exercise of EU rights preceded the acquisition of nationality. Moreover, in these situations, the migrant EU national still remains a migrant EU national, thus there is no question that the 'EU law connection' with their parent-in-law still exists. A non-EU dependant parent-in-law remains their 'family member' as defined in Article 2(2) of Directive 2004/38, irrespective of what the nationality of their spouse is.

---

[357] Cases C-148/02 *Garcia Avello*, C-353/06 *Grunkin-Paul* (in the case of surnames), 292/86 *Gullung*, C-419/92 *Scholz*, C-339/96 *Gilly*, C-152/03 *Coulais*. Also Cases C-7/10 and C-9/10 *Kahveci & Inan* (in the case of dual EU/Turkish nationals who could can rely on the EU/Turkey association agreement family reunion rules even after they have naturalized in their host Member State)

[358] This policy was introduced with the Immigration (European Economic Area) (Amendment) Regulations 2012.

[359] A Spanish national obtained Swedish nationality after exercising her Treaty rights there for many years. One year after obtaining Swedish nationality she married a Moroccan national who applied for a residence card on the basis of EU law. The **Swedish** authorities refused to take into account his spouse's Spanish nationality and to treat his application under EU law and insisted on applying Swedish immigration rules. The EU national decided to give up her Swedish nationality so that her husband could benefit from EU rules, however, she then faced problems with some Swedish government agencies who claimed that she had been living in Sweden "for too long"; Also a permanent residence card was refused in **Sweden** to the spouse of a Danish/Swedish national.

[360] Where the **Cypriot** authorities refused to treat application for a residence card of family member of UK national under EU law because the UK national was of Cypriot origin, despite the fact that he had never applied for Cypriot nationality.

## 4.7. Dependent non-EU children after they are no longer dependants

Children of EU nationals or of their spouse or partner have the right to reside with the EU national in another Member State if they are under the age of 21, or if they are over 21, but still dependent on the EU national[361].

What happens, however, in the situation when children enter a Member State as "family members" within the scope of Directive 2004/38 but then grow up, get a job and cease to be dependent on the EU national?

Directive 2004/38 does not provide for this eventuality. A technical interpretation would suggest such children no longer fall within its scope and the host Member State can require them to obtain a residence permit on the basis of national law. Paradoxically, such children, who may have got a job without needing a work permit[362], may now have to apply for one.

Such cases have arisen in the **UK**[363] and **Bulgaria**[364], where the national authorities have adopted this literal interpretation, denying the right to residence to such adult children who were working – in some cases giving them 30 days to leave the country.

Such an approach, however, is at odds with the judgment of the Court in Case C-423/12 *Reyes*, where the Court held that as long as the dependance situation existed when the child entered the country, such children can reside in the host Member State and that, moreover, "*[...] Article 23 of that directive, … expressly authorises such a descendant, if he has the right of residence, to take up employment or self-employment*"[365]. It follows that if an initially dependant child then gets a job and is thus no longer dependent on their EU parent, they do not lose the right to residence.

We invite the Commission to make this clear to the Member States, so that such children and their parents do not end up in the illogical situation of essentially losing the rights they had been enjoying for years or, in the worst case, being forced to leave a country they had made their own.

## 4.8. Requirements for issuing permanent residence documents

Article 19 of Directive 2004/38 provides that "*Upon application, Member states shall issue Union citizens entitled to permanent residence, after having verified duration of residence, with a document certifying permanent residence*".

[361] Article 2(2)(c).

[362] Pursuant to Article 23 of Directive 2004/38 which provides for the right of family members to work in the host Member State.

[363] A Canadian daughter who lived in the **UK** with her mother for 5 years and held an EU family member's residence card was refused permanent residence as she was over 21 and employed – she was advised by the Home Office to leave the country and apply for residence based on her British ancestry; The adult, Canadian children of an Irish national, who came to the **UK** as minors and held family members residence cards, had their applications for permanent residence denied and were given 30 days to leave the UK. The children got jobs while resident in the UK but still resided with their mother. The family had no link with Canada and going there would be traumatic for one of the children who had suffered sexual abuse in Canada from a mentor; The same issue arose in two other enquiries concerning the **UK**.

[364] Where the non-EU adult dependant son of a UK national joined his mother in **Bulgaria**, obtained a family member's residence permit and one year later got a job. Upon expiry of their residence documents, the UK national the Bulgarian authorities advised the UK that she could obtain the permanent resident status but that her son had to apply for residence under national law.

[365] Par. 32.

It is, therefore, clear that Member States can request proof that the applicant completed a 5 year uninterrupted period of residence. It is also clear that "continuity of residence may be attested by any means of proof in use in the host Member State"[366].

What is not clear, however, is whether national authorities can require to see proof that the applicant is a "Union citizen entitled to permanent residence" within the meaning of Article 16 of Directive 2004/38? I.e. can the applicant be required to prove that during a five year period they were indeed residing "lawfully" in their host Member State – or does the burden of proof shift to the authorities at the moment a five year residence period is completed? If the authorities can request to see proof of "lawful residence" in the initial five years, what evidence is acceptable? Can "any means of proof" be used, as is the case when proving continuity of residence?

Moreover, what type of proof can be required of non-EU family members who apply for a permanent residence card? Article 20 of Directive 2004/38, which outlines the formalities for issuing permanent residence cards to non-EU family members, does not make any reference to what proof must be produced by the applicant – there is no mention of verifying continuity of residence as there is in Article 19. Article 20(1) merely provides that "*Member States shall issue family members who are not national of a Member State entitled to permanent residence with a permanent residence card [...]*". Does that mean that national authorities can verify that a family member is "entitled" to permanent residence at the moment of application? If so, what means of proof can they request?

As explained in **section 3.2.2.6** above, Member States do go beyond requiring just proof of continuity of residence. Excessive requirements are applied to both EU citizens and to non-EU family members applying for permanent residence.

It is, therefore, essential to provide clarity on whether Member States are entitled to check the "lawfulness" of residence during a five year period when EU nationals and their family members apply for a permanent residence document. If so, it ought to be specified when such verification may be carried out (i.e. does there need to be a suspicion that the citizen did not reside lawfully for the entire five year period?). Moreover, it should be made clear that the applicant should be able to prove this by any means of proof[367].

It is also essential to specify that in no circumstances should the applicant be required to provide proof that they satisfy the Article 7(1) conditions after the completion of the relevant five year period, or proof of other conditions, such as social integration and language knowledge.

## 4.9. The start of the "continuous period of five years"

As evident from **section 3.2.2.6** above, some Member States are adopting a restrictive approach to what they accept or require as proof of "continuous five year residence" when a citizen applies for a permanent residence document.

**France**, **Belgium** and **Italy** seem to require that the relevant period immediately precedes the date of application, when there is no such requirement in the Directive.

Whereas in **Spain**, a Croatian national who had completed such a five year period was told to wait until the end of five years from the date of Croatia's EU accession before being eligible to apply for permanent residence. This is contrary to the Court's judg-

[366] Article 21 of Directive 2004/38.

[367] I.e. if a citizen was working part of the time and had sufficient resources and healthcare cover for the rest of the five year period, there should be no requirement to see proof of continuous employment.

ment in joined Cases C-424/10 *Ziolkowski* and C-425/10 *Szeja* where the Court made absolutely clear that periods of residence completed by a national of a non-Member State before the accession of that State to the EU must be taken into account in calculating the five-year qualifying period, provided they were completed in compliance with the conditions laid down by EU law.

For these reasons, it is worth clarifying to the Member States that the five years can start at any time, even prior to the EU accession of the citizen's country of origin, and do not necessarily have to precede the date of application.

## 4.10. The beginning and the end of the initial three months of unconditional residence

Directive 2004/38 provides that, for the first three months, residence is unconditional and after that an EU citizen may be required to register. Family members must register if they intend to stay for longer than three months. There is, in principle, nothing stopping EU citizens and their family members from registering as soon as they arrive, as long as there is an intention to stay for longer than three months.

What is not clear, however, is what happens to those who may not be staying for a continuous 3 months after they first arrive but intend to come and go – and may also be doing the same in other Member States. This is the case of those who travel frequently and have no fixed place of residence[368], such as, for example, long distance truck drivers[369] or persons who work on rotation contracts (for example, working six weeks on – six weeks off on an oil rig outside the EU[370]).

While these citizens face no issues as regards their own residence, they face problems getting a residence document for their non-EU spouse because they cannot demonstrate an intention to stay longer than 3 months at any one time. This, in turn, means that their non-EU spouse is limited by short term visa requirements and cannot stay with them in the EU for longer than 90 days in every 180. A result that is at odds with the fundamental right to family life – enshrined in Article 7 of the EU Charter on Fundamental Rights.

It would be helpful to clarify that time does not necessarily have to restart every time the EU national leaves. As long as the EU national satisfies the conditions in Article 7(1) of Directive 2004/38 and has an intention of staying in that Member State for longer than 3 months – even if intermittently – then their non-EU spouse should be issued with a residence card.

[368] A Lithuanian citizen was employed by a Latvian employer but due to the nature of the work traveled frequently between the Baltic countries and resided in temporary accommodation each time. She was not able to obtain a residence document from any country as she did not have a stable address in any.

[369] An Estonian national worked as a long distance truck driver for a Finnish employer. He did not have a fixed permanent residence in any EU country but stayed temporarily in Finland, Belgium, Germany and Netherlands. For this reason he was unable to obtain a residence permit for his Russian wife and she was only able to join him for 90 days in every 180.

[370] Reported a few times by EU nationals that reside in **Cyprus** and work in the Middle East. Also in **Cyprus** where an EU national with the intention of settling, obtained a registration certificate and shortly thereafter left in order to bring his family from Pakistan to Cyprus with him. He did not have time to complete all administrative formalities as regards his employment before travelling to Pakistan and his family members were denied a visa because he had not demonstrated that he was "effectively resident" in Cyprus.

## 4.11. The right of permanent EU residents to have their family members join them if they are no longer self-sufficient

Pursuant to Article 7(1)(d) of Directive 2004/38, family members have a right to residence for more than three months in the host Member State when they are "accompanying or joining" an EU citizen who is either working or has sufficient resources and comprehensive sickness insurance.

Article 16 provides that EU citizens who have "resided legally for a continuous period of five years" in the host Member State can stay there permanently without needing to satisfy the residence conditions of Article 7(1).

What happens, however, in the situation where an EU citizen who has obtained the right to permanent residence wishes to have their family members join them, but s/he no longer satisfies the Article 7(1) conditions? Do such EU citizens, who may even be relying on the state for financial assistance, still have the right to have their non-EU family members join them?

Article 16(2) does not provide much clarity – it merely states that non-EU family members also acquire the right to permanent residence only once they have "resided with the Union citizen in the host Member for a continuous period of five years". This is unproblematic if they enter the host Member State at the same time as the EU national. If, however, they arrive later and, at some point before they complete their five years, the EU national no longer satisfies the residence conditions, their right to residence may be jeopardised. If they attempt to arrive when the EU permanent resident is no longer self-sufficient, then they may not even be allowed entry.

The Commission's view[371] seems to be that "Article 16(1) in conjunction with Article 7(1), should be interpreted as meaning that an EU national with a right of permanent residence, who is a pensioner and in receipt of social welfare benefits in the host State, may claim the right to family reunification even if the family member will also be claiming social welfare benefits"[372].

Evidence suggests that Member States do not allow family reunification unless the EU permanent resident still satisfies the residence conditions of Article 7(1), even if they are not claiming financial assistance from the State[373].

---

[371] As evidenced from its observations before the EFTA Court in the Case E-4/11 *Arnulf Clauder* (*http://www.eftacourt.int/uploads/tx_nvcases/4_11_Judgment_EN.pdf*).

[372] *Arnulf Clauder* par. 19.

[373] Where a retired UK permanent resident wished to have his non EU wife join him in **Cyprus** and was asked to provide proof of sufficient resources, healthcare cover and a house rental agreement. The citizen was not relying on assistance from the State. A similar issue arose in the **UK**, although in that case the EU citizen resided in the UK since 1977, where he had worked for 25 years but was, for the last 6 years, receiving disability benefits; A Dutch national resident in **France** since 2000 who had acquired the right to permanent residence with her two minor daughters, was told by the prefecture that her non-EU husband (and father of the two girls) was unlikely to obtain a residence card because she did not currently have sufficient resources to cover the needs of the family; A Portuguese national resident in **France** since 1966 wished to have his Moroccan wife reside in France with him and was faced with a Catch 22 situation. She was required to provide evidence of health insurance in order to receive a residence card. The french social security authorities had confirmed that she would be covered by the husband's own insurance as his family member, but only once she obtains a residence card. The citizen was not claiming financial assistance from the state; A residence card was denied to a non-EU husband of a French national who had been resident in the **UK** since 1987 and had acquired a permanent right of residence. The reason invoked, apparently, was that she had wrongly declared being self-sufficient. The citizen was receiving sickness benefits from the State after having worked in the UK for several years prior to obtaining the right to permanent residence.

Clarity on this issue would, therefore, be welcome, as a restrictive interpretation of the Directive leads to a result that is at odds with EU citizens' fundamental right to family life (Article 7 of the Charter).

## 4.12. The "envisaged period of residence"

Article 11 of Directive 2004/38 provides that the family member's residence card "shall be valid for five years from the date of issue or for the envisaged period of residence of the Union citizen, if this period is less than five years". Presumably, it is the citizen that is to "envisage" such a shorter term, not the authorities of the host Member State.

If the citizen has a short term employment contract or enrolls on a study period that lasts less than five years, but at the moment of registration expresses no intention to leave at the end of that period, then his – as well as his family members' – residence documents should not be limited in duration.

This is not always the case, as demonstrated by an enquiry from an Italian national resident in France whose spouse received a residence card with duration limited to the period of his employment contract, even though he resided in France prior to the contract and did not express any desire to leave at the end of its term.

## 4.13. Limiting the duration of a visa

As explained in **section 2.2.7** above, family members who applied for entry visas have had the duration of their visas limited arbitrarily or for reasons that are at odds with family members' rights under Directive 2004/38. Since EU nationals have a right to have their family members accompany them to the host Member State and remain there unconditionally for up to three months, it follows that short term entry visas should be issued for the maximum duration of three months. If there are no grounds to deny a visa in any particular case, there should be no grounds for limiting its duration.

There is currently no express guidance on this issue, neither in the Commission's 2009 Communication nor in the Schengen Visa Handbook. Given how frequently Member States ignore family members' EU rights during the visa application process, clarity on this issue would be most welcome.

## 4.14. Residence cards issued to family members of own nationals

Article 5(2) provides that family members who possess a "valid residence card referred to in Article 10" shall be exempt from the visa requirement. An Article 10 residence card is normally issued to family members of migrant EU nationals. Family members of own nationals are generally treated under national law. Some countries, however, issue a residence card in the same format to family members of their own nationals irrespective of whether or not the EU national has exercised their EU rights[374]. This leads to confusion among citizens who are given the impression that they can rely on their residence

[374] **Belgium** issued Article 10 residence cards to family members of a Belgian citizen – they wonder whether they can travel to the UK visa free – UK Guidance provides that the card must have been issued by a country other than that of the EU national's origin.

card to travel in the EU without a visa and who may then be denied entry as their residence card is not accepted[375] or denied boarding by the air carrier[376].

Although this does not generally affect travel in the Schengen area and the Schengen candidate countries (that apply Schengen rules unilaterally), since non-EU Schengen residents have an independent right to travel visa free in the Schengen area, it has come up as an issue when citizens wish to travel outside Schengen, specifically to the **UK**.

It would be helpful to clarify that Article 10 residence cards should be reserved for family members of EU migrants, including own nationals who have returned home after having exercised their free movement rights[377].

## 4.15. The rights of non-EU carers of EU minors

In Case C-200/02 *Zhu and Chen*, the CJEU held that "*a young child can take advantage of the rights of free movement and residence guaranteed by Community law*"[378]. Articles 20 and 21(1) TFEU and Directive 2004/38 apply to them, and as long as they have sufficient resources and healthcare cover, they can reside in the host Member State. The Court clarified that "*[i]n such circumstances, those same provisions allow a parent who is that minor's primary carer to reside with the child in the host Member State*"[379]. Thus, non-EU carers of EU minors derive residence rights from their children on the basis of EU law despite the fact that they do not fall within the strict definition of 'family members' in Article 2(2) of the Directive.

The practical questions that arise are:

- Can such parents benefit from the accelerated procedure to obtain an entry visa when travelling with their children in the EU?
- If the child and parent/s settle in another Member State, what type of residence card should such parents receive?

If the Court's judgment in *Chen* is to be given useful effect, non-EU parents of mobile EU minors should benefit from the same rules that apply to 'family members' of EU nationals in the strict sense of Directive 2004/38. Treating entry and residence applications from such parents on the basis of national immigration rules would be at odds with the Court's judgment in *Chen*. The application of stricter rules to non-EU carers than those that apply to their minor EU national child may lead to the situation where a parent is denied the right to entry and residence, and that "*would deprive the child's right of residence of any useful effect*"[380].

Citizen enquiries received by YEA reveal instances where entry and residence applications from such parents are being processed on the basis of national immigration rules and not EU law. There is no provision for *Chen* parents in section 35 of the standard Schengen visa application form[381]. The only situation contemplated for parents, is that

[375] The non-EU spouse of a Belgian national, resident in Belgium with an Art. 10 residence card was denied entry to the UK at Calais on the ground that she did not have a visa.

[376] A Chinese *de facto* partner of a Czech national with an Art. 10 residence card issued by the Czech Republic was told by the UK embassy that she did not require a visa (following the McCarthy ruling), however she was denied boarding by the air-carrier because her residence card was issued by her partner's country of nationality.

[377] Pursuant to the *Surinder Singh* case law.

[378] Case C-200/02 *Zhu and Chen*, par. 20.

[379] Case C-200/02 *Zhu and Chen*, par. 47.

[380] Case C-200/02 *Zhu and Chen*, par. 45.

[381] For the standard Schengen visa application form see Annex 1 to Regulation 810/2009 (Visa Code).

of "dependent ascendant". Citizens wonder how to fill in visa applications[382]. They are told they need to fill in all sections of the form and the accelerated procedure is not applied to them[383]. Sometimes visas are denied on invalid grounds[384]. Moreover, their applications for residence cards are considered under national law[385], which means that sometimes residence documents are limited in duration[386] or denied altogether[387].

In order to avoid narrow or incorrect interpretations of the Court's decision in *Chen*, it should, therefore, be made clear that non-EU carers of mobile EU minors should be treated on the same terms as Article 2(2) 'family members' when it comes to their entry visa and residence card applications.

# 5. Conclusion

It is evident from the enquiries that citizens are sending to YEA, that their right to free movement, enshrined in Articles 20(2)(a) and 21 TFEU, is not yet entirely "free". There is, indeed, still much room for improvement.

EU citizens need clear and correct information on the entry rules that apply to their non-EU family members. They need consular authorities (as well as their private visa service providers) to be aware of the special rules that apply to family members and to respect those rules – so that family members who are visa exempt can benefit from visa free travel and those who are not are able to obtain their visas quickly and for free without having to provide excessive documents or be denied a visa on invalid grounds.

EU citizens who move to another EU country need a speedy and smooth application process for obtaining their residence documents and those of their family members. All mobile EU citizens need this, not just those who arrive with a long term employment contract.

---

[382] A non-EU parent and his 7 year old UK national daughter wished to travel to France together. He was unsure how to fill in the Schengen visa application form as it does not provide for the situation of non-EU parents of EU minors.

[383] The Russian mother of two minor Portuguese children was told she needed an invitation to travel to **Spain** and that her minor child could not provide such an invitation; A Ukrainian national wishes to travel to **Lithuania** with her 3 year old UK national daughter, the accelerated procedure was not applied to her visa application.

[384] The **UK** authorities refused to issue an entry visa to the non-EU primary caretaker of an EU child wishing to visit family in the UK. The UK authorities required the citizen to demonstrate his child was living in the UK, even though the UK rules that give effect to the Chen rule do not require such a condition. The UK rules only require the citizen to demonstrate that his child would be self-sufficient were she to be residing in the UK; A non EU father wishing to travel with his EU child on a short holiday to the UK was denied a visa. The **UK** authorities insisted he had no right under EU law. Four more enquiries on similar facts were received regarding the **UK**.

[385] The Filipina wife of a German national who had a British child applied for a residence card in **Germany**. Her application was treated under national immigration law as the spouse of a German national, meaning that she had to comply with extra formalities, despite German law expressly incorporating Zhu and Chen by way of Administrative Regulation on the Free Movement Act (Allgemeine Verwaltungsvorschrift zum Freizügigkeitsgesetz/EU) paragraph 3.2.2.2, page 11: *http://dip21.bundestag.de/dip21/brd/2009/0670-09.pdf*).

[386] The **German** authorities refused to consider the residence applications of the Pakistani parents of a Portuguese minor and insisted on treating them under national law giving them one year visas.

[387] A Nigerian national applied for residence in **Romania**, where she lived with her minor UK national child. The Romanian Immigration Office refused to register the residence of the EU child and his mother on the grounds that only the UK father could apply for registration, despite the fact that the UK father had no contact with the child.

EU citizens also need to be able to go about their daily lives without being required to provide a residence document as a condition for accessing essential public and private services and without arriving at a dead-end because they cannot obtain a national identification number.

EU citizens need to be treated equally with nationals when EU law gives them certain rights, and do not need to be penalised for being a national of another EU country.

Finally, EU citizens need their Member States to not exploit legislative loopholes in a way that restricts their right to residence and encroaches upon their fundamental rights.

# 6. Recommendations

On the basis of the evidence at hand, the following **FIVE ISSUES** that affect the largest number of mobile EU citizens and their family members are **in most need of action at EU and national level**:

**1. The *personnummer* problem in Sweden (section 3.3.1)** – this problem has existed for over 10 years. Action taken at EU and national level to date has not been sufficient to remedy it. On the contrary, the increasing number of citizen enquiries that YEA continues to receive on this issue indicates that this problem has worsened since 2015.

**Action needed:**

- **The Swedish tax authority**, which issues the *personnummer*, **should**:
  - **accept the EHIC** as evidence of comprehensive healthcare cover; and
  - **relax the excessive requirements for private health insurance** so that private health insurance policies taken out by citizens can in practice be accepted as evidence of comprehensive healthcare cover in Sweden.

***Alternatively:***

A system should be put in place whereby EU migrants can contribute to the Swedish national healthcare system in a proportional way and be able to rely on this as evidence of comprehensive healthcare cover without having to provide the S1 Form or any other evidence of health cover.

- **Swedish legislation** (§3 of the Swedish Population Register Law 1991), which provides for the obligation to register in the population registry if one intends to reside in Sweden for at least one year, **should be amended to allow for the possibility to register immediately, or at least within 3 months**. This would bring the concept of residence in the Swedish legislation in line with that in EU law (Directive 2004/38).

***Alternatively,*** if Swedish legislation remains unaltered,

- the Swedish tax authority should accept a letter of intent from the citizen as evidence that they are likely to be resident in Sweden for at least a year; and
- the temporary personal number, currently issued to those that can demonstrate intent to stay in Sweden for six months, should be issued in the same format as the regular personnummer to ensure it is accepted by the IT systems of public and private service providers and should be provided to all temporary residents irrespective of their intended length of stay.

**2. The residence cards problem in France (section 3.3.2)** – this has been a problem for approximately 3-4 years and has worsened since the Brexit vote, with UK nationals particularly affected.

**Action needed:**

- an investigation must be carried out to determine the reason behind the prefectures' frequent refusal to issue residence documents to EU nationals, despite French and EU law allowing EU nationals to obtain such documents. (Citizens' enquiries received by YEA have not provided any indication of the possible reasons behind this policy). The prefectures should be instructed to comply with the relevant French and EU legislation; and
- the Caisse d'Allocations Familiales (and any other government agency applying the same policy) should be instructed to cease making the payment of benefits conditional upon presentation of a residence document. This is a violation of EU law (Article 25 of Directive 2004/38), thus enforcement action should be taken by the European Commission, if necessary.

**3. The marriage certificates problem in Spain, Italy, France and Portugal (section 3.2.1.4** and Annex 1).

**Action needed:**

Positive action is required at EU and national level to ensure that:

- **only an apostille stamp (or legalisation) and a certified translation should be required** for a non-EU marriage certificate (or other public document) to be accepted as proof of family link when non-EU family members apply for entry visas or residence cards;
- **any additional requirements**, aiming to establish whether a marriage is genuine, **should only be imposed in cases where there is reason to suspect abuse**, not as a general policy.

**4. Excessive delays in issuing residence cards in Sweden, Ireland and the UK (section 3.2.3)** – this is a persistent problem that exists in several EU countries. However, it is most serious in Sweden, Ireland and the UK, which account for over half of all citizen enquiries sent to YEA where this issue has been flagged.

**Action needed:**

While the situation in the UK should be dealt with in the specific context of Brexit, **positive action at EU level is necessary in order to enforce EU law in Sweden and Ireland, ensuring that residence cards are issued to non-EU family members no later than six months from the date of application**.

**5. Excessive delays in issuing entry visas to family members of EU nationals in Ireland (section 2.2.4.2.4)** – this is a serious and persistent problem, which accounts for 3/4 of all YEA citizen enquiries flagging the problem of delays to obtain a visa. According to the Irish Naturalisation and Immigration Service, the current processing time for most visas is 8 weeks. However, family members of EU nationals have reported significantly longer delays.

**Action needed:**

Positive action is needed at EU and national level to find a solution that strikes a balance between preventing abuse and ensuring that EU free movement rules are respected so that **family members of EU nationals are issued entry visas on the basis of an accelerated procedure**.

ANNEX I

# The non-Recognition of Foreign Marriage Certificates

## 1. Background information

The process of recognition of foreign civil status documents is a matter of national competence. While steps have been taken at EU level in an attempt to promote mutual recognition of civil documents issued by other Member States[1], problems still exist when EU nationals and their family members wishing to exercise free movement rights present documents issued outside the EU.

At present, the formalities for recognising official foreign documents are partly governed by the The Hague Convention of 5 October 1961[2], which has 113 signatories[3] and institutes the apostille stamp[4]. For the rest, legalisation is required, which is a more complex process[5].

As there is no harmonisation on this issue, getting their marriage certificate legalised or apostilled is an additional administrative step that mobile EU nationals may need to perform when moving to another EU country together with their family members. This is necessary in order to prove their family relationship and thus be able to obtain a visa or a residence card for their family members on the basis of EU law (Directive 2004/38).

The Commission's 2009 Communication[6] suggests that the requirement of legalisation should only be imposed in cases where there is suspicion about the authenticity of the issuing authority[7] and not, therefore, as a general policy.

[1] REGULATION (EU) 2016/1191 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012. For the press release see: *http://europa.eu/rapid/press-release_IP-16-2092_en.htm*

[2] The Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation of Foreign Public Documents.

[3] All EU Member States are signatories. The list of all signatories is available at: *https://www.hcch.net/en/instruments/conventions/status-table/?cid=41*

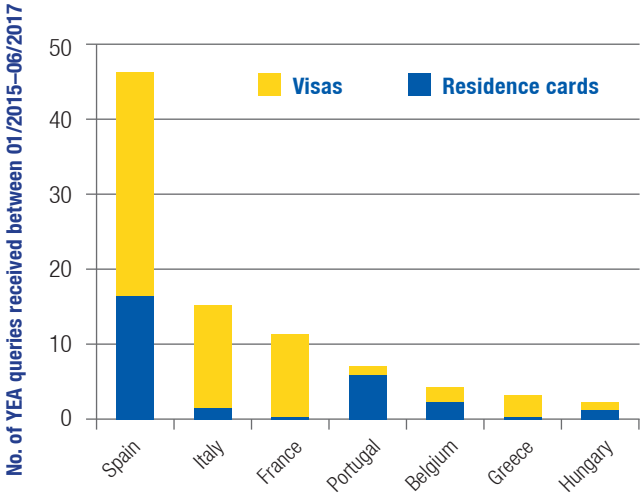
[4] This simplifies recognition of civil status documents as the only required formality is getting the document apostilled by the competent authority in the country where it was issued. This apostille stamp is evidence that the document is genuine and should then be accepted without further formalities in the other countries which are signatories to the Hague Convention.

[5] The document must be certified by the foreign ministry of the country in which it originated, and then by the foreign ministry of the country in which it will be used – one of the certifications will often be performed at an embassy or consulate. In practice this means the document must be certified twice before it can have legal effect in the receiving country.

[6] (COM(2009) 313) (*http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52009DC0313*).

[7] Section.2.2.2 "*Member States may require that documents be translated, notarised or legalised where the national authority concerned cannot understand the language in which the particular document is written, or have a suspicion about the authenticity of the issuing authority*". This is in line with the CJEU's case law C-424/98 *Commission v Italy* (par. 37) and C-336/94 Dafeki (par. 19).

### Non-recognition of foreign marriage certificates




The enquiries sent by citizens to Your Europe Advice (YEA) suggest, however, that this guidance is not always being followed. Moreover, some Member States seem to use the non-recognition of foreign marriage certificates as a way of denying citizens their EU free movement rights.

This problem has been reported by citizens in relation to several Member States but appears to be most serious in Spain, where it affects both residence card and visa applications by non-EU family members. Regarding Italy and France, citizens have reported facing this problem when applying for a visa at French and Italian consulates and, as a result, being unable to benefit from the free accelerated procedure which should be available to family members of EU citizens. Whereas in Portugal, several family members have had their residence card applications delayed or rejected because their foreign marriage certificates were not recognised, despite being apostilled or legalised.

▶ *"I am a UK citizen and my wife is Chinese. We were married in China this year and my wife is now living with me in the UK on a spouse visa. We wish to visit countries in the Schengen area as tourists. So, we would like to apply for a free visa for my wife, as is our right. However, we have a dilemma. Here's how it goes:*
*1. Both the French Embassy and Italian Consulate in London require us to submit a marriage certificate and/or translation that has been legalised in the UK. [...]*
*2. The Chinese Embassy in the UK does not normally legalise documents issued in China. It only provides this service for documents issued in the UK. The Chinese Embassy say that if the document is not from the UK it has to be first notarised by the issuing country (in our case China) and then legalised by the UK Government. [Ref: http://www.chinese-embassy.org.uk/eng/lsfw/legalization/t1021900.htm]*
*3. The UK government only legalises documents issued in the UK (and by UK authorities). So, they won't look at our Chinese marriage certificate. [Ref: https://www.gov.uk/get-document-legalised]*
*4. The Chinese authorities in Beijing might legalise our marriage certificate, but the French and Italian embassies won't accept this, as they both want our documents legalised in the UK only (see point 1)."** ◀

* *YEA enquiry received in January 2015.*

## 2. The problem of non-recognition of foreign marriage certificates

### 2.1. Apostille and legalisation

Given the lack of a harmonised approach at EU level, the **apostille stamp (or legalisation), as well as a certified translation, are often required as a matter of course** in order for a non-EU marriage certificate to be recognised and constitute proof of the family link.

Sometimes, however, the more complex process of legalisation is required, despite the relevant country being part of the Hague Convention[8].

Some citizens arrive at a dead end when they are required by the authorities of their host Member State to legalise their marriage certificate but the embassy of the relevant country in that Member State refuses to legalise documents which were issued by its own authorities back in that country[9].

[8] Three enquiries in relation to Spain brought this to light, one concerned a UK birth certificate.

[9] This seems to be the case of citizens with a Chinese marriage certificate resident outside China as evidenced by 3 YEA enquiries.

## 2.2. The requirement for an EU marriage certificate

Moreover, there have been some cases where citizens with non-EU marriage certificates were told by consulates (or by the external visa service providers) that their **marriage certificate would not be recognised simply because it has not been issued in the EU**[10]. ▶

▶ *"I am Irish, my wife is Kenya. We got married in Kenya. The Spanish Embassy in Kenya says they won't accept visa applications from spouses of EU citizens unless the marriage certificate is from the EU. I don't see a requirement for this in the law as it just says "spouse' with no qualification on the definition of spouse. Are they entitled to impose this condition?"**

* *YEA citizen enquiry received in July 2017.*

## 2.3. The requirement to register the marriage in another EU Member State

However, the **main issue** that citizens face when trying to prove their family link by way of a marriage certificate **is that certain Member States** go beyond the requirements of apostille/legalisation and certified translation. They also **require that the applicants provide evidence that their marriage has been registered and is considered as valid in the Member State of the EU national's origin**[11].

- **UK nationals have been particularly affected** by this policy as there is no obligation to register a marriage in the UK and thus no registry of marriages exists in the UK[12]. In the period between January 2015 and June 2017, YEA received **31 enquiries** from UK nationals whose non-EU spouses faced difficulties obtaining a visa or a residence card in Spain, Italy, France, Portugal and Sweden as a result of this policy. As regards Spain, it appears that the UK consular authorities now issue a "certificate of foreign marriage recognition" for the purposes of registration with Spanish authorities[13]. This, however, costs €210[14] and both spouses must be present for it to be issued, which leads to a Catch 22 situation when the non-EU spouse needs the certificate to obtain a visa for travelling to Spain in the first place. As one UK national writes[15]: ▶

  Other citizen enquiries bring to light the outright refusal by some consulates to accept UK nationals' foreign marriage certificates: ▼

- Another group of citizens particularly affected by this policy are **married same sex couples**. These citizens

▶ *"The problem I'am facing is I would like my Colombian wife and her daughter to join me here in Spain. I have complied fully with my obligations to reside in Spain as a EU citizen. The trouble is for my wife and child to join me on a family visa the Spanish government want proof from me that my marriage is legal in the UK. There [are] a few problems with this:*

*A. There is no legal obligation for UK citizens to register their marriage.*

*B. The cost of obtaining recognition from the UK is for me a lot of money, the total being £205.*

*C. The UK embassy states we both have to be present to collect this certificate. Even though my wife cannot come without it.*

*D. If I can achieve this in Colombia it would mean something in the region of over £1000 for one piece of paper and 10000 mile round trip.*

*It would appear to me that these are deliberate delaying tactics employed by the state. I'm more than happy to prove reasonable documents and information. But I'm not a cash cow."*

[10] **Spain:** (5 equiries), in one case even a Danish marriage certificate was not recognised. The couple was questioned as to why they did not get married in Poland, the country of the EU national's origin; **Portugal:** 1 enquiry.

[11] **Spain:** (6 enquiries); **Portugal:** 4 enquiries; 1 enquiry relating to each of Italy, Belgium and Hungary.

[12] For example: **Spain:** 16 enquiries; **Italy:** 8 enquiries; **France:** 4 enquiries; **Portugal:** 2 enquiries; **Sweden:** 1 enquiry.

[13] https://www.gov.uk/guidance/notarial-and-documentary-services-guide-for-spain

[14] *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/617258/Website_consular_fees__22_.pdf*

[15] YEA enquiry received Q2/2015 (170502).

▶ *"I am a British National resident in Spain. My wife of three years is Philippina and has been domiciled in Bangkok for more than 35 years, having been a teacher in International Schools in Bangkok, and is now living in Bangkok on a retirement Visa. After three years or more of obstruction from the Spanish Embassy in Bangkok on the issuing of a Family visa to my wife, they have finally given a reason. They say that the UK does not recognise Foreign Marriages held abroad, as there is no system for registering/storage of these marriages in the UK. This being the case, they cannot recognise the Foreign marriage of a UK National held abroad for the issuing of a Family Visa. The Spanish Embassy in Bangkok is saying that 'UK Member' foreign marriages held abroad, must be recognised as valid in the UK Court system, before it will recognise 'UK Member' marriage certificates for the issuance of Family Visas. An International Lawyer has quoted 7000 pounds uncontested, to 25000 pounds contested fees for complying with the Spanish requirements. He also said that there is no dedicated route for doing this in our courts, and it should not be a requirement [...]"* (YEA enquiry received in May 2016).

VFS, processing visas for Spain in Vietnam, informs the Vietnamese wife of a UK national that the visa fee waiver does not apply to her. She is told that *"Although the U.K is not officially out of the EU, there is a new law that family members of British nationals have to pay visa fee and will be considered as any other applicant"* (YEA enquiry received in Q3/2016).

A UK/Peruvian couple with a Peruvian marriage certificate wish to travel to Ireland via Madrid. The citizen writes: *"The Spanish Consulate here in Lima [...] refused to accept our Peruvian marriage certificate (which has an apostille) [and] doesn't need to be translated as it is already in Spanish, but they told my wife that for them to accept it I would need to register our marriage with the British government [...] My wife even quoted them [...] Directive 2004/38/EC, Article 5.2 [...] their response to this was they have their rules & that EU Law has nothing to do with them! They also warned my wife if she flies to Madrid without a Schengen Visa the Spanish authorities will deport her back to Peru regardless of the fact she has a valid Irish Visa!"* (YEA enquiry received in March 2015).

A UK national resident in Spain writes*: "I'm currently pregnant with our 3rd child. My husband is a Nigerian national resident in UAE. He has been repeatedly refused a spanish visa to visit us here. Im resident here with our 2 children and due to give birth in May. I really want my husband to be with me for the birth, he missed the birth of our other children. The spanish embassy in UAE request our nigerian marriage certificate be stamped by the british embassy but the british embassy refuse to stamp it. The spanish embassy keep giving the same reasons for refusal and not explaining or asking my husband for an interview. I think it is so unfair. Our marriage certificate is already stamped by ministry of foreign affairs in nigeria and Nigerian embassy in UAE. My husband has his own company in UAE and sufficient finances, he supports us financially. The spanish embassy also withheld our police invitation letter which is still valid which means I cannot apply for a new one. We've just had another visa refusal. I have 8 weeks before I'm due to give birth. I'm having to fly to uae on Sunday heavily pregnant to see my husband to see what can be done. Please advise. We have appointment with spanish embassy in 31st March. What can I do to help my situation?"* (YEA enquiry received in March 2015).

arrive at a dead end when they are required to register their marriage in the EU citizen's country of origin but that country does not recognise same sex marriage[16]. This leads to the paradox that the non-EU spouse is unable to benefit from Directive 2004/38 to obtain a family member's residence card, even though their host Member State itself does recognise same sex marriages.

[16] This has been reported on three separate occasions by Italian nationals seeking residence cards and entry visas in Spain who could not register their same sex marriage in Italy. Although Italy has since recognised same sex unions, several EU countries still do not, thus nationals of those countries wishing to settle with the same sex partner in a Member State which requires such marriage registration would face the same issue.

Moreover, In order to obtain the relevant document from the EU national's country of origin, citizens have been required to **submit their birth certificates**, which makes the whole process even longer and more expensive[17].

Furthermore, **it often takes several months to obtain the relevant document** from the EU citizen's home country – timeframes between 3 months to over 1½ years have been reported[18]. As this Hungarian national writes: ▼

▶ *[...] I am working in Spain. My husband is Serbian (non EU). We got married in Serbia. They told us we need Serbian marriage certificate to be recognised in Hungary in order to get working permit for him in Spain since I work as a EU passport holder in Spain. To get it we need to wait minimum 6 months (information from official Hungarian Ministry web page we got from Hungarian embassy in Madrid), but I know people waiting already 1.5 years with no answer from Hungary.*

*My husband has his date for visa application on June 9. We got it couple of weeks ago and it is extremely difficult to get date. I am afraid that we will not have this document till then and that we will have to ask for a new appointments for him. In that case it would be earliest in August. The other problem is that Spain recognizes certificates for 3 months from issuing date and that we have to apply for appointments and certificate again if we don't get certificate on time.*

*Is there any possibility to apply with Serbian marriage certificate translated and approved in Spanish [embassy] in Belgrade since we are both holding Serbian passport. Is there any other solution for this situation.*

## 2.4. The requirement to provide recent documents

A further obstacle that citizens often report is the requirement to provide documents that are recent. The timeframe usually given is that the documents should have been **issued in the 90 days prior to the application**[19].

This requirement creates additional trouble, as citizens need to obtain new documents from the non-EU country that issued them, a process that can be very expensive and complex and often impossible to accomplish in the short timeframe given by the authorities. In Spain, citizens have reported being given **only 10 days to bring the required documents**.

The following two enquiries from citizens are illustrative of the issues above: ▼▼

▶ A UK national writes: *"My wife and daughter who are Chinese nationality, have applied to the relevant authority in Spain (the Extranjeria), and I was just informed that the marriage and birth documents that we provided as proof of familial relations were outside of their validity date (3 months) and that we must give them the proper documents within 10 working days or the application will be refused and they must therefore leave the country since they have no more time left on their visa.*

*The marriage and birth documents that we provided to them were the same documents that the Spanish embassy in Beijing required in order to process the visa for them to come to Spain (non-eu family member of eu citizen visa).*

[17] See the second case study in paragraph 2.4 below.

[18] Time frames of over 1½ years have been reported in **Hungary**, upto 1 year in **Italy** and **Spain** itself, 8 months in **Germany** and 3 months in the **Netherlands**.

[19] **Spain:** (4 enquiries); **Portugal:** (1 enquiry), **Belgium:** (1 enquiry) (six months).

*Given that the Spanish embassy accepted these documents as valid in Beijing, and I have seen no regulations regarding a 3 month validity date on any information coming from the Extranjeria or any other agency, I regard it as unfair that this has been the reason for the refusal of the residence card.*
*Further, a new translation (apostilled and verified in Beijing by the relevant authorities) cannot be obtained in 10 days, therefore I regard the timeframe as being unreasonable.*
*What is the complaints/appeal procedure for cases such as these? Can my wife and child stay in Spain when the appeal procedure is ongoing?"*

▶ *"I am a Dutch citizen and my wife is from the United States. We were married in the United States and have an American marriage certificate. We moved to Spain together to work in September.*
*Prior to our departure, we contacted the Spanish consulate in the United States and were told we would need our official marriage certificate and an apostille from the Hague Convention for my wife to receive residency. When we arrived in Spain we had these documents officially translated into Spanish to submit with her application.*
*This week we received notice from the Spanish government that our marriage needs to be registered in the Netherlands and we need a document to prove this. An American marriage certificate and apostille was not enough. We were told we would have 10 days to submit this document.*
*I contacted the main registry in the Hague and found that we will have to travel there in person to register our marriage and that this process can up to three months. We would also both need to submit our birth certificates for this which will take additional weeks to collect beforehand.*
*What can we do now so that we can stay in Spain? There seems to be no way we can get this document in 10 days and we weren't even aware that we needed it. Even the Spanish government website for this application does not say it is required."*

In some cases, no indication is provided of how recent a document must be – the burden of proof is simply reversed seemingly as a matter of general policy. Despite the Commission's guidance that it is individual cases where there is a "well-founded suspicion of abuse" that can be investigated[20], applicants in situations with no indication of abuse had to bear the burden of proving that they were still in fact married at the time of application[21].

## 2.5. Additional invalid reasons for rejecting a marriage certificate

Some citizens have been denied a recognition of their marriage certificates for reasons that can only be described as pedantic, such as "*the judge who signed it wrote the date in by hand*"[22] or, the marriage certificate was translated by a certified translator in Madrid but had to be translated by one in Catalunya[23], or the marriage certificate had a stamp on it from a third country[24], or the apostille stamp was placed on a certified copy of the certificate instead of on the original[25].

[20] Par. 4.2 of the 2009 Communication.

[21] This appears to be the approach taken by the **Greek** consulate in Bangkok (3 enquiries evidence this).

[22] **Italy.**

[23] **Spain.**

[24] **Estonia.**

[25] **Spain.**

## 3. The consequences

The administrative hassle and extra costs that these requirements add are significant. However, the more serious implications of the above policies are the denial of EU entry and residence rights to non-EU family members, namely:

- non-EU family members are **unable to benefit from the free, accelerated procedure** provided for by Directive 2004/38 for obtaining a visa – some citizens have been obliged to apply as regular visitors because the consulate did not recognise their family link even though they provided apostilled and translated documents[26], while others decide to do so voluntarily and pay the relevant fee because the administrative hassle and cost of obtaining the extra documents required to prove their family link exceeded that of applying just as a regular visitor; or
- non-EU family members have their **visa applications denied** on the grounds that they have not proven their family link and have not satisfied the more stringent conditions that apply to regular visa applications[27]; or
- for those family members who are faced with the above requirements **when applying for a residence card, the resulting added delay puts them in a situation where their visa is due to expire** and they have to choose between having to return to their home country and reapply for a new visa or overstay their visa term[28]; or
- family members are **unable to work** in their host Member State **until they receive a residence card**, which could take up to a year[29].

## 4. Conclusion and recommendations

The above requirements constitute a significant obstacle to EU citizens' and their family members' freedom of movement. The families affected bear an added administrative and financial burden, and in many cases also an emotional one, as their family reunification is often put on hold.

There is often no clear mention of these additional requirements on the immigration portals, which generally only refer to the need for legalisation or apostille of foreign documents and to the need for translation[30]. Thus, citizens often only find out about them when submitting their application.

While the applicant bears the initial burden of proving their family link, they can only be required to prove the genuineness of their marriage or its continued existence in cases where there is reason to suspect abuse[31]. That burden of proof is on the authorities, who

[26] E.g. The Service provider for the **Spanish** embassy in Istanbul refused to accept a Turkish marriage certificate from a Bulgarian/Turkish couple and thus refused to process the application on the basis of Directive 2004/38. No reason was given for the denial; Enquiries on similar facts concerned **Spain**, **Italy** and **France**.

[27] E.g. **Hungary**, the **Netherlands** and **Sweden**.

[28] Even though pursuant to C-127/08 *Metock*, these family members should not be concerned about overstaying their visa term, nonetheless citizens are generally not aware of their rights and this becomes a major cause of stress for them. National authorities often tell them that they must return home and reapply for a visa if they cannot get their residence document in time. But in one case (168769) a family member had his passport taken away and was told that unless his status is confirmed he was going to be fined for overstaying his visa and deported. Also in **Denmark**, a family member was not issued with a registration certificate while the Danish authorities were trying to verify their foreign marriage certificate – the citizen was faced with an expiring visa.

[29] **Spain:** (two enquiries); **Portugal:** (two enquiries).

[30] For example see the Spanish immigration portal (*http://extranjeros.empleo.gob.es/es/InformacionInteres/InformacionProcedimientos/CiudadanosComunitarios/hoja103/index.html#documentacion*). The website of the Spanish police does include a brief mention but only in Spanish (*https://www.policia.es/documentacion/comunitarios/est_resid.html*).

[31] Article 35 of Directive 2004/38.

must prove that the marriage is fake in the event that they suspect this to be the case. The above additional requirements essentially reverse this burden back onto the applicant. The applicant, who needs their visa for imminent travel, or their residence card in order to comply with administrative formalities or take up employment, has no choice but to comply with these burdensome additional requirements.

Positive action is, therefore, required at EU and national level to protect the affected mobile EU citizens and their family members by ensuring that:

- **only an apostille stamp (or legalisation) and a certified translation can be required** for a non-EU marriage certificate (or other public document) to be accepted as proof of family link when non-EU family members apply for entry visas or residence cards;
- **any additional requirements**, aiming to establish whether a marriage is genuine, **should only be imposed in cases where there is reason to suspect abuse** and not as a general policy.

European Citizen Action Service

77, Avenue de la Toison d'Or, B-1060 Brussels, Belgium
+32 (0) 2 548 04 90
info@ecas.org
www.ecas.org

ACT4FREEMOVEMENT

Epim
European Programme
for Integration
and Migration