THE AIRE CENTRE
Advice on Individual Rights in Europe

Fitness Check Report for the United Kingdom

A review of the state of compliance of the United Kingdom's implementation of Directive 2004/38 on residence rights of EU citizens and their family members

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This work is supported by the European Programme for Integration and Migration (EPIM). Sole responsibility for the contents lies with the author and the contents may not necessarily reflect the positions of EPIM or its partner foundations.

May 2018

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1. Introduction

The purpose of this fitness check report is to provide an overview of the United Kingdom's rules regulating the residence rights of EU citizens and their family members, the rules concerning their access to benefits and those relating to their expulsion and removal, in order to identify the existence of obstacles to free movement encountered by EU mobile citizens and in particular those rules which have a particular impact on destitute and homeless persons.

The first three substantive sections of the report deal with residence formalities, access to benefits and the rules relating to expulsion and removal of EU citizens and their family members. Each part begins with an overview of the rules followed by a discussion of evidence of the existence of obstacles to free movement, including the identification of obstacles that operate to the particular detriment of destitute and homeless EU citizens. A final section is devoted to a discussion on strategies which may be deployed to overcome the obstacles identified in this report.

2. Methodology

The report has been compiled on the basis of a desk review of UK immigration law and related regulations, as well as the associated case law of the UK courts. The report covers the UK rules that aim to implement Directive 2004/38 and associated case law. In addition, where relevant, the report also encompasses the UK application of Regulation 492/2011 on the free movement of workers and Regulation 883/2004 on the coordination of social security. In addition to primary sources, several subject-specific secondary sources listed in the bibliography have also been consulted. The desk research has further been supplemented by interviews with officials and practitioners.

3. Implementation of Directive 2004/38 in the UK

According to the European Commission report[1] and the European Parliament study, the majority of Directive 2004/38/EC (the Directive/CRD as 'Citizens' Rights Directive') has been correctly and fully transposed into UK law.[2]

However, as will be discussed in this report, concerns remain. There has, for instance, only been a partial transposition of Article 7(3) on the retention of the status of a worker or a self-employed person and the UK still offers more limited opportunity for self-employed migrants to retain their rights as economically-active individuals than

[1] Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, 10th December 2008, COM(2008) 840 final.
[2] The key EU instrument which currently governs EU free movement law is Directive 2004/38/EC (Citizens' Directive). This consolidated and replaced most previous relevant EU instruments. It was initially transposed into UK law by the Immigration (European Economic Area) Regulations 2006, SI 2006/1003 (EEA Regs 2006), which came into force from 30 April 2006. The EEA Regs 2006 have been revoked and replaced from 1 February 2017 by the Immigration (European Economic Area) Regulations 2016, SI 2016/1052 (EEA Regs 2016). Council Regulation (EU) 492/2011 of 5 April 2011 is also relevant, in relation to the free movement of workers and their family members (this codified the previous Council Regulation (EC) 1612/68 and subsequent case law).

does Directive 2004/38/EC. Article 24(1) CRD – on equal treatment – is yet to be fully transposed into UK law.

In addition, there are persisting barriers to the entry and residence of Union citizens into the UK, such as the introduction of a 'minimum earning threshold' to define a 'worker'. This means denying Article 7 Directive 2004/38 residence rights to low-wage or zero hours workers, who may not meet this standard and would also be unlikely to be considered as 'self-sufficient' since the UK continues to refuse to recognise the National Health Service as comprehensive sickness insurance for the purposes of Article 7(1)(b) and (c) Directive 2004/38. Moreover, it introduces the consequent concern that such workers will not qualify under the UK's 'right to reside' test for equal access to social welfare.

3.1 Conditions relating to the right of residence

The term 'EEA nationals' refers to nationals of the countries in the EEA other than the UK, as well as Switzerland, which reflects the definition in the Immigration (European Economic Area) Regulations 2016 (EEA Regs 2016), SI 2016/1052.[3] Entry and residence on this basis is by right, and EEA nationals (and third country nationals) who meet the conditions for an EU right of residence are not required to obtain leave to enter or remain in the UK under the Immigration Rules. The Immigration Rules[4], Introduction, para 5 provides that:

> *'Save where expressly indicated, these Rules do not apply to those persons who are entitled to enter or remain in the UK by virtue of the provisions of the 2006 EEA Regulations. But any person who is not entitled to rely on the provisions of those Regulations is covered by these Rules.'*

The UK Home Office's policy has been to read para 5 of the Immigration Rules as being reflective of section 7 of the Immigration Act 1988, so that a person with an enforceable EU law right of residence cannot be required to seek leave to enter or remain under the Rules. However, there is nothing to stop such a person, if they wish to do so, from applying for leave under the Immigration Rules.

EEA nationals are technically still 'subject to immigration control', as they do not have the right of abode in the UK under the Immigration Act 1971 (IA 1971).[5]

3.1.1 Right of Entry

Under Directive 2004/38, as implemented in the UK by the EEA Regs 2016, EEA nationals are able to enter the UK on production of a valid passport or national identity card, unless one of the grounds of exclusion permitted under EU law applies.[6]

Entry may also be denied if the Immigration Officer has reasonable grounds to suspect that admission would lead to a misuse of rights, and where an EEA national has been removed for not having or ceasing to have a right of residence they may be prevented

[3] http://www.legislation.gov.uk/uksi/2016/1052/made
[4] https://www.gov.uk/guidance/immigration-rules/immigration-rules-introduction
[5] Immigration Act 1971, s 2
[6] Article 5(1) of Directive 2004/38/EC as transposed in the Immigration (European Economic Area) Regulations 2016, SI 2016/1052, regs 11 and 23

from returning to the UK for 12 months (although they can apply to be admitted during that period if there has been a material change in circumstances). The legality of these provisions is considered later on at 5.5.

Regulation 31 of the EEA Regulations 2016 applies the Immigration Act 1971, Sch 2, Pt I, para 6(2)[7] to EEA nationals who have been admitted to the UK, but who should not have been (on the basis of one of the permitted grounds for exclusion). This allows an Immigration Officer to revoke the decision to admit such a person by written notice within 24 hours of the conclusion of their examination on entry.[8]

3.1.2 Residence for up to three months

The conditions governing the right of residence for the first three months under the Directive 2004/38/EC have been correctly transposed into UK law. EEA nationals have an initial right of residence for three months, on the sole requirement of holding a valid passport or national identity card.[9]

The right of residence will cease on them becoming an unreasonable burden on the UK social assistance system.[10] It is also subject to any decision to remove, refusal to issue residence documentation, cancellation of the right of residence or revocation of admission, as stated above, and under one of the permitted EU grounds.[11] These have been satisfactorily transposed into UK law.[12]

3.1.3 Residence beyond three months

EEA nationals have a right of residence beyond the initial three-month period if they fall within the following categories of persons in the UK and satisfy the conditions relevant to that category:

- worker—which includes jobseekers
- self-employed person
- student, or
- self-sufficient person.

The EEA Regs 2016 term these categories 'qualified persons'.[13] The definitions of each category are a matter of EU law rather than national law.

From 16 July 2012, subject to certain transitional provisions, the definition of 'EEA national' in the then EEA Regs 2006 was amended to 'national of an EEA state who is not also a British citizen'.[14] This meant that, unless a transitional provision applied, the family members of a person who had dual nationality of the UK and another EEA

[7] https://www.legislation.gov.uk/ukpga/1971/77/contents
[8] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 31
[9] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 11(1)
[10] Article 6(1) of Directive 2004/38/EC and EEA Regs 2016, SI 2016/1052, reg 13
[11] Directive 2004/38, Articles 27-33.
[12] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 23(5), 24(6)(a), 25(2)(b) and 27
[13] Article 7 of Directive 2004/38/EC and EEA Regs 2016, SI 2016/1052, reg 14
[14] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 2(1)

state were not be able to benefit from EU free movement rights in the UK. This change was made following the CJEU judgment in *McCarthy v SSHD*.[15]

However, the EEA Regs 2016 will now need to be further amended following the CJEU decision in *R (Lounes) v SSHD*,[16] which held that an EU national who had exercised their rights of freedom of movement by moving to and residing in a Member State other than that of which they were a national, and then acquired the nationality of that state, could no longer benefit from the Citizens' Directive (nor could any family members). However, a third-country national who subsequently married the (now) dual national would be able to enjoy a derived right of residence in the host Member State under Article 21 of the TFEU on conditions which must not be stricter than those provided for by Directive 2004/38/EC.

EEA nationals are also able to reside beyond the 3-month period if they are providing services in the UK temporarily, although this right does not derive from Directive 2004/38 and is not included in the EEA Regs 2016.

The extended right of residence remains subject to any decision to remove, refusal to issue residence documentation, cancellation of the right of residence or revocation of admission under one of the grounds permitted under EU law.[17]

It is open to EEA nationals to apply for a registration certificate (see paragraph 3.2 for a full discussion), which will confirm an extended right of residence under Directive 2004/38. This is not compulsory and, prior to the UK's vote to leave the UK on 23 June 2016, evidencing an EEA national's 'qualified' status would often only arise in the context of applications for their third country national family members. Since the Brexit vote, more EEA nationals are seeking to obtain registration certificates to try and protect their immigration position after the UK leaves the EU.

3.1.4 Residence as a worker

There is no definition of worker in Article 45 of the Treaty on the Functioning of the European Union (TFEU)[18], Directive 2004/38/EC, nor in Council Regulation (EU) 492/2011 of 5 April 2011 on freedom of movement for workers within the Union, which replaced and codified Regulation (EEC) 1612/68. A broad definition of the concept must be given, and further development of the concept is not excluded beyond the date of implementation of Directive 2004/38.[19]

Successive CJEU decisions have given guidance as to what characteristics of economic activities constitute employed work.[20] Part-time work can count, including where income is supplemented by unemployment or sickness benefits, although the activities must not be 'on such a small scale as to be purely marginal and ancillary'.[21] These

[15] Case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* (EU:C:2011:277)
[16] Case C-165/16 *Lounes v Secretary of State for the Home Department* (EU:C:2017:862)
[17] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 14(4)
[18] Article 45 of Treaty on the Functioning of the European Union and Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 4(1)(a)
[19] Case C-507/12 *Saint Prix v Secretary of State for Work and Pensions*, [2014] All ER (D) 157 (Jun)
[20] Case C-66/85 *Lawrie-Blum v Land Baden-Wurttemberg* [1986] ECR 2121 and Case C-53/81 *Levin v Staatssecretarias van Justitie* [1982] ECR 1035
[21] Case C-139/85 *Kempf v Staatssecretaris van Justitie* ECLI:EU:C:1986:223

questions will often arise in the context of applications by family members, or in benefits or housing assistance cases. UK cases that provide helpful summaries of the development of the law on workers include *Barry v London Borough of Southwark* and *Begum (EEA–worker–jobseeker) Pakistan*.[22]

However, the UK Home Office now applies a minimum earnings threshold (MET) as part of its assessment as to whether an EEA national's work activities constitute genuine and effective employment (and self-employment) including as to whether they are 'on such a small scale as to be purely marginal and ancillary'.[23] This is part of a more restrictive approach taken by the UK Home Office to EEA applications since 2015, eg by using various stage tests in decision-making and adding detailed lists of suggested supporting documents in relevant guidance.

The Modernised Guidance (MG) on EEA nationals qualified persons summarises the application of the MET threshold as follows:

> *'HMRC has a Primary Earnings Threshold (PET), which is the point at which employees must pay class 1 National Insurance contributions. If an EEA national is earning below PET you must make a further enquiries into whether the activity relied upon is genuine and effective.'*

The current weekly threshold corresponds to the Primary Earnings Threshold under UK social security legislation[24] and is currently set at £162 per week for the 2018/19 tax year[25]. This is the same threshold as was introduced by the Department for Work and Pensions (DWP) in March 2014, in relation to EEA nationals qualifying as workers or self-employed persons in regards to their accessing certain benefits.[26]

It is clear from the wording of the MG (and the DWP policy)[27] that the threshold does not have to be met in all cases nor does it supersede the relevant EU case law. But in practice, persons earning below the threshold (which at the time of its introduction in the benefits sphere equated to 24 hours of work a week at the same level as the National Minimum Wage) will face more questions and will need to prepare their residence application and evidence carefully.

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[22] *Barry v London Borough of Southwark* [2008] EWCA Civ 1440, [2008] All ER (D) 243 (Dec) *Begum (EEA–worker–jobseeker) Pakistan* [2011] UKUT 275 (IAC)

[23] Other EU jurisdictions do not impose a threshold. Unlike the UK, there does not appear to be any need for an earnings threshold to control access to benefits as an individual can only claim unemployment benefit in other EU counties if they have worked for a specific amount of time and thus contributed to the system or made a certain number of social security payments. This ranges from four months in France to one year in many countries, including Austria, Denmark, Germany, Italy, and Spain. For further details see 'Your rights: country by country' published by the European Commission. http://ec.europa.eu/social/main.jsp?catId=858&langId=en

[24] DWP's DMG guidance, para 073038 onwards p 32 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/690047/dmgch0703.pdf

[25] See further listing of NIC PETs over time: https://www.gov.uk/government/publications/rates-and-allowances-national-insurance-contributions/rates-and-allowances-national-insurance-contributions

[26] https://www.gov.uk/government/publications/housing-benefit-adjudication-circulars-2014

[27] https://www.gov.uk/government/publications/decision-makers-guide-vol-2-international-subjects-staff-guide

This threshold is potentially problematic in light of the proliferation of low-wage, zero hours contract work on the UK job market[28], and arguments about whether the MET represents a breach of EU law by discriminating against part time workers and defining the concept of "worker" by reference to national law, which is impermissible.[29] However in assessing whether someone is a worker, the MET appears to comply with EU law, since it introduces a two tier test; firstly a minimum earnings threshold (equivalent to 24 hours per week at the national minimum wage) is applied, and those who pass it are automatically workers, while those come below it will have their work assessed to see whether it is 'genuine and effective', or 'marginal and ancillary', drawing upon the distinction of the CJEU case law.[30] Concerns remain about application, in particular how the MET guidance is applied to part time work; the treatment of students who work; and role of disability in determining the genuineness of work.[31]

3.1.5 Residence beyond three months for jobseekers

There is no separate right as a 'jobseeker' within Directive 2004/38. This derives from the CJEU decision in *Antonissen*[32] which held that an EEA national who has entered another member state to seek work should continue to be classed as a worker for 6 months after entry in order to be allowed to look for work. After that, if he or she produces evidence of a continued search for employment and of a genuine chance of being engaged, status may be retained.

The requirements relating to jobseekers are now set out in the EEA Regs 2016,[33] and broadly mirror the position in the preceding Immigration (European Economic Area) Regulations 2006 (EEA Regs 2006)[34], although the EEA Regs 2006 had undergone three sets of amendment on this issue as the result of perceived UK concerns about the threat of so-called 'benefit-tourism' by nationals of other Member States. This concern had gained particular momentum shortly prior to the removal of the restrictions on access to the labour market as regards Bulgarian and Romanian nationals on 31 December 2013.

From 1 January 2014[35] (and as carried through to the EEA Regs 2016) EEA nationals who enter the UK in order to seek employment will be qualified persons as 'jobseekers' if they can satisfy the following conditions A and B[36]:

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[28] Puttick, K., 'EEA Workers' Free Movement and Social Rights after Dano and St Prix: Is a Pandora's Box of New Economic Integration and 'Contribution' Requirements Opening?' (2015) 37(2) JSWFL 253

[29] Case 75/63 *Hoekstra v The Netherlands* [1964] ECR 177.

[30] Case 53/81 *Levin v Staatssecretaris van Justitie* [1982] ECR 01035, 17-18.

[31] O'Brien, C., 'The Pillory, the Precipice and the Slippery Slope: the profound effects of the UK's legal reform programme targeting EU migrants' (2015) 37(1) JSWFL, 111-136, 123

[32] Case C-292/89 *The Queen v. The Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen* (ECLI:EU:C:1991:80)

[33] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 6

[34] Immigration (European Economic Area) Regulations 2006, SI 2006/1003 http://www.legislation.gov.uk/uksi/2006/1003/contents/made

[35] Through the Immigration (European Economic Area) (Amendment) (No. 2) Regulations 2013 (SI 2013/3032).

[36] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, regs 6(4)–6(7)

- Condition A—requires EEA nationals either to have entered the UK as a jobseeker or to have become a jobseeker, having previously resided as a qualified person in another capacity—see below
- Condition B—requires EEA nationals to provide evidence that they are seeking employment and have a genuine chance of being engaged

As of 1 July 2014, where the claimant has previously had a right of residence as a jobseeker and has been absent from the UK for less than 12 months, then a further restriction (Condition C) applies. In these circumstances the claimant can only have a right of residence as a jobseeker provided they can from day 1 provide compelling evidence they are continuing to seek employment and have a genuine chance of being engaged.[37]

From 10 November 2014, the Immigration (European Economic Area) (Amendment) (No 3) Regulations 2014, stipulated that the maximum aggregated period for initial jobseekers (prior to being required to provide 'compelling evidence') is 91 days rather than 182, and the 'relevant period' will include any period after 31 December 2013 spent in the UK as a jobseeker.

The effect of the changes made in the Immigration (Economic Area) (Amendment) Regulations 2014[38], is that initial jobseekers cannot 'restart the clock' by leaving the UK and returning, and must count previous time in the UK as a jobseeker towards the relevant time limit beyond which that they must show 'compelling evidence' that they are seeking employment and have a genuine chance of being engaged (unless they have been outside the UK for 12 months). Persons who have retained worker status after at least 1 year's previous employment in the UK will have to show such 'compelling evidence' on their return if they leave the UK at all.[39] The current Modernised Guidance (MG)[40] says what constitutes 'compelling evidence' of genuine prospects of employment:

> *'represents a higher threshold than the requirement to prove that a person is actively seeking work and has a genuine chance of finding work. For example we would expect to see a recent job offer. Or evidence the EEA national has very recently significantly improved their prospect of finding work by successfully completing a vocational course which is directly relevant to the field in which they are hoping to work and which significantly increases the prospect of an imminent job offer. In this case a person may temporarily continue to have a right of residence as a jobseeker.'*

This seems to be a higher standard that required under the *Antonissen* formula which does not ask for evidence of a change of circumstances, much less a time-restricted change. Nor does it require that a claimant actually have a job, or that the prospect of an 'imminent job offer' is likely'. Instead, the *Antonissen* phrasing ('evidence that he is *continuing to seek employment* and that he has genuine chances of being engaged') suggests a claimant might be still in the active 'seeking' part of the process, rather than

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[37] Immigration (European Economic Area) (Amendment) Regulations 2014 (SI 2014/1451)
[38] http://www.legislation.gov.uk/uksi/2014/1451/made
[39] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, regs 6(8)–6(10)
[40] *MG European Economic Area nationals: qualified persons, Compelling evidence*
https://www.gov.uk/government/publications/european-economic-area-nationals-qualified-persons

sitting on a job offer, or waiting for one following an interview. Nor does the MG seem to accord with decisions in the Administrative Appeals Chamber of the UK Upper Tribunal (UT). In *KS v Secretary of State for Work and Pensions*,[41] the UT held that the requirement for "compelling evidence" did not mean that a higher standard of proof was required than the normal civil standard. This may well therefore breach and be challenged at EU level.

In another case, *Secretary of State for Work and Pensions v MB (JSA) and others (European Union law: free movement)* [42], the UT considered whether the UK's "compelling evidence" test was compatible with EU law. It held that the new 'compelling evidence' requirement 'cannot raise the bar for what constitutes a genuine chance (or chances) of being engaged higher than it falls to be set in accordance with *Antonissen*'. Although the tribunal noted that 'applying the concept of the "reasonable period" after increasing periods of unsuccessful job-seeking may mean the conditions become ever harder to satisfy', it went on to conclude, in relation to the six-month point, that there is nothing 'in EU law which permits any kind of step change in what has to be proved at that (or any other) point'.

The MG gives extensive guidance on what is needed to show an evidential picture of job-seeking, including noting that the type of evidence submitted should be appropriate to the level of the EEA national's skills/qualifications. Persons who are seeking to rely on any time spent as a jobseeker when applying for permanent residence should also be careful to check the conditions for job-seeking set out in the EEA Regs 2016 or the EEA Regs 2006 during any time they were not working, including any transitional provisions.

3.1.6 Retention of worker status

The provisions of Directive 2004/38 on the retention of the status of worker[43] and the protections offered are broadly reflected in the UK's regulations.[44] However the EEA Regs 2016 limits retention of 'self-employed' status to situations in which an individual temporarily unable to pursue his/her activity as a self-employed person, as a result of illness or accident.[45] The more extensive range of circumstances contained in Directive 2004/38/EC, including, for example, unemployment linked to the pursuit of vocational training, is limited in UK law to workers. If an EEA national worker ceases work temporarily they will be able to retain worker status if they[46]:

- are temporarily unable to work as the result of an illness or accident
- are in duly recorded involuntary unemployment after having been employed in the UK for at least 1 year, provided they have registered as a jobseeker with the relevant employment office and can provide evidence that they are seeking employment and have a genuine chance of being engaged
- are in duly recorded involuntary unemployment after having been employed in the UK for less than 1 year, provided they have registered as a jobseeker

[41] *KS v Secretary of State for Work and Pensions* [2016] UKUT 269 AAC
[42] *Secretary of State for Work and Pensions v MB (JSA) and others (European Union law: free movement)* [2016] UKUT 372 (AAC)
[43] Article 7(3).
[44] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 6(2)
[45] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 6(4)
[46] Case C-442/16 *Florea Gusa v Minister for Social Protection and Others* ECLI:EU:C:2017:1004 confirmed these provisions also apply to mobile Union citizens who have been self-employed

with the relevant employment office and can provide evidence that they are seeking employment and have a genuine chance of being engaged. This is subject to an upper limit of 6 months' of retained worker status, although it is questionable whether an absolute limit of this sort is acceptable as a matter of EU law[47]

- are voluntarily unemployed and have embarked on vocational training, or
- have voluntarily ceased working and embarked on vocational training that is related to their previous employment.

On temporary inability to work due to illness or accident, this is not time limited, what matters is that the situation is not permanent.[48] The decision on whether a situation is permanent or temporary is an objective one and cannot be determined solely by reference to the worker's belief or intention at the time, whether reasonable or unreasonable. Instead the test is whether or not there is a realistic prospect of them returning to work.[49] A temporary inability to work due to illness can include time spent detained in a hospital pursuant to an order of the court under the Mental Health Act 1983, where the person has not been convicted of any criminal offence.[50]

Pregnancy is not considered as an illness, but the CJEU has confirmed that a woman who gives up work or seeking work because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth will retain the status of worker provided she returns to work or finds another job within a reasonable period after the birth of her child.[51] To cease working for such a period could not be seen as meaning that she no longer belonged to the labour market of the host member state.

What will be a reasonable period will depend on the specific circumstances of the case, and the applicable national rules on the duration of maternity leave in accordance with the protections found in Directive 92/85/EEC (the Pregnant Workers Directive). [52] Two decisions of the UT (Immigration and Asylum Chamber) (UT) and the UT (Administrative Appeals Chamber) have both held that the reasonable relevant period will (usually) commence no earlier than 11 weeks before the date of confinement and last for up to 52 weeks. 52 weeks is the maximum period of maternity leave that a worker in the UK is permitted to take by statute.[53] In *Shabani (EEA—jobseekers; nursery education)*[54], the SSHD 'conceded' that where a worker who has been in employment becomes unemployed and does not retain worker status, they can potentially qualify as a jobseeker provided they could meet the conditions in reg 6(4) of the EEA Regs 2006 (now incorporated within reg 6(1) of the EEA Regs 2016).[55]

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[47] Article 7(3) of Directive 2004/38/EC says the status of worker shall be retained for **no less** than six months

[48] *FMB (EEA reg 6(2)(a) – 'temporarily unable to work') Uganda* [2010] UKUT 447 (IAC)

[49] *De Brito and another v SSHD* [2012] EWCA Civ 709 [2012] All ER (D) 10 (Jun)

[50] *JO (qualified person—hospital order—effect) Slovakia* [2012] UKUT 00237 (IAC)

[51] Case C-507/12 *Saint Prix v Secretary of State for Work and Pensions* [2014] All ER (D) 157 (Jun)

[52] Directive 92/85/EC, art 8

[53] *Weldemichael and another St Prix* [2014] EUECJ C-507/12; effect) [2015] UKUT 540 (IAC) *SSWP v SFF* [2015] UKUT 502 (AAC)

[54] *Shabani (EEA—jobseekers; nursery education)* [2013] UKUT 00315 (IAC)

[55] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 6(1)

3.1.7 Residence beyond three months for self-sufficient citizens

According to Article 7(1)(b) of Directive 2004/38/EC Union citizens, who are not workers or self-employed, only have the right of residence on the territory of another Member State for a period of longer than three months if they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover (CSI) in the host Member State.[56] This is transposed in the EEA regualtions 2016.[57]

Family members of an EEA national will have a right of residence while the EEA national satisfies these conditions. Each family member must also have CSI cover.[58] Although Directive 2004/38/EC does not specifically make the right of residence of family members dependent on having CSI, it is clear they must not become a burden on the host state, and therefore this requirement is likely to be justified.[59]

The Commission has tried to provide some guidance on the notion of sufficient resources in its guidelines, published in 2009. According to these guidelines the notion of 'sufficient resources' must be interpreted in the light of the objective of the Directive, which is to facilitate free movement, as long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State.[60] At the same time Article 8(4) of Directive 2004/38, which is the important provision in this context, prohibits Member States from laying down a fixed amount to be regarded as "sufficient resources", either directly or indirectly, below which the right of residence can be automatically refused. The authorities of the Member States must take into account the personal situation of the individual concerned. The text of this provision fully reads:

"Member States may not lay down a fixed amount which they regard as "sufficient resources", but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State"

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[56] Recital 10 of Directive 2004/38/EC says that persons who had a right of residence should not be an unreasonable burden on the social assistance system of the host state during an initial period. The Directive provides for this to be five years. This position was found to be proportionate by the UK Court of Appeal in *Ahmed v Secretary of State* [2014] EWCA Civ 988.

[57] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 4(1)(c)

[58] The UK's implementation of EU law has always required the family members of self-sufficient EEA citizens to have Comprehensive Sickness Insurance as well as the EEA citizen in order for them to have a right of residence. From 6 April 2015 the same rule has also been applied to the family members of EEA students.

[59] Directive 2004/38/EC, arts 7(1)(b), 7(1)(d),7(2) and Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 4(2)–(3).

[60] 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, Section 2.3.1. Sufficient resources.

Unfortunately, this text has a rather ambivalent character.[61] On the one hand a fixed amount is prohibited, but on the other hand a threshold at the level of a social assistance benefit is indicated. An example of this can be seen in how the UK transposes this provision, and the fact that since the UK has a number of different social security and assistance mechanisms, it is not legally certain when an individual will be considered to have sufficient resources.[62]

a) Proof of sufficient resources

The definition of sufficiency of resources is the level which will exceed the maximum level of social assistance to which a British citizen and his or her family will be entitled to, whereas Article 8(4) of Directive 2004/38 stipulates that sufficient resources 'shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance'.

This transposition creates, at the very least, unnecessary ambiguities, in fact, the terminology prescribed in this case is detrimental to transparency for Union citizens as the figure representing the 'maximum level of resources which a UK national may possess if he is to become eligible for social assistance' remains difficult to quantify. The UK UT seem to suggest that it is above the amount that they would still get Housing Benefit,[63] and that it may be relevant if the amount of benefit at stake is merely a top up to balance the budget.[64]

The origin of the resources can either be through a trust fund or the employment of a spouse or any other family member.[65] There is no fixed amount that is regarded as 'sufficient resources'. The personal situation of each applicant has to be taken into account.

In *Kuldip Singh*[66] the CJEU considered the question of the potential sources of income for a person claiming to be self- sufficient, holding that the necessary income could derive in part from a spouse who is a TCN. The UK Home Office does not expressly state that the resources cannot also be derived from a British citizen, and therefore there does not seem any prohibition on someone relying on the income from their British-born spouse or partner as well. The Northern Irish Court of Appeal[67] has recently made a reference to the CJEU on a *Chen* case as to whether (1) income from employment that is unlawful under national law establish, in whole or in part, the availability of sufficient resources under Article 7(1)(b) of the Citizens Directive; (2) If 'yes', can Article 7(1) (b) be satisfied where the employment is deemed precarious solely by reason of its unlawful character?

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[61] J. Shaw and N. Nic Shuibhne, 'General Report: Union Citizenship: Development, Impact and Challenges', in U. Neergaard, C. Jacqueson and N. Holst-Christensen (eds.), Union Citizenship: Development, Impact and Challenges, The XXVI FIDE Congress in Copenhagen (Copenhagen: DJØF Publishing, 2014), 91

[62] *Ahmad v Secretary of State for the Home Department [2014] EWCA Civ 988* and *see* P. Minderhoud, 'Directive 2004/38 and Access to Social Assistance Benefits', in E. Guild, C. Gortazar Rotaeche and D. Kostakopoulou (eds.), *The Reconceptualization of European Union Citizenship* (Leiden- Boston: Nijhoff , 2014), 254.

[63] *SG V Thameside Metropolitan Borough Council* 2010 UKUT 243 AAC

[64] *AMS v SSWP (PC)* (final decision) [2017] UKUT 381 (AAC)

[65] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 4(4)

[66] Case C-218/14 *Kuldip Singh and Others v Minister for Justice and Equality* ECLI:EU:C:2015:476

[67] Case C-93/18 *Bajratari v SSHD*

As regards to whether claiming social assistance benefits bars someone from being self-sufficient, in *Brey*,[68] the CJEU ruled that EU law prohibits an automatic bar on benefit claims from those relying on a self-sufficiency based right to reside. In *VP v Secretary for Work and Pensions*[69], the UT considered the UK's policy of refusing social assistance benefits to the economically inactive, on the grounds they could not be self-sufficient. The tribunal examined *Brey* and found that, though the CJEU had not said so, it could only apply to claimants whose resources had been assessed at the point of applying for a residence card. As the UK does not issue registration cards as a matter of course, the tribunal concluded that it was legitimate to treat a benefit claim as a failure of a sufficient resources assessment. If the logic of *VP* is upheld and followed, it would seem to never be possible to claim a social assistance benefit in the UK as a self-sufficient EU migrant, which seems at odds with the reasoning of *Brey*, which prohibits 'a mechanism, whereby nationals of other Member States who are not economically active are automatically barred by the host Member State from receiving a particular social security benefit'.[70]

The case of *VP* also stated that a person should be able to 'point to "resources" to see them through five years', not just the period between jobs, and could not rely on periods during which he had made no claim upon public resources 'through a combination of luck and an unusually frugal lifestyle'. In not becoming a burden to the social assistance system, they 'may have been fortunate, but the risk [of becoming a burden] was still there'.[71] EU citizens therefore cannot get credit for not having been a 'burden' – only for showing that from the outset there was no risk of them having become a burden, by showing substantial private resources (five years' worth) from the outset.

b) Proof of comprehensive sickness insurance

The UK began enforcing the requirement to hold comprehensive sickness insurance (CSI) in 20 June 2011. Limited transitional arrangements were made for students who had been issued with a registration certificate as a student before that date. The UK's implementation of EU law has always required the family members of self- sufficient EEA citizens to possess comprehensive sickness insurance as well as the EEA citizen in order for them to have a right of residence. From 6 April 2015 the same rule has also been applied to the family members of EEA students.

The rest of the EU uses a system of health insurance to provide the public with health care. The UK, uniquely, has the National Health Service (NHS) instead, which is not insurance based but instead simply provides free health care at the point of need. Anyone who is 'ordinarily resident' in the United Kingdom is entitled to use the public NHS. But according to the UK authorities the NHS cannot be seen as CSI for economically inactive EU migrants.[72] For this category the UK authorities have

[68] Case C-140/12 *Pensionsversicherungsanstalt v Brey Case*, [2013] All ER (D) 198 (Sep)
[69] *VP v Secretary for Work and Pensions* (JSA) [2014] UKUT 32 (AAC),
[70] Case C-140/12 *Pensionsversicherungsanstalt v Brey Case*, [2013] All ER (D) 198 (Sep) para 77
[71] *VP v Secretary for Work and Pensions* (JSA) [2014] UKUT 32 (AAC), para 84
[72] See S. De Mars, 'Economically inactive EU migrants and the United Kingdom's National Health Service: unreasonable burdens without real links' (2014) 6 European Law Review, 770– 789.

interpreted the requirement for CSI in European Operational Policy Notice 7/2011[73] to mean that additional cover is necessary in the form of one of:

- Private medical insurance plan that covers an individual and their family for the majority of risks while in the UK.
- European Health Insurance Card (EHIC) issued by an EEA Member State other than the UK.[74]
- Protection through reciprocal arrangements with the home Member State

However, according to the Commission the UK has breached EU law by not considering entitlement to treatment by the NHS as sufficient to allow EU citizens who live but have no job in the UK to stay in the country for more than three months. The Commission has launched an infringement procedure in 2012 against the UK, requesting it to comply with EU rules by considering NHS cover as sufficient sickness insurance when assessing whether or not a non-active EU citizen is entitled to remain in the UK under the free movement rules.[75]

The UK is required to amend national rules and to bring UK law in line with EU law,[76] but the Commission has not yet taken any decision whether or not to bring the matter before the CJEU, and say they are still analysing the possible impact of the *Brey* and *Dano* judgments on this issue.[77]

The UK Court of Appeal (CA) has supported the view of the UK authorities and considered in *Ahmad v Secretary of State for the Home Department (SSHD)* that the requirement on an EEA national who is exercising a treaty right in the UK as a student to have comprehensive sickness insurance, cannot be met by having access to the NHS.[78] The UK Courts used the argument that the public healthcare system of the host state could not be included because that would defeat the object of the Directive, namely relieving the state of the cost of providing healthcare in the first five years of the EEA national's presence in that state. According to the UK Court the conditions in Article 7(1) Directive 2004/38 must not be interpreted dynamically. Instead, in line with the CJEU decision in *Brey* the conditions required strict and literal interpretation but remained subject to the general principles of EU law such as proportionality.

Article 7 Directive 2004/38 and the 'not to become a burden on the social assistance system of the host Member State' only refers to the sufficient resources requirement and not to the comprehensive sickness insurance requirement. This suggests that, contrary to the view of the UK Court of Appeal, even in a strict and literal

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[73] https://www.gov.uk/government/publications/european-operational-policy-notice-102011-for-caseworkers-to-process-eea-nationals-applications

[74] Relying on an EHIC issued by another EU country will only be accepted if one confirms their intention not to live in the UK permanently. Neither Directive 2004/38 nor Regulation 883/2004 contain any obligation on people who rely on an EHIC to meet the requirement to hold CSI to make a declaration of temporary residence.

[75] On 18 September 2017 the Commission said it was still assessing the exact impact on this infringement http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2017-003659&language=EN

[76] See http://europa.eu/rapid/press-release_IP-12–417_en.htm?locale=en (last accessed on 20 January 2016)

[77] Information received from DG Justice on 12 February 2015.

[78] *Ahmad v Secretary of State for the Home Department* [2014] EWCA Civ 988 (16 July 2014).

interpretation an appeal to the NHS cannot be regarded as an appeal to the social assistance system of the UK.[79]

3.1.8 Permanent residents

The right to permanent residence under Directive 2004/38/EC is transposed into UK law via Reg 15 EEA Regulations and is broadly consistent with the substance of Article 16 of Directive 2004/38/EC.

Although Reg 15 does not refer to the fact that permanent residents are not required to meet the same conditions of residence as EU citizens exercising their rights under Article 7 CRD (right of residence for more than three months), this is arguably implicit in Reg 14, which transposes Article 7 CRD on extended residence rights. This provision states that those rights are in addition to any rights enjoyed pursuant to Regulation 15. Nevertheless, given the relatively high number of complaints to the Your Europe Advice Service that the UK (along with other Member States) around Article 7 residence requirements imposed on permanent residents, it might be helpful to make this rule more explicit.

Permanent residence is a settled status in the UK and means that someone who has acquired this status is no longer required to be economically active in order to remain in the UK. According to Article 16(4) of Directive 2004/38/EC, an acquired right to permanent residence can only be lost through absences from the host Member State of more than two consecutive years. Further exceptions can apply to fraudulently acquired permanent residence (Article 35 of Directive 2004/38/EC). However, the UK Home Office has sought to argue that a two year period of economic inactivity after acquiring permanent residence is akin to a physical absence of the same period, and means permanent residence status can be lost. This has yet to be tested in the UK Courts.

In the run up to Brexit many EEA Nationals are applying for permanent residence in the hope it will prove their claim to be a permanent resident in future immigration applications. Proof can come as one of the following types of document[80]:

1. For EEA nationals who have acquired five years of legal, continuous residence in accordance with the Citizens Directive, a document certifying permanent residence (Article 19 Citizens Directive, regulation 19 of the 2016 Regulations;
2. For non-EEA family members of a qualified person or an EEA national with a right of permanent residence, a residence card, (Article 10 Citizens Directive; regulation 18 of the Immigration (European Economic Area) Regulations 2016;
3. For the non-EEA family members of EEA nationals who have acquired a right of permanent residence, a permanent residence card (Article 20 Citizens Directive, regulation 18 of the 2016 Regulations).

[79] See F. Van Overmeiren, E. Eichenhofer and H. Verschueren, 'Social Security Coverage of Non-Active Persons Moving to Another Member State', in E. Guild, C. Gortazar Rotaeche and D. Kostakopoulou (eds.), *The Reconceptualization of European Union Citizenship* (Leiden- Boston: Nijhoff , 2014), 254.

[80] From 1 October 2016, the Home Office has introduced online application forms for EEA nationals applying for registration certificates and permanent residence cards. This was expanded on 9 February 2017 to include EEA and TCN family members who are applying at the same time as the EEA national.

A mandatory fee of £65 is payable for residence documents.[81]

Previously, it was not compulsory to use the official forms. However, from 1st February 2017 all applications need to be made on the UK Home Office prescribed forms. Though legally questionable[82], it brings EEA applications in line with other immigration applications made under the domestic rules.

3.2 Registration formalities

The Citizens' Directive gives Member States the power to oblige nationals from other Member States, who are residing in their territory for beyond the initial right of residence of 3 months, to apply for a registration certificate. The UK has not chosen to make this compulsory for EEA nationals, however, EEA nationals are able to apply for a registration certificate if they choose to do so. A registration certificate must be issued immediately on application and production of a valid passport or national identity card, and proof of being a 'qualified person'.[83]

EEA nationals are also able to apply for a registration certificate if they are not a 'qualified person' themselves but they are the direct family member, durable partner or other family member of a 'qualified person' or have retained the right of residence as a family member.[84]

Since EEA nationals are able to enter and exit the UK without restriction, there is often no need for them to apply for a registration certificate. It can, however, facilitate the application process for their TCN national family members if they do apply at the same time. For example, as discussed below, a TCN national applying for a residence card at the same time as their EEA family member may use the European passport return service. There are several administrative issues which affect EEA nationals

- In general, in order to be entitled to any social security or tax credit, you must satisfy the national insurance (NI) number.[85] UK citizens are issued with a NI number when they turn 16years old. EU nationals have to apply to the DWP using Form DCI1 and, in the case of EU nationals, an interview at the local DWP office will also be part of the process. Various documents are required to establish identity.[86]
- There is no requirement for people to provide any proof of address in order to register for GP and health services.[87]

[81] Directive 2004/38/EC, art 25(2) provides that registration certificates, residence cards, documents certifying permanent residence and permanent residence cards should be issued 'free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents'. As the UK does not have a system of ID cards for both UK citizens and residents, it is arguable that there is no 'similar document' issued by the UK government. This position has not yet been challenged.
[82] Forms are not mentioned in the relevant lists contained in Directive 2004/38/EC. This, together with the declaratory nature of the documents being applied for in the case of EEA nationals and direct family members, means that, arguably, forms are not mandatory under European law.
[83] Article 8 of Directive 2004/38/EC and EEA Regs 2016, SI 2016/1052, reg 17(1)
[84] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 17(3)
[85] s1(1A) and (1B) SSAA 1992; reg 5(4) TC(CN) Regs
[86] https://www.gov.uk/apply-national-insurance-number
[87] https://www.nhs.uk/NHSEngland/AboutNHSservices/doctors/Documents/how-to-register-with-a-gp-homeless.pdf

- Similarly, you do not need to have an address to claim any benefit[88] A claimant will require a safe correspondence address, which could be for example a drop-in centre; but if no suitable alternative is available they may use the local Jobcentre Plus office.
- Benefit payments are made by direct credit transfer into a bank, building society, credit union or Post Office Card Account. Where a person does not have an account, they may receive their benefits via "Simple Payment". This involves people being issued with a Simple Payment card, which they can use to collect their benefit payment from any "PayPoint" outlet displaying the Simple Payment sign. PayPoint outlets can be found in newsagents, convenience stores or supermarkets.[89]
- Under the Government's Right to Rent scheme, people renting out homes were made responsible for ensuring their tenants have a legal right to be in the UK.[90] This has caused significant issues for EU nationals, with many finding that landlords are unwilling to rent to them. [91]

Partners of EEA nationals who wish to enter or reside in the UK face a number of practical obstacles, such as enrolling their biometric data before any residence documentation is issued.[92] The excessive processing delays and the consequent retention of personal documents that this entails have become a major issue for EEA nationals and their family members and has been the subject of a petition to the European Parliament.[93] Nevertheless the UK High Court has concluded that the EU law doctrine of Member State liability for breaches of Union law only protects the substantive rights of entry and residence afforded to family members under the Directive 2004/38/EC[94] and not the procedural rights conferred on extended family members by Article 3 of Directive 2004/38/EC.[95]

3.2.1 Registration procedures

Registration certificate applications from qualified persons must be submitted on Form EEA(QP) or online.[96]

[88] DWP Freedom of Information response 92/2013, 7 February 2013
[89] https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7698
[90] S22 Immigration Act 2014. See also Code of Guidance https://www.gov.uk/government/publications/right-to-rent-landlords-code-of-practice/code-of-practice-on-illegal-immigrants-and-private-rented-accommodation-for-tenancies-starting-on-or-after-1-february-2016
[91] https://www.independent.co.uk/news/uk/home-news/landlords-rejecting-eu-citizens-homes-avoid-regulations-brexit-a7933411.html
[92] Reg 6A Immigration (Provision of physical Data) Regulations 2006
[93] Petition No 1340/2013 to the European Parliament
[94] Article 2(2) and 3(1) CRD
[95] *B v Home Office* [2012] EWHC 226 (QB)
[96] https://visas-immigration.service.gov.uk/product/eea-qp

EEA national family members must use form EEA(FM), if they are direct family members,[97] or form EEA(EFM),[98] if they are extended family members. Hard copy forms EEA(QP) can be submitted to the Croydon Premium Service Centre (PSC). If an applicant uses the online (rather than hard copy) version of the EEA(QP) form, they will be able to use the new European passport return service (EPRS), so that they will not have to give up their passport while the application is pending.

Under reg 21(2)(a), an application will be invalid unless accompanied or joined by the evidence or proof required by Part 3 of the EEA Regs 2016. Reg 17(1) of the EEA Regs 2016.[99] states that an application by a qualified person will only be valid where it includes:

- a valid passport or EEA national identity (ID) card issued by an EEA state, and
- evidence that they are a qualified person

An EEA national applying for a registration certificate on the basis of a retained right of residence must also provide proof that they have retained right of residence. [100]
Reg 17(2) of the EEA Regulations 2016 provides that, in the case of a worker, confirmation of the worker's engagement from the worker's employer or a certificate of employment is sufficient proof that the applicant is a qualified person.

Directive 2004/38/EC (Recital 14) says the supporting documents required by the competent authorities for the issuing of a registration certificate or of a residence card should be comprehensively specified 'in order to avoid divergent administrative practices or interpretations constituting an undue obstacle to the exercise of the right of residence by Union citizens and their family members'. The MG (*Processes and procedures for EEA documentation applications, Application for a registration certificate as a qualified person*)[101] asks for a number of documents not strictly required to show someone is a qualified person;

- EEA(QP) Annex A sets out a huge number of documents to show whether someone is self-employed, such as qualification/professional registration, evidence that your business is actively trading etc.[102] However all that is needed is enough evidence to prove that you are genuinely self-employed, (i.e. you pay tax) and that, as with a worker, it is genuine and effective rather than marginal and ancillary.
- In respect of students, a number documents are requested, including any work placement, though it is not clear on what basis the UK Home Office are entitled

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97 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/699291/eea_fm_-04-18.pdf

98 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/640417/EEA-extendedfamilymembers-03-17.pdf

99 Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 17(1)
100 Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 17(4)
101 https://www.gov.uk/government/publications/processes-and-procedures-for-eea-documentation-applications
102 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/673052/EEA_QP__guide-to-supporting-documents_v1_3_2015-12-04_KP.pdf

to ask for this. The UK Home Office themselves concede that only one of the listed forms of evidence need to be submitted and indeed, under EU law, the declaration of sufficient resources is sufficient

3.3 Family members

A previous Commission and Parliamentary study[103] had highlighted concerns around the UK's implementation of Article 3(2) Directive 2004/38/EC, concerning the residence rights of 'other family members' and partners with whom EU citizens are in a durable relationship.

In particular, UK measures which made the right of residence of third country national family members/other family members conditional upon their prior lawful residence in another Member State were not in line with the approach which the CJEU had found breached Directive 2004/38/EC.[104] Since then, the UK has to a greater extent transposed Article 3(2) of Directive 2004/38/EC into its law, subsequently amending it to give effect to the CJEU case law.[105] However the UK continues not to recognize opposite-sex civil partnerships[106], even after the introduction of marriage for same sex couples into UK law.[107] They are therefore not considered as 'family members' for the purposes of Directive 2004/38/EC, but may be considered as 'durable partners' and corresponding to the category of 'extended family members'.

The EEA Regulations 2016, reg 9 provides that third country national family members of British citizens, who have exercised EU rights of residence in another EEA state and return to the UK, can obtain a right of residence. This derives from the principle developed in the *Singh* ruling,[108]as considered more recently by the Court of Justice in the case of *O* & *B*.[109] The EEA Regs 2016 have made a number of changes to reg 9, including restricting appeal rights, replacing the previous 'centre of life' test in relation to residence in the host Member State with a 'genuine residence' test, and introducing a total bar on applications on this basis where the purpose of the residence in the host Member State was as a means for circumventing any UK immigration laws applying to non-EEA nationals to which the family member would otherwise be subject. [110] The right of residence has now been extended to family members of British citizens who are students or self-sufficient, purportedly implementing the CJEU decision in *O* &

[103] Comparative Study on the application of Directive 2004/38/EC of 29 April 2004 on the Rights of Citizens and their family members to move and reside freely within the territory of the Member States, European Parliament (2009).
[104] Case C-127/08 *Metock and others* [2008] ECLI:EU:C:2008:449. UK national courts had already disapplied the prior residence requirements before the UK government had amended the EEA Regulations – see *ZH (Afghanistan) v SSHD* [2009] EWCA Civ 1060
[105] The Immigration (European Economic Area) (Amendment) Regulations 2011, SI 2011/1247, Reg 2(3) amending Reg 8(2) of the EEA Regulations 2006
[106] S.216(1) Civil Partnership Act
[107] The Marriage (Same Sex Couples) Act 2013
[108] Case C-370/90 *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*. ECLI:EU:C:1992:296
[109] C-456/12 *O. v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B*. ECLI:EU:C:2014:135
[110] This is arguably in contravention of the classic two-stage test for abuse of rights as formulated by the Court of Justice Case C-110/99 *Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas*. ECLI:EU:C:2000:695

B.[111] However the requirement that the British citizen must also satisfy the conditions of being a qualified person on and after return to the UK (unless in their first three months of residence) still seems to directly contradict EU law.[112]

The evidential requirements as to registration are different where the applicant is an EEA national applying as the family member of a qualified person. The MG (*Processes and procedures for EEA documentation applications, Application for a registration certificate or residence card as a direct family member and Application for a registration certificate or residence card as an extended family member*)[113] provides that an application from an EEA national family member will only be valid where it includes:

- a valid EEA passport or ID card for the applicant
- a valid EEA passport or national ID card for the relevant EEA national
- proof that the applicant is such a family member, eg a marriage certificate or birth certificate, or in the case of an extended family member, evidence of the relationship between the extended family member and the EEA national
- proof that the relevant EEA national is a qualified person or has the right of permanent residence

Where relevant, extended EEA national family members (*Processes and procedures for EEA documentation applications, Application for a registration certificate or residence card as a direct family member and Application for a registration certificate or residence card as an extended family member*) must also include the following for an application to be valid:

- evidence that they are in a durable relationship with the EEA national
- evidence that they are a relative of the EEA national and are dependent on them, a member of their household, strictly need their personal care on serious health grounds or would meet the requirements in the immigration rules for indefinite leave to enter/remain as a dependent relative

The other documents required by the MG for EEA family members track regs 17(3) and 17(5) of the EEA regulations 2016. These provide that the SSHD must or, in the case of extended family members, may issue a registration certificate on production of such documents.[114]

4 Access to social benefits for EU mobile citizens in the UK

This section will provide a general overview of the UK welfare system before proceeding to an examination of the eligibility conditions that specifically apply to EU citizens and their family members. The influence of popular opinion on the direction

[111] C-456/12 *O. v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B*. ECLI:EU:C:2014:135
[112] Case C-291/05 *Minister voor Vreemdelingenzaken en Integratie v R. N. G. Eind* ECLI:EU: C:2007:771
[113] https://www.gov.uk/government/publications/processes-and-procedures-for-eea-documentation-applications
[114] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, regs 17(3) and (5), 21(5)

of public policy can be seen in the shaping of the welfare rights of migrants and visitors to the UK,[115] despite the objective evidence of welfare 'magnetism' being weak.[116]

4.1 Overview of system

The UK welfare system is convoluted and complex.[117]

It can broadly be divided into three types of benefit: (1) contributory[118]; (2) means tested; and (3) specific-circumstance related. The system places less emphasis on contributory principles[119] than some others in the EU.[120] Means tested benefits are intended to supplement low incomes as well as help those out of work, and many claimants of means tested benefits are in work.[121]

Social security in the.[122] Even when UC has been fully introduced, the basic division between contributory (national insurance) and non-contributory (either means-tested or non-means tested) benefits will continue, although there has been a decline over recent decades in the extent of contributory entitlement, leaving aside retirement pensions.

The UK government classifies UC as a 'social assistance', so as to invoke the exclusion in Article 24(2) of Directive 2004/38 to exclude EU national jobseekers from UC in their entirety. This makes the distinction between 'worker' and 'jobseeker' all the more crucial.

The UK operates a right to reside test as a condition of eligibility for several benefits.[123] It is not a residence condition (that is not a condition that an applicant be resident or have been resident), though it is a condition as to legal status. As well as applying to those recently arrived in the country and who make a claim for certain benefits, or seek housing assistance from a local authority, it also applies to returning UK nationals.

UK nationals automatically have a right to reside, whilst EU nationals need to demonstrate they are exercising a right to reside conferred by Directive 2004/38, although the approach to self-sufficiency in the UK means that it is never a route to

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[115] According to opinion poll data, nearly two-thirds of UK citizens believe migrants receive an unfair share of welfare benefits, cited in HM Government (2014a: paras 2.62).
[116] Migration Advisory Committee (2014: paras 3.79–3.82)
[117] For a guide to the structure and conditions see Child Poverty Action Group (CPAG), *Welfare Benefits and Tax Credits Handbook* (London, CPAG, 2017). For a critical analysis of recent reforms to the whole UK welfare system, see S Royston, *Broken Benefit's: What's Gone Wrong with Welfare Reform* (London, Policy Press, 2017)
[118] These are "social advantages" for the purposes of the right to equal treatment enshrined by Article 7(2) of Regulation 492/2011 on the free movement of workers [2011] OJ L 141/1.
[119] Contributory benefits are income-replacement benefits for people out of work due to unemployment (jobseeker's allowance), illness (ESA) or retirement (state retirement pension).
[120] Contributory accrue to the benefit of migrant workers and members of their family benefit irrespective of a residence requirement – see Case 157-84 *Frascogna* EU:C:1985:243, paras 24 and 25
[121] Working tax credit is a means tested benefit only available to people in work
[122] For details of the progress of implementation of UC from October 2017 see https://www.gov.uk/government/news/next-phase-in-rollout-of-universal-credit-confirmed
[123] For a history of how the test has evolved and operates see N.Harris *'Demagnetisation of Social Security and Health Care for Migrants to the UK'* European Journal of Social Security, Volume 18 (2016), No. 2. 131

eligibility of benefits. The UK UT has said it is open to the UK authorities to deem that a claim for benefits alone means that resources are not sufficient.[124]

The UK's right to reside test, after a number of complaints, was the subject of infringement proceedings brought by the European Commission. However following the CJEU's findings in *Brey* onwards, that special non-contributory benefits could lawfully be subject to a right to reside tests, the Commission altered its focus to litigate solely on the matter of child benefit and child tax credit (family benefits under Regulation 883/2004).[125] The CJEU in a highly controversial judgment, *Commission v UK*[126], eventually found that the condition of requiring a national of another Member State to be residing in its territory lawfully commits indirect discrimination, but that the measures were proportionate in the light of the desire of Member States to protect public finances.[127]

The specific conditions regarding residence which must be met by EU citizens and their family members will now be examined in respect of a number of changes to access to various benefits.

4.2 Income based Job Seekers Allowance (JSA) during first 3 months in the UK

In January 2014, the UK government introduced a precondition of having been in the UK (or the Republic of Ireland, the Channel Islands or the Isle of Man) for three months before new claimants could be considered habitually resident for the purposes of income-based JSA (IB-JSA).[128] An exception was introduced was later introduced to aid some returning UK nationals.[129]

This is problematic because the CJEU has made it clear that EU law does not allow Member States to impose a requirement of a fixed period of residence for establishing habitual residence on their own nationals returning to their home state having exercised EU free movement rights.[130]

Another criticism of this condition is also that it goes beyond threshold of proportionality, based on the period necessary to show a genuine link with a labour market.[131]

A similar three months residence requirement was introduced within the equivalent rules relating to child benefit and tax credits for entrants on or after 1 July 2014.[132] In targeting migrant children, the measure echoes those put in place in the aftermath of *Ruiz Zambrano*[133] and where the UK Court of Appeal found that the lawful presence

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[124] *VP v Secretary for Work and Pensions (JSA)* [2014] UKUT 32 (ACC), 62
[125] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social secuiryt systems OJ [2004] L 200/1.
[126] Case C-308/14 *Commission v UK* EU:C:2016:436
[127] For a fuller consideration of the case see C O'Brien 'The ECJ Sacrifices EU Citizenship in Vain: *Commission v United Kingdom'* (2017) 54 CML Rev 1, 209.
[128] Reg 85A of the Jobseeker's Allowance Regulations 2006.
[129] See the Jobseeker's Allowance (Habitual Residence) Amendment Regulations 2014 (SI 2014/2735).
[130] Case C-90/97 *Robin Swaddling v Adjudication Officer* [1999] ECR I-01075
[131] *Collins v Secretary of State for Work and Pensions* (C-138/02) [2005] QB 145
[132] The Child Benefit and the Tax Credits (Residence) (Amendment) Regulations 2014 (SI 2014/1511).
[133] Case C-34/09 *Gerardo Ruiz Zambrano,v Office national de l'emploi (ONEm)* [2011] ECR I-01177

of the other parent meant that the child would be able to stay, notwithstanding the break-up of the family unit.[134]

4.3 EEA nationals income based JSA limited to a maximum duration

The government, as set out earlier, has also progressively limited the total period of entitlement to income-based JSA for many claimants. The overall effect is that in most cases the maximum duration of benefit will now be six months for retained workers and three months for jobseekers.

4.4 Excluding EEA jobseekers from housing benefit and Social Housing

Social (council) housing in the UK is a public resource.[135] Therefore, as with entitlement to social security benefits, EEA nationals' access to social housing is based on the principle of free movement and the entitlement of EEA nationals to enjoy equal treatment with UK nationals in accessing social advantages. Hence the existence or otherwise of a person's right to reside in the UK is the starting point in establishing their eligibility for housing.[136] However, not all EEA nationals with a right to reside are eligible, and where possible the UK government has limited any rights under EU law.[137]

Until 1 April 2014, EEA nationals in receipt of income support, income-based JSA or income-related employment and support allowance were automatically 'passported' through the residence requirements for claiming Housing Benefit, with the effect that they were able to claim it on the same basis as UK nationals. [138] Amendments to the Housing Benefit Regulations now mean that income-based JSA recipients are denied a right to reside for the purposes of a new claim for housing benefit,[139] unless they can demonstrate that they have a qualifying right to reside on another basis, for example, through having retained worker status. This also affects family members.[140]

The DWP accepts that these proposals will have a disproportionate impact on EEA nationals aged under 35, those from minority ethnic groups, those that are single, and those that are female given they are 'more likely to have primary childcare responsibilities, which may act as a barrier to moving into work'. This in turn may lead to longer periods of time on IB-JSA and a higher risk of homelessness. There were also fears that letting by some private landlords to EEA migrants might be deterred by the

[134] *Harrison v. Secretary of State for the Home Department* [2012] EWCA Civ 1736
[135] The rules on eligibility for housing assistance in relation to persons from abroad are extremely complex. Guidance can be found in chapter 9 and annexes 11-13 of the Homelessness Code of Guidance for Local Authorities (last updated in July 2006) and in annexes 2-4 of Allocation of accommodation: Guidance for local housing authorities in England (2012).
[136] Includes primary carers of children in education: *Baumbast* C-413/99, *Ibrahim* C-310/08, *Teixeira* C-480/08. (NB This derivative right extends to non-EU national parents/carers as well)
[137] The Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006 for instance specifically exclude jobseekers from eligibility for homelessness assistance. Similarly HowZambrano carers are excluded form housing assistance under the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006 SI 2006/1294, as amended by reg 2 Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) Regulations 2012 SI 2012/2588.
[138] Housing Benefit Regulations 2006 (SI 2006/213), reg.10(1)-(3A).
[139] Housing Benefit (Habitual Residence) Amendment Regulations 2014 (SI 2014/539)
[140] See DWP, Housing Benefit Circular A6/2014.

risk of housing benefit denial to migrants who became unemployed.[141] The government ruled out urgent mitigating action, believing that unemployed migrants at risk of destitution should simply 'return home'.[142]

There is an argument that these amended regulations are unlawful, on the grounds that denying Housing Benefit to EEA nationals constitutes unlawful discrimination on the grounds of nationality under EU law,[143] as UK national jobseekers were not subject to the same exclusion.[144] Housing Benefit, however, is categorised as a social assistance benefit, and Directive 2004/38 appears to make an exception to the non-discrimination principle by permitting the UK to deny social assistance benefits to EEA national jobseekers.[145]

Another potentially stronger argument is that Housing Benefit is, at least so far as jobseekers are concerned, a benefit of a financial nature designed to facilitate access to the labour market. If so, then according to the CJEU case law, it would appear to be unlawful to deny it to jobseekers.[146] However this argument was also recently rejected by the UK Court of Appeal.[147]

4.5 Access to Universal Credit

The government sought to extend the more restrictive right to reside policy to the new UC scheme in 2015,[148] to jobseekers and family members.[149] UC is, however, not merely a benefit for the unemployed. It also replaces tax credits for the low paid. EEA nationals who are workers will retain a right to reside for UC purposes, as will those with retained worker status.[150]

Migrant jobseekers will be unable to access UC until they have commenced or undertaken work in the UK. The SSAC has highlighted the likelihood of hardship for 'a significant number' of migrant families who may previously have undertaken some work in the UK but do not have a qualifying right of residence – for example, as a retained worker.[151]

At the same time, however, a UC measure potentially in breach of EU law for discriminating against other Member State nationals was revoked.[152] EEA jobseekers and retained workers who qualified for UC were subjected to the 'all work

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[141] A Bartlett *'Equality Analysis form Removal of Access to Housing Benefit for EEA Jobseekers'* Department for Work and Pensions (2014).
[142] Secretary of State for Work and Pensions (2014) response to n94 para 7.
[143] Articles 18 and 45 TFEU (Treaty on the Functioning of the EU).
[144] Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-06193
[145] Article 24(2), read with art 14(4)(b) Directive 2004/38.
[146] Joined Cases C22/08 & C23/08 *Vatsouras and Koupatantze v Arbeitsgemeinschaft (ARGE) Nürnberg 900* [2009] ECR I-4584.
[147] *Alhashem v SSWP* [2016] EWCA Civ 395
[148] Under the University Credit (EEA Jobseekers) Amendment Regulations 2015 (SI 2015/546).
[149] Amendment to reg.9 of the Universal Credit Regulations 2013 (SI 2013/376).
[150] DWP (2015a: para 7.2)
http://www.legislation.gov.uk/uksi/2015/546/pdfs/uksiem_20150546_en.pdf
[151] Letter from Paul Gray, Chair of the Social Security Advisory Committee, to the Secretary of State for Work and Pensions, 4 March, available at www.gov.uk/government/uploads/system/uploads/ attachment data/fi le/410153/paul-gray-to-sec-of-state-040315-uc-eea-nationals.pdf.
[152] Universal Credit Regulations 2013 (SI 2013/376), reg.92, revoked by SI 2015/546

requirements', which comprise onerous activation conditions.[153] The conditions were imposed on them in circumstances in which UK nationals would face ones that were less strict.[154] Those circumstances included having a limited capability for work due to continuing ill health or being a carer of a child under the age of one. The conditions for UK nationals and EEA migrants have now been aligned

4.6 Cash Sickness and Invalidity Benefits

Regulation 883/2004 makes a distinction between 'invalidity benefits' and 'cash sickness benefits' in order to establish which Member State is competent to pay them.[155]

The general rule arising from Regulation 883/200 in article 11, states that 'persons to whom this Regulation applies shall be subject to the legislation of a single Member State only'. It follows that persons who reside in the UK are subject to UK law and the UK would be the responsible state for paying benefits. Invalidity benefits are therefore subject to the general rules of articles 11 to 16 of Regulation 883/2004.

In addition, Articles 17 to 35 of Regulation 883/2004 govern the special rules of 'cash sickness benefits'. Specifically, articles 23 to 30 of the regulation govern the special rules applicable to pensioners. These special rules prevail over the general rule of article 11.

Article 29 of Regulation 883/2004 states that the Member State responsible for the payment of sickness benefits in kind (such as NHS care) is the Member State responsible for paying cash sickness benefits to a pensioner. According to article 23 to 26 it follows that the Member State responsible for paying sickness benefits in kind, is usually the same Member State that is responsible for the person's pension. An exception to this arises from article 31 of Regulation 883/2004. According to this article, articles 23 to 30 do not apply to persons 'who are entitled to benefits under the legislation of a Member State on the basis of an activity as an employed or self-employed person'. To these persons, the general rule of article 11 applies: the Member State of residence is the responsible state. In addition, it should be noted that when an EEA citizen receives pension from more than one Member State, including the Member State in which the citizen resides in, the Member State of residence is responsible for paying cash sickness benefits, according to article 23.

In *Tolley*[156], a reference from UK Supreme Court the CJEU concluded that Disability Living Allowance (DLA) falls within the category of cash sickness benefits and stated that

[153] Welfare Reform Act 2012 ss 15–18, 22 and 23.
[154] In ss 19–21 of the Welfare Reform Act 2012. A 'work preparation requirement' is 'a requirement that a claimant take particular action specified by the Secretary of State for the purpose of making it more likely in the opinion of the Secretary of State that the claimant will obtain paid work (or more work or better-paid work)': ibid: s.16(1).
[155] Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems
[156] Case C-430/15 *Secretary of State for Work and Pensions v Tolley (deceased, acting in the proceedings by her personal representative)* ECLI:EU:C:2017:74

'it is apparent from the information provided by the referring court that the purpose of that non-contributory cash benefit, which is not means tested, is to compensate for the extra costs which a person may have to bear on account, inter alia, of being unable or virtually unable to walk' and further because the 'grant of that benefit does not depend on an individual assessment of the claimant's personal needs and that it is granted on the basis of objective criteria, such as the inability of the person to prepare a meal for himself, which are defined in the 1992 Act (paras. 47-48).[157]

It is likely that Attendance Allowance (which pays for personal care if you're 65 or older and disabled) would also be deemed to be a 'cash sickness' benefit and therefore payable by the Member State which pays the pension.[158]

4.7 Social assistance for EU citizens without the right to reside

Member States do not have to provide non-contributory (social assistance) benefits to non-active EEA citizens,[159] which includes things like housing benefit and income support for the first three months of their stay,[160] and later only if it would not cause an unreasonable burden on the host country's welfare system.[161]

In *Dano*[162] the CJEU rejected a claim for benefit by an inactive EU citizen from Romanian who had entered Germany solely for the purpose of claiming benefits. The CJEU held that the right to equal treatment, which would include access to benefits, presupposes legal residence under Directive 2004/38/EC, which the claimant did not have owing to a lack of sufficient financial means. This approach was subsequently adopted by the UK Supreme Court,[163] which also decided that, in the context of social security, proportionality could not be invoked to entitle a person to have a right of residence and social assistance in another member state, save for extreme circumstances. The UK UT has subsequently applied this restrictive approach to the role of proportionality within welfare benefit cases on numerous occasions.[164]

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[157] Referring to the Social Security Contributions and Benefits Acts 1992

[158] C-299/05 - *Commission v Parliament and Council* ECLI:EU: C:2007:608

[159] An economically inactive 'self-sufficient person' may however be able to access means-tested benefits without being considered an 'unreasonable burden' on the UK's social assistance system, in certain circumstances. See Martin Williams, 'Right to reside: Breytastic!' [October 2013] Welfare Rights Bulletin, 7–9

[160] The UK Government amended the rules on access to benefits to ensure that people who had a right to reside solely on the basis of the new three-month right of residence would not be able to claim benefits for that reason: Social Security (Persons from Abroad) Amendment Regulations 2006 SI 2006/1026.

[161] *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11, [2011] 1 WLR 783 - a Latvian national, refused State Pension Credit (SPC) because she did not satisfy the right to reside condition, argued that she was the victim of direct discrimination as SPC is a special non-contributory benefit such that she could rely on the anti-discrimination provision in article 3 of Regulation (EC) 1408/7 on the coordination of social security schemes (in force at the time). The UK Supreme Court held that any discrimination was indirect rather than direct as UK nationals returning from abroad could fail the habitual residence test. Any discrimination suffered by EU citizens under the right to reside condition was justified as a means of controlling benefit tourism.

[162] Case C-333/13 *Dano v Jobcenter Leipzig* [2015] 1 WLR 25.

[163] *Mirga and Samin v Secretary of State for Work and Pensions & Anor* [2016] UKSC 1, [2016] 1 WLR 481.

[164] Including *Lo v SSWP (IS)* [2017] UKUT 440 (ACC) which concerned an EU national separated from her unmarried UK partner, who was the mother of two very young children, and precluded by order of the family courts from taking the children out of the UK and this prevented from returning to her home state to access whatever social assistance was available to its nationals. The UT held any

5 The expulsion of EU mobile citizens from the UK

In the UK, the exclusion and expulsion provisions have been significantly revised in the EEA Regs 2016. They reflect the government's stated policy to 'clarify the basis on which measures may be taken to restrict the free movement rights of people who pose a threat to the UK by setting out a non-exhaustive list of the "fundamental interests of society"'. This follows similar previous moves in domestic legislation in relation to protection under Article 8 of European Convention on Human Rights (ECHR) against deportation.

The EEA Regs 2016 also introduce a new regime of time-limited deportation orders, change the way that removal decisions relating to marriages of convenience and fraud are made, and reflect recent judgements of the CJEU which recognise that the same protections against exclusion and expulsion apply to those with derivative rights of residence.

In line with Directive 2004/38, an EU citizen or their family member can be refused entry into UK on grounds of public policy, public security, public health, fraud or abuse.[165]

Following their entry into the national territory, an EU citizen who has taken up residence in the UK may face expulsion or removal from the country in four broad circumstances;

- Does not or ceases to have a right to reside[166]
- Public policy, public security or public health[167]
- Misuse of a right to reside[168]
- Entry in breach of a deportation or exclusion order[169]

These provisions will be examined after a brief discussion of the available statistical data on expulsions.

5.1 Statistics on expulsion orders

The UK Home Office has published statistical information on the number of expulsion orders served on EU citizens from year ending March 2015 to year end March 2017.[170]

Analysis of this data shows there were 26 per cent more enforced removals of EU nationals in the first three months of 2017 than in the same period from 2016. The

disproportionality in respect of refusing benefits by reference to Directive 2004/38/EC did not outweigh the interests of Member States in protecting their public finances against additional claims on their social assistance budget.

[165] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, regs 11 and 23

[166] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 23(6)(a)

[167] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 23(6)(b)

[168] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 23(6)(c)

[169] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 32(4)

[170] https://www.gov.uk/government/publications/immigration-statistics-january-to-march-2017/how-many-people-are-detained-or-returned

number of EU citizens being removed from the UK has now increased fivefold since 2010. It reached 5,230 in 2017 – up by 20% from 2016.[171]

The rapid rise followed a fall of more than 74 per cent in the previous six years, down from 3,779 in 2004. It comes despite a significant drop in the total number of people being deported, suggesting the focus of the Home Office and its immigration enforcement units has shifted specifically towards immigrants from EU countries.[172]

5.2 Non-Exercise of Treaty Rights and unreasonable burden on the social assistance scheme of the UK

Unless 'misuse of rights' is alleged, EEA nationals and their family members cannot be refused entry on the sole basis that they are not or will not be 'qualified persons'.

EEA nationals and their family members can be removed from the UK and their registration certificates and residence cards revoked if they cease to be qualified persons.[173] However, that removal must not be the automatic consequence of having recourse to the social assistance system of the UK.[174]

Article 14 of Directive 2004/38/EC ensures the retention of residence rights so long as the Union citizen and their family members do not become an 'unreasonable burden' on the social assistance of the host state. Article 7(1)(b) of Directive 2004/38/EC confers residence rights on EU citizens with sufficient resources not to become an 'unreasonable burden' on the social assistance system of the Member State. The UK includes in its definition of 'qualified persons' EEA nationals who meet the requirements of Article 7 of Directive 2004/38/EC.[175] This means that the expulsion of EEA nationals for failing to exercise residence rights in accordance with Directive 2004/38/EC could be triggered without the need for an 'unreasonable' burden on the UK social assistance system,[176] even though the EEA Regs 2016 emphasises that removal, in line with EU law above, cannot be an automatic consequence of reliance on the UK welfare system.[177]

In a written Parliamentary response dated 8 March 2017, the government confirmed that 'because it is relatively straightforward to rectify and establish a right to reside in the UK, longstanding Home Office practice is not to seek the removal of EU nationals solely because they do not have comprehensive sickness insurance but have otherwise met the requirements under EU law'.[178]

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[171] Data on the grounds for removal show number of rejected asylum applicants and foreign national prisoners, but do not go beyond that. Other removals and departures are not disaggregated by reason for removal,

[172] https://www.independent.co.uk/news/uk/politics/brexit-latest-eu-citizens-deportations-rise-uk-home-office-referendum-a7935266.html

[173] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 23(6)(a)–(7) and MG guidance on Removals and revocations of European Economic Area (EEA) nationals https://www.gov.uk/government/publications/removals-and-revocations-of-european-economic-area-eea-nationals

[174] Recital 16 of Directive 2004/38/EC

[175] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 6

[176] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 23(6)(a)

[177] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 23(7)(a)

[178] Written answer HL5917 by Baroness Williams of Trafford, 8 March 2017 (Parliament)

5.3 Restrictions on grounds of public policy or public security

Member State may only restrict residence rights on grounds of public policy or public security[179] where the person represents a "represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society".[180] The rules relating to the expulsion of Union citizens on grounds of public policy, public security, and public health are generally accurately transposed in the UK.[181]

It used to be the UK's practice to exclude those with derivative rights of residence from public policy, public security, and public health requirements set out in reg 27 of the EEA Regulations 2016. However, CJEU has held in *Marín v Administración del Estado*[182] and *SSHD v CS*,[183] that this practice was unlawful in relation to those with *Zambrano* and *Chen* 'derivative rights of residence. Regulation 28 of the EEA Regs 2016 now makes clear that those with derivative rights of residence, whether or not they have derivative residence cards, have the same protections as EEA family members.

5.3.1 Genuine, present and sufficiently serious threat affecting fundamental interests of society

The UK courts have often been asked to consider this issue,[184] taking into account a range of factors set out in the EEA Regulations 2016[185]

The CJEU case law on proportionality and rehabilitation[186] has been expanded on by the UK Court of Appeal which held that the 'European dimension' was a part of the proportionality exercise under the previous EEA Regs 2006 (now within the EEA Regs 2016)[187], requiring a decision maker to first consider whether deportation will prejudice the prospects of rehabilitation. This will necessarily entail a comparison with the prospects of rehabilitation in the home country and requires a broad interpretation. The social and family support available is as important as the more formal structures, [188] and both the SSHD and individual share the responsibility of providing evidence of the support services available in the country to which the individual would be sent.[189]

In the case of an 'Other Family Member' (OFM), the SSHD must consider granting a residence document. Failure to consider exercising that discretion may render the deport decision unlawful.[190]

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[179] Directive 2004/38, Article 27(1)
[180] Directive 2004/38, Article 27(2) and see Case C-30/77 *R v Bouchereau*, [1981] 2 All ER 924
[181] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 27
[182] Case C-165/14 *Marín v Administración del Estado* [2016] All ER (D) 86 (Oct)
[183] Case C-304/14 *SSHD v CS*, [2014] All ER (D) 46 (Sep)
[184] See for instance *SSHD v Dumliauskas* [2015] EWCA Civ 145; [2015] All ER (D) 307 (Feb); *Essa (EEA: rehabilitation/integration*) [2013] UKUT 00316 (IAC); *Vasconcelos (risk—rehabilitation)* [2013] UKUT 00378 (IAC)
[185] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 21(5 ad 21(6)
[186] *Land Baden-Württemberg v Tsakouridis Case* C-145/09, [2013] All ER (EC) 183
[187] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 27
[188] *R (Essa) v Upper Tribunal (Immigration & Asylum Chamber)* [2012] EWCA Civ 1718, [2013] All ER (D) 12 (Jan)
[189] *SSHD v Dumliauskas* [2015] EWCA Civ 145; [2015] All ER (D) 307 (Feb)
[190] *Rose (Automatic deportation—Exception 3) Jamaica* [2011] UKUT 00276 (IAC)

5.3.2 Effect of Imprisonment and previous criminal convictions

The effect of imprisonment has been subject to CJEU level case law[191]. The effects of these decisions are implemented in UK immigration law.[192]

In the UK, the Court of Appeal confirmed that once PR has been acquired, it cannot be lost by extensive periods of imprisonment. Imprisonment is not to be equated to absence, and PR may only be lost by absences of over two years.[193]

In respect of the highest level of protection, available after ten years residence, the UK Court of Appeal said it is possible to aggregate periods of non-imprisonment to amount to ten years, but that will be fact-specific and may still not be enough if, as a matter of fact, the individual is not sufficiently integrated.[194] The Supreme Court still does not consider the law to be clear and referred for clarification by the CJEU the following questions[195]:

> '(1) whether enhanced protection under art 28(3)(a) depends upon the possession of a right of permanent residence within art 16 and art 28(2)
> (2) if the answer is negative, whether the period of residence for the previous ten years, to which art 28(3)(a) refers, is:
> (a) a simple calendar period looking back from the relevant date (here that of the decision to deport), including in it any periods of absence or imprisonment
> (b) a potentially non-continuous period, derived by looking back from the relevant date and adding together period(s) when the relevant person was not absent or in prison, to arrive, if possible, at a total of 10 years' previous residence
>
> (3)what the true relationship is between the 10 year residence test to which art 28(3)(a) refers and the overall assessment of an integrative link.'

Directive 2004/38 also prohibits the ability of Member States to take restrictive measures against EU citizens solely because of the existence of a previous criminal conviction[196] and must be based exclusively on the personal conduct of the citizen[197]. Schedule 1 to the EEA Regs 2016 now sets out the broad principle that custodial sentences and persistent offending may trigger the deportation process. [198]

Extensive guidance is given in the MG EEA decisions on grounds of public policy and public security[199], which also notes that 'a decision can be made even if the person has

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[191] *Onuekwere v SSHD Case* C-378/12, [2014] All ER (D) 125 (Jan) *SSHD v MG Case* C-400/12 [2014] All ER (D) 124 (Jan)
[192] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 3
[193] *AA (Nigeria)* [2015] EWCA Civ 1249, [2015] All ER (D) 76 (Dec)
[194] *Warsame v SSHD* [2016] EWCA Civ 16*, All ER (D) 160 (Jan)*
[195] *SSHD v Franco Vomero* [2016] UKSC 49, [2016] All ER (D) 139 (Jul)

[196] Directive 2004/38, Article 27(2), para 2.
[197] ibid.
[198] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, Schedule 1(3)
[199] *MG EEA decisions on grounds of public policy and public security*

not received any criminal convictions if there is a sufficient, corroborated law enforcement evidence to underpin a decision'. However, this seems to conflict with a recent decision of the UT which confirmed that the identification by the CJEU[200] that '*past conduct alone may constitute such a threat to the requirements of public policy*' is no longer good law as that conclusion applied to a previous legal regime and has not survived the advent of Article 20 TFEU and Directive 2004/38, either singly or in combination.[201]

5.3.3 'Serious' and 'imperative' grounds justifying the expulsion of permanent residents and minors

The reinforced protections against expulsion for permanent residents and minors contained in Directive 2004/38 have been transposed into UK law[202].

The Modernised Guidance (MG) European Economic Area (EEA) foreign national offender (FNO) guidance[203], provideS guidance as to the types of offences that would constitute serious grounds of public policy or public security in relation to exclusion and expulsion. The UT has concluded, albeit *obiter*, that this was not exhaustive. The UT felt that gang-related conspiracies, coupled with a lack of evidence of rehabilitation and contrition, would also cross this threshold.[204]

In *FV (Italy)*[205], the UK Court of Appeal referred to the CJEU case law of *I* and *Tsakouridis*[206] on how to assess imperative grounds of public security, and held that it is not sufficient that there is a risk of re-offending, unless the offences in question are likely to be of a particularly serious nature affecting sectors of the public. Murder and manslaughter do not appear in the list in the TFEU, art 83(1) and while that does not rule out a finding of imperative grounds where an individual poses a risk of killing members of the public at random, there must be evidence of that risk produced. The risk to a known individual was insufficient. In *Straszewski*[207], the Court of Appeal confirmed that public revulsion at a particular offence should have no part to play in the imperative grounds assessment, save in exceptionally serious cases.

5.4 Fraud and abuse

Changes to the previous EEA Regs 2006, were brought into force in the UK on 1 January 2014.[208] These introduced a new explicit sanction regime for 'abuse of rights or fraud' (and in this context included fraud and marriages of convenience as types of abuse). This regime has been brought across to the EEA Regs 2016, but has been significantly changed, with the sanction regime for fraud and marriages of

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[200] Case C-30/77 *R v Boucherau* [1978] QB 732
[201] *Arranz (EEA Regulations – deportation – test)* [2017] UKUT 00294 (IAC).
[202] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 27(4)
[203] *MG European Economic Area (EEA) foreign national offender (FNO) cases*
[204] *Jarusevicius (EEA Reg 21—effect of imprisonment)* [2012] UKUT 120 (IAC)
[205] *FV (Italy) v SSHD* [2012] EWCA Civ 1199
[206] Case C-348/09 *I v Oberbürgermeisterin der Stadt Remscheid* [2013] All ER (EC) 218 Case C-145/09 *Land Baden-Württemberg v Tsakouridis* [2013] All ER (EC) 183
[207] *SSHD v Straszewski* [2015] EWCA Civ 1245
[208] Immigration (European Economic Area) (Amendment) (No 2) Regulations 2013, SI 2013/3032, Sch 1, para 18

convenience shifted across to the general regime of exclusion and expulsion on public policy grounds. 'Abuse' of rights (an EU law term) has been renamed 'misuse'.[209]

In addition to a refusal to admit someone to the UK on the grounds of public policy, public security or public health, and to remove them, or refuse or revoke residence documents on the same grounds, the EEA Regs 2016 provide that such an 'EEA decision' is also justified where there are reasonable grounds to suspect the misuse of a right to reside, as defined under reg 26(1), and it is proportionate. Regulation 26(1) says 'misuse' occurs where a person

- observes the requirements of the EEA Regs 2006 in circumstances which do not achieve the 'purpose' of the regulations (as determined by reference to the Citizens' Directive and the EU Treaties), and
- intends to obtain an advantage from the EEA Regs 2006 by engaging in conduct which artificially creates the conditions required to satisfy the criteria set out in the regulations

An example of such misuse is given at reg 26(2), which is attempting to enter the UK within 12 months of being removed for not having a right to reside in the UK, where the person attempting to do so is unable to provide evidence that, upon re-entry to the UK, they will have met the conditions for a right to reside, other than the initial three months right of residence set out in reg 13. The UK also defines marriages of convenience as a misuse of the right to reside.[210]

While Article 35 of Directive 2004/38/EC permits Member States to refuse. terminate or withdraw the rights it confers in the case of marriages of convenience, there is evidence to suggest that the UK employs this tool in a disproportionate manner to restrict the residence rights of Union citizens.[211]

A person's right to reside can also be cancelled on misuse of rights grounds.[212] A decision to remove on misuse of rights grounds has the effect of terminating any right to reside otherwise enjoyed by the individual concerned. It will also invalidate any EEA residence document they may hold, or any outstanding application for one.[213]

In the past, removal of EEA nationals on this basis was very rare, but the UK government's self-proclaimed 'hostile environment' to migrants and EU free movement in particular, has led to a significant increase in removals (and prior detention).[214] Homeless charities have reported a vast increase in the numbers of their clients being removed. In many cases this removal was effected under the misuse of rights provisions (typically, on the basis of rough sleeping) rather than on non-exercise of treaty rights grounds. That policy was found to be unlawful by the UK High Court

[209] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 26, 23(3), 23(6), 24(1), 26(3)
[210] The term spouse expressly excludes marriages of convenience – Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 2(1)
[211] Groenendijk et al 'European Commission Report on the Free Movement of Workers in Europe 2012-13' (2014), para 62
[212] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 25
[213] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 23(9) and 24(2)
[214] Theresa May must explain 'disgraceful' fivefold rise in EU citizens held in detention centres, MPs demand,19 January 2017 (Independent)

in *R (Gureckis) v Secretary of State for Home Department (SSHD)*, on 14 December 2017.[215] Figures suggest that 698 homeless EU nationals were targeted and removed from the country under this policy and that at least 45 individuals are currently pursuing damages claims.[216] The Home Office have confirmed that no further action was being taken against EU citizens for rough sleeping, and their most recent guidance has removed all references to rough sleeping.[217]

5.5 Re-entry bans

Under Directive 2004/38/EC, if an EEA national is removed, they are able to return immediately, unless abuse of rights is alleged or one of the grounds of public policy, public security or public health applies.

However, under the UK misuse of rights provisions[218], those removed as having no EEA right of residence, or ceasing to have such a right, are barred from returning for 12 months unless they are able to establish that they have a right to reside.[219]
If within the 12-month period they can point to a material change in circumstances, they can apply to the Home Office from outside the UK to have the effect of removal set aside.[220]

On their face these provisions are incompatible with Article 15(3) of Directive 2004/38/EC. Article 15(3) states in clear terms that "[t]he host Member State may not impose a ban on entry in the context of an expulsion decision to which paragraph 1 applies". The effect of Article 15(3), read alongside Article 15(1), is therefore that the UK is prohibited from imposing any ban on entry where there has been an expulsion decision "on grounds other than public policy, public security or public health". There have been several challenges to this by way of Judicial Review in the UK, but all cases have been settled by the UK Home Office before any cases have reached a hearing. A direct challenge to the policy may therefore need to be brought, which is not reliant on an individual litigant.

Very recently the CJEU confirmed that requests for family reunification must be examined even if the national of a non-EU country, who is a family member of an EU citizen who has never exercised his right of freedom of movement, is subject to an entry ban.[221] Although much of the judgment relates to the returns directive[222] which is not applicable to the UK, the UK will still have to consider whether there is a need to amend its procedures in light of this ruling.

5.6 Procedural safeguards and certification

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[215] *R (Gureckis) v SSHD* [2017] EWHC 3298 (Admin), [2017] All ER (D) 107 (Dec)
[216] https://www.bbc.co.uk/news/uk-44093868
[217] https://www.gov.uk/government/publications/misuse-of-rights-and-verification-of-eea-rights-of-residence
[218] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 26
[219] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 26(2)
[220] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 26(4)
[221] Judgment in Case C-82/16 *K.A. and Others v Belgian State (Family reunification in Belgium)*
[222] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals

The ability of the UK authorities to verify of a right to reside were initially added to the previous EEA Regs 2006[223] and have been carried through to the EEA Regs 2016.[224] In brief, regulation 22 of the EEA Regs 2016 means the UK Home Office can, where it has 'reasonable doubt' that a person has an EU right of residence or a derivative right of residence, invite that person (and/or the EEA national or British citizen whose relationship the claimed right is based on) to provide evidence or attend an interview in determining this. This 'verification' can be requested either be in the context of a family permit or residence document application, or otherwise.[225]

A negative factual inference around the right to reside may be drawn by an individual's failure 'without good reason' to provide the requested information, and/or where they fail to attend an interview on at least two occasions, leading to possible removal.[226] These new powers are subject to two limited safeguards:

- the decision on the right to reside in the UK cannot be based solely on non-compliance with reg 22
- the regulation 'may not be invoked systematically'

Art 14 (2) of Directive 2004/38/EC allows Member States, in *'specific cases'* and where there is a *'reasonable doubt'* around the lawful exercise of treaty rights, to verify whether those conditions are fulfilled. The evidence and interview provisions are not, per se, therefore likely to be in breach of EU law. However the problem is more likely to lie in the application of this power, specifically in the inferences that can be drawn from failure to comply with it, because art 14 prohibits systematic verification. Reg 22 of the 2016 Regs does itself superficially acknowledge this, but arguably any policy that targets particular groups, such as Roma, would amount to systematic invocation of regulation 22 and be unlawful. CJEU case law also implies that, where relevant, any form of proof that would be accepted from a UK national must also be accepted for an EEA migrant.[227] In addition, by analogy with domestic case-law on sham-marriages, it is arguable that non-compliance/attendance should not even be the decisive let alone the sole basis of any adverse inference.[228]

With effect from 28 July 2014, reg 33 (formerly EEA Regs 2006, reg 24AA)[229] has provided that persons who are subject to a decision to remove them on the grounds of public policy, public health or public security can be removed from the UK pending the hearing on their appeal, unless such removal would mean a breach of their rights under section 6 of the UK Human Rights Act (HRA) 1998 (in particular if they faced a 'real risk of serious irreversible harm' in the country or territory to which it was proposed that they be removed to). This primarily covers persons subject to deportation procedures due to previous criminal conduct which the Home Office considers meets the relevant EU law threshold.[230] The UK High Court found

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[223] Immigration (European Economic Area) (Amendment) (No 2) Regulations 2013, Sch 1, para 16
[224] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 22
[225] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 22(1)-(3)
[226] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 23(6)(a)
[227] Case C-215/03 *Oulane v Minister voor Vreemdelingenzaken en Integratie* ECR I-1245
[228] *Papajorgji (EEA spouse—marriage of convenience) Greece* [2012] UKUT 00038(IAC)
[229] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 33
[230] The Home Office policy on reg 33 provides a list of factors that should be taken into account when considering certification and distinguishes between the proportionality of temporary removal and long-term removal - *Guidance, Regulations 33 and 41 of the Immigration (European Economic Area) Regulations 2016*

found reg 24AA (now EEA Regs 2016, reg 33) to be compatible with Directive 2004/38/EC.[231] A failure to apply the correct test under HRA 1998 renders the certification decision unlawful.[232]

An EEA national who has instigated an appeal but has been removed from the UK on this basis prior to the appeal being heard, can apply be temporarily admitted to the UK for the purposes of attending the appeal hearing and to make submissions in person. This has been inserted into the EEA Regs 2016 in order to reflect the requirements of Article 31(4) of Directive 2004/38/EC.[233] There is a presumption of a person's re-admission to make submissions in person before the tribunal. The exception is when his or her appearance before the tribunal may cause serious troubles to public policy or public security.[234]

5.7 Appeal rights

The EEA Regs 2016 made changes to the domestic EEA appeals regime, which took effect from 1 February 2017.

The transitional provisions are contained in the EEA Regs 2016.[235] Undecided applications pending upon the entry into force of the EEA Regs 2016 on 1 February 2017 will be considered under the new Regulations. However, appeals that were pending on 31 January 2017 will be considered under the previous EEA Regs 2006, as will cases where a person had a right to appeal under the EEA Regs 2006 against an EEA decision on 31 January 2017.

The EEA Regs 2016 purport to transpose the appeals provisions of Directive 2004/38/EC.[236] A person may appeal to the First-tier Tribunal (FTT) from an 'EEA decision', which is defined as in reg 2(1) to mean a decision that concerns:

- a person's entitlement to be admitted to the UK
- a person's entitlement to be issued with, or to have renewed, or not to have revoked, a registration certificate, residence card, derivative residence card, document certifying permanent residence or permanent residence card (but does not include a decision that an application for any of these documents is invalid)
- a person's removal from the UK, or
- the cancellation, pursuant to reg 25, of a person's right to reside in the UK

It does not include a decision[237]:

- to refuse to issue an EEA family permit, registration certificate or residence card to an extended family member
- to reject an application under reg 26(4) (misuse of a right to reside: material change of circumstances)

[231] *R (Macastena) v SSHD* [2015] EWHC 1141 (Admin)
[232] *R (X) v SSHD* [2016] EWHC 1997 (Admin), [2016] All ER (D) 41 (Aug)
[233] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 41
[234] *R (Kasicky) v SSHD (Reg 29AA: interpretation) IJR* [2016] UKUT 107 (IAC)
[235] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, Sch 4, para 3 and Sch 6.
[236] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, reg 35-42
[237] Immigration (European Economic Area) Regulations 2016, SI 2016/1052, 2(1) 12(4), 17(5), 18(4), 26(4), 33 and 41

- taken under reg 33 (human rights considerations and interim orders to suspend removal), or
- taken under reg 41 (temporary admission to submit case in person)

Reg 2 of the EEA Regs 2016 also excludes decisions that an application is invalid as it is not an 'EEA decision, so the only available legal remedy is judicial review.
Amendments to the documentation requirements under the EEA Regs 2016 also effectively remove a right of appeal for applications under reg 9 (ie those family members of British citizens applying under the *Surinder Singh* route) for many applicants in that category. Reg 36(6) says that family members of British citizens relying on the EEA Regs 2016 may not appeal unless they produce either an EEA family permit, or a qualifying EEA state residence card together with proof that the applicant is the family member of a British citizen and proof that the British citizen exercised treaty rights in another EEA state. Therefore, a right of appeal has been preserved for applicants under reg 9 only in two circumstances.

1. Those who have been permitted to enter the UK on a family permit but then refused a residence permit.
2. Those who have been issued an EEA residence permit by another Member State but the reg 9 application has been refused, eg on the basis of a failure to satisfy the genuine residence requirement.

Those who have never been issued with an EEA family permit by the UK or a residence card by another Member State do not have a right of appeal. Similarly, where the applicant was issued with a residence card by another Member State but the UK Home Office does not accept the proof that they are the family member of a British citizen who has exercised Treaty rights, there is no right of appeal under reg 36. In these circumstances, the only available remedy will be judicial review

This issue is likely to be litigated, given EU law is clear that the rights of free movement (including procedural rights) do not hinge on EEA nationals and their family members producing documentation.[238] Indeed Article 25 of Directive 2004/38/EC specifically prohibits making possession of a residence card 'a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof.' Arguably, therefore, such restrictions may contravene EU law.

The UK's EEA appeals regime has already been the subject of considerable recent litigation.

Whether a rule of national law which precludes an appeal to a court or tribunal against a decision of the executive refusing to issue a residence card to a person claiming to be an extended family member is compatible with the Citizens' Directive is one of the questions included a reference for preliminary ruling from the UT to the Court of Justice issued on 20 February 2017.[239]

[238] Case C-48/75 *Royer v Belgium* ECLI:EU:C:1976:57
[239] Case C-370/90 *SSHD v Rozanne Banger (reference)*

In respect of Extended Family Members (EFM), they enjoy a statutory right of appeal against the refusal of a residence card according to the UK Court of Appeal.[240] In doing so it overturned a decision of the UT (Immigration and Asylum Chamber) which had said that any challenge to the refusal to issue a residence card had to be by way of judicial review.[241] The UK Supreme Court confirmed the right of a statutory appeal in a sperate case and that such decisions could be appealed in the ordinary way to the First-tier Tribunal.[242]

In respect of the effect of an EEA appeal on removal, the UT concluded that there is no in-country right of appeal where a third country national marries an EEA national and applies for a residence card, the residence card application is refused on the basis that the marriage is a sham, and the Home Office takes removal action against the third country national under section 10 of the Immigration and Asylum Act 1999. The UT further held that any judicial review of the decision to remove in these circumstances will not succeed if the Home Office reasonably suspects the third country national of being a party to a marriage of convenience.[243] On appeal, the UK Court of Appeal upheld the UT's decision and found more broadly that if a third country national family member does not have leave to remain, they may be removed pending appeal against a decision to refuse residence documentation.[244]

6. Suggested strategies to overcome obstacles to free movement in UK

6.1 The European Commission should clarify terms

There is evidence that the UK does not necessarily have due regard to the concept of a worker as interpreted by the extensive case law of the EU Court of Justice, adopting a restrictive interpretation of the concept of worker[245] and the circumstances in which a person retains the status of a worker or a self-employed person[246]. The Commission should therefore issue an interpretative communication on the concept of "worker" under Article 45 TFEU that summarises the Court's extensive case law.

Similarly, what is meant by 'Durable relationship duly attested' (Article 3(2) of Directive 2004/38/EC): This must be defined by Member States. However, it is not always clearly defined, leaving a wide margin of appreciation to national authorities to interpret what durable relationship means.

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[240] *Khan v Secretary of State for the Home Department (AIRE Centre intervening)* [2017] EWCA Civ 1755, [2017] All ER (D) 67 (Nov).
[241] *Sala (EFMs: Right of Appeal)* [2016] UKUT 411 (IAC)
[242] *SM (Algeria) v Entry Clearance Officer, UK Visa Section* [2018] UKSC 9 (14 February 2018)
[243] *R (Bilal Ahmed) v SSHD (EEA/s 10 appeal rights: effect)* IJR [2015] UKUT 436 (IAC), [2015] All ER (D) 47 (Aug)
[244] *R (Ahmed) v SSHD* [2016] EWCA Civ 303, [2016] All ER (D) 232 (Mar)
[245] UK MET test which limits recognition of worker status to persons who earn less than £157 per week (the primary earnings threshold for the payment of national insurance contributions in 2017/18).
[246] Under regulation 6(2) of the Immigration (EEA) Regulations 2016, which purports to give effect to Article 7(3) of Directive 2004/38, the UK refuses to recognise that a worker who has worked over a year retains the status of a worker for an indefinite period, unless they can demonstrate "compelling evidence" of continuing to seek employment and having a genuine chance of being engaged, in practice requiring the former worker to demonstrate they have a firm job offer.

'Grounds of public security and public policy' (Article 27 of Directive 2004/38/EC): As the Commission Communication highlights, the grounds of public security and policy must be defined by the Member States. However, some Member States have not defined or not sufficiently defined what falls within public security and public policy at national level. This leaves too wide a margin of discretion to national authorities to decide on expulsions on those grounds.

6.2 There is a need for more systematic and comparable information and data at EU level

The European Commission should require Member States to collect and provide data on the number of refusals of entry and residence and the number of expulsion of EU citizens and family members as well as the reasons for the refusals and expulsion. The European Commission should also require Member States to regularly report information on the implementation of the Directive. This would include an assessment of recent trends and monitoring the impact of other events on the implementation of the Directive.

6.3 The European Commission should collect more systematic and comparable information and data at Member State level

The European Commission should monitor closely and enforce the full transposition of Directive 2004/38/EC in all the Member States. The European Commission should act more systematically on Member States' breaches of the Directive. The European Commission has initiated 29 infringement proceedings since 2008 related to various transposition issues[247], but the fact that transposition is still problematic in several Member States shows that rigorous monitoring and action from the Commission are still needed.[248]

6.4 The European Commission should remove unnecessary barriers

Delays and excessive documentation requirements are recurrent barriers reported in relation to the right to entry and residence. The delays in obtaining a residence card have an impact on access to employment or essential services such as healthcare.

Discrimination against same-sex couples who are exercising their free movement rights has been reported in a number of Member States, including the UK.

Member States should ensure the removal of unnecessary barriers to the right of entry/residence in particular as regards the requirement to report presence, excessive administrative requirements at the borders for EU and non-EU Member States, granting TCN family members access to the accelerated entry procedure, the establishment of appeal systems against refusals and any discriminatory practices.

[247] Article 258 (ex Article 226 TEC) of the Treaty on the Functioning of the European Union

[248] The Commission's failure to progress an infringement procedure launched in 2012 against the UK, requesting it to comply with EU rules by considering NHS cover as sufficient sickness insurance when assessing whether or not a non-active EU citizen is entitled to remain in the UK under the free movement rules is a case in point.

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