



# **The legal status and rights of the family members of EU mobile workers**

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# **The legal status and rights of the family members of EU mobile workers**

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## **EXECUTIVE SUMMARY**

This report analyses the legal status and rights of the family members of EU mobile citizens in general and workers in particular. From the very early stages of European integration, the (then) EEC sought to grant protection to the families of mobile workers, consistently with the strong social dimension that has always underpinned the free movement of workers ideal. The notion of family was naturally construed along traditional lines and family members derived from the worker a wide range of rights, including a right to reside. Furthermore, the broad interpretation of 'social advantages' meant that even pre-Union citizenship the workers' family benefited from very extensive equality rights. Directive 2004/38 systematizes and updates the rights of family members. This report describes the legal regime applicable to family members, whilst also highlighting some remaining issues. Since Directive 2004/38 has brought about a common regime for all EU mobile citizens, we refer generally to Union citizens unless we are examining regimes that are only applicable to workers (and self-employed persons). This approach also has the advantage of recognizing the economic reality of statuses that are no longer fixed as they were in the late 60s: categories are more fluid than they used to be, and individuals, whether by choice or necessity, might move between employment, self-employment, unemployment, economic inactivity, studies and training, even within comparatively short periods of time.

**Section 1** of the report analyses the **personal** scope of the protection afforded by EU law. Directive 2004/38 distinguishes between two different categories of family members, commonly referred to as **protected family members** and **'other' family members**.

**Protected family members** are the **spouse**, the **registered partner** if the host State recognizes registered partnerships as equivalent to marriage, the **direct descendants** who are under the age of 21 or dependent, and the dependent relatives in the **ascending** line. The family member does not need to be biologically linked to the main right-holder; thus, family members of the spouse or of the registered partner are also protected, as are **adopted** children. The term **spouse** is gender neutral so that it also encompasses **same sex spouses**, at least insofar as the couple has married in one of the Member States. The notion of **dependency** both in relation to descendants and ascendants is a question of **fact** and does not presuppose a legal obligation to provide maintenance for the family member.

**'Other' family members** are family members of the main right-holder (to the exclusion of those of the spouse/registered partner) who are **dependants** or members of the **household of the Union citizen**; and those who need the personal care of the main **right-holder** for health reasons. Furthermore, and importantly, **partners** in a durable relationship duly attested also qualify as 'other' family members. The notion of **'other' family member** does not necessarily require a biological link, so that a legal undertaking to care for a child suffices.

**Section 2** focuses on the **rights of family members**, including the rights to enter, reside, work, and equal treatment. Family members have the right to enter the host country; if they are third country nationals the host State might require a visa in certain circumstances. Family members also have a **right to reside** which, beyond the first three months, is conditional upon the main right-holder satisfying the conditions set out in Directive 2004/38; family members are eligible for all three types of residence (short term, medium term and permanent) but their right to reside is mostly dependent on and derivative from that of the main right holder. Family members have the **right to work** in the host State, and benefit from the **right to equal treatment** in respect of all matters falling within the scope of Directive 2004/38.

**Section 2.2** focuses on the rights specific to the families of mobile **workers and self-employed persons**. Economically active citizens benefit from more extensive rights by virtue of Regulation 492/2011 and/or the right to equal treatment provided for in Articles 45(2) and 49 TFEU. In particular, the worker can rely on Article 7(2) of Regulation

492/2011 to claim social advantages that directly benefit the family member, and only indirectly the worker. **Section 2.3** looks at the rights of **families of frontier workers**, who are in a peculiar situation because by definition the place of work of the main right holder differs from her place of residence, and this creates issues especially in relation to the right to equal treatment *vis-à-vis* social advantages. **Section 2.4** analyses the rights of family members of **jobseekers**, whereas **section 2.5** details the rights to family reunification of **returning citizens**, i.e. EU mobile citizens returning to their State of nationality with their families after having exercised their free movement rights. **Section 2.6** concludes this part and looks at the situation of the **'other' family members**; here the host State has a duty to **facilitate entry and residence**. The Court of Justice has held that whereas the host State maintains wide discretion in this regard, it must treat 'other' family members as privileged 'immigrants' who derive from the Directive extensive rights (clarity in criteria, stated reasons, and right to judicial redress) in relation to admission. Directive 2004/38 specifies that other family members who have been admitted have a right to a **residence card**; in the absence of case-law it is unclear whether they derive further rights such as the right to work and the right to equal treatment.

**Section 3** focuses specifically on the **rights of children**; a discrete section is warranted by three considerations. Firstly, children are more **vulnerable**, and their **best interests** must always be a primary consideration when interpreting EU law (Article 24 of the Charter of Fundamental Rights). Secondly, children have a right to **continue their education** in the host State also when their parent who is or was an EU mobile worker has left that State or is no longer a worker. This right has been construed broadly and also encompasses the right of the parent/carer (regardless of nationality) to stay in the host State whilst the child is in education. Thirdly, children might be **right-holders** in their own right, i.e. they might be Union nationals who have moved to reside in another country. In order to ensure the effectiveness of the right to move and reside of children, the Court has clarified that their parents/carers also derive a right to reside. The right to reside of the child however is in this case conditional upon having sufficient resources and comprehensive health insurance. Finally, **section 3** concludes, for sake of completeness, with the so-called **Ruiz Zambrano rights**: i.e. the **derived rights of residence of the parents/carers of static EU national children** in the home Member State. Those rights are instrumental to ensure that the EU national child is not forced to follow a parent/carer to live outside the territory of the EU. The same could, in very exceptional circumstances, apply also to adults.

**Section 4** offers some **critical remarks** in relation to areas where EU law protection is either lacking or insufficient. We start by considering **relationships that are neither marriages nor treated as equivalent to them**, which have become a fairly common feature across the EU and inevitable in those countries where same sex partnerships are not recognized. We then turn to **divorced and separated partners**, where the Court has held that the divorced spouse is only protected insofar as the main right holder has not left the host State before commencement of the divorce proceedings. This interpretation is problematic in cases of **domestic violence** where the victim might be in no position to commence proceedings before her spouse leaves the country. We then consider the specific situation of **children** whose protection might be lacking, namely **children in care**, who might be left unprotected once they exit the care system; and **children of same sex couples**. Finally, we note that pending CJEU case law<sup>1</sup> may shed light on the free movement rights of an EU child with same sex married parents.

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<sup>1</sup> See pending reference in Case C-490/20 *V.M.A. v Stolichna Obsthina, Rayon 'Pancharevo'*.





## INTRODUCTION

This report was commissioned to the MoveS network by the EC DG Employment, Social Affairs and Inclusion. It should be noted that information and views set out in this report are those of the authors and do not necessarily reflect the official opinion of the European Commission. Our mandate was to provide *'an overview of the legal status and rights of family members of EU mobile workers in EU free movement law'* so as to provide practitioners with a reference text. Accordingly, we consider the rights of family members of mobile EU workers in particular but also mobile EU nationals in general, while highlighting areas where protection is insufficient.

There are three reasons for devoting attention to the family members of non-workers. First, up to a point Directive 2004/38 succeeded in departing from the *'piecemeal approach'*<sup>2</sup> that was prevalent beforehand. While it did not erase the boundaries between the family members of workers and the family members of other EU citizens, it did mostly subject them to a common framework. Second, the different statuses are fluid as people transit between them: a person who is a worker today might be an economically inactive citizen tomorrow, and vice versa. Third, because of the proliferation of atypical employment statuses in Member States, such as mini-jobs and zero-hour contracts, combined with the vagueness of the definition of mobile worker, the distinction between workers, self-employed persons and economically inactive persons can be fuzzy in practice.<sup>3</sup> For those reasons, no analysis of the rights of the family members of workers would be complete without consideration of the position of the family members of other EU citizens.

Although the Treaty provisions do not mention them, it was always clear that free movement of workers presupposes protection for their family members. The preamble to Regulation 1612/68 states that, in order to ensure that the fundamental right of freedom of movement can be exercised *'in freedom and dignity ... obstacles to the mobility of workers shall be eliminated, in particular as regards the worker's right to be joined by his family and the conditions for the integration of that family into the host country'*.<sup>4</sup> The rights of movement and residence of family members were therefore instrumental to and derived from the free movement of workers. They also flow from the right to preserve family unity, which is intrinsically connected with the right to the protection of family life, a fundamental right incorporated in the Charter of Fundamental Rights of the EU. Much as Regulation 1612/68 played a pivotal role historically, the main source of rights is now Directive 2004/38. Regulation 492/2011, which repealed and replaced Regulation 1612/68, still provides additional residence, equal treatment and education rights for the family members of (former) mobile workers. For instance, art. 10 vests residence rights for children and their primary carer, while art. 7(2) protects family members against nationality discrimination in the access to social advantages.

As said, the main legal instrument of reference is Directive 2004/38, which aims to bring into one single instrument the rights of residence of Union citizens and their family members, as well as updating the legislation in the light of particularly rich and important case law delivered after the introduction of Union Citizenship. The complexity of Directive

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<sup>2</sup> Recital 4 of Directive 2004/38.

<sup>3</sup> Manos Matsaganis, Erhan Özdemir, Terry Ward and Alkistis Zvakou, *Non-standard employment and access to social security benefits*, Research note 8/2015, European Commission 2016; Martin Risak and Thomas Dullinger, *The concept of 'worker' in EU law; Status quo and potential for change*, Report 140, European Trade Union Institute 2018; Charlotte O'Brien, Eleanor Spaventa and Joyce De Coninck, *Comparative Report 2015, The concept of worker under Article 45 TFEU and certain non-standard forms of employment*, FreSsco, European Commission 2016.

<sup>4</sup> Now recital 6 Regulation 492/2011.

2004/38 has been unveiled with time as more nuanced cases reached the Court of Justice. For these reasons, we carry out an extensive examination of the case law. We have also referred to pending preliminary references that might result in an important development or clarification.

**Section 1** of the Report deals with the *'Identification of the family members of EU mobile workers/citizens who are beneficiaries of rights under EU free movement law, and, where applicable, the conditions for being a family member who is a beneficiary'* (point 1 of the mandate). In particular we distinguish between 'protected' and 'other' family members, and highlight how those are defined in both legislation and case law.

**Sections 2 and 3** address the material scope of the rights of family members, in line with point 2) and 3) of the mandate. In particular we outline *'the rights conferred by EU law to those family members in particular the right of entry and residence, the right to remain, protection against expulsion, access to work (including access to posts in the public sector and access to work during the first three months of residence), conditions for entering a Member State other than the host Member State, equal treatment'*. In line with the mandate, we have included separate subchapters on the family members of **jobseekers (Section 2.4)**, on **circular migration** and reverse discrimination (**section 2.5**) and on the rights of **'other'** family members (**Section 2.6**).

**Section 3**, in line with point 3 of the mandate, deals with the *'rights of the children of EU mobile workers'* and, for sake of completeness, also addresses the right of residence of children *qua* EU citizens, and the derived right to reside of parents/carers both of mobile children and of children in their own Member State.

Finally **Section 4** identifies *'the main problems raised by the current legislation on free movement in view of the evolution of society and of national legislation in the Member States concerning family matters in the last few years'* (point 4 of the mandate). We focus in particular on **non-spousal relationships (4.1)**; the rights of **divorced** and **separated** individuals (**4.2**); **domestic violence (4.3)**; **children in care (4.4)**; and **children of same sex couples (4.5)**. **Section 5** offers some concluding remarks.

## **1. WHO ARE THE 'FAMILY MEMBERS'?**

It is standard in EU law to distinguish between 'protected' family members (spouse, registered partner, descending and ascending relatives); and 'other' family members (dependents, members of the household, those needing the personal care of the main right-holder on health grounds and partners in a durable relationship). The former have full rights in EU law, the latter, as we will see, have more limited rights. Before analysing these different categories of persons, it is however worth recalling that the rights of family members are derived from the main right-holder so that the latter must be exercising her free movement rights *and* have a right to reside pursuant to Articles 6, 7 or 16 of Directive 2004/38. Under Article 6 Directive 2004/38, for the first three months the EU national has a right to travel and stay in the host country with her protected family members without having to satisfy any conditions; if the Union citizen is economically inactive however, she and her family must not become an unreasonable burden on the social assistance of the host State.<sup>5</sup>

Article 7 provides that in order to reside in the host State pursuant to Directive 2004/38 beyond the first 3 months, the EU mobile citizen must be either economically active (worker or self-employed) or economically independent (i.e. having comprehensive health insurance and sufficient resources). The latter category also encompasses students and pensioners. If the conditions of economic activity / independence are not fulfilled,<sup>6</sup> the EU mobile citizen does not have a right to reside and consequently her family also does not derive a right to reside (as we will see the situation is slightly different when the Union citizen has exercised her right to reside and then this is terminated by choice or circumstances).

Finally, Article 16 provides the right to permanent residency for Union citizens who have resided pursuant to the conditions provided for in Directive 2004/38 in the host State for a continuous period of 5 years. In this case, the right to reside becomes unconditional so that they no longer need to satisfy the requirements of economic activity/independence to remain in the host country.

The reasons why an EU citizen has decided to exercise her free movement rights are immaterial so that if the citizen has moved only to benefit from the family reunification regime in the Directive she and her family are nonetheless protected (provided they satisfy the conditions for residence as recalled above). As we shall see, the EU citizen who returns to her Member State of nationality after having exercised her free movement rights is also protected by EU law.

### **1.1. Protected family members (article 2(2) Directive 2004/38)**

As mentioned above, Article 2(2) of Directive 2004/38 identifies the 'family members' relevant for the purposes of the protection provided by the Directive; those are the spouse (Section 1.1.1.), the registered partner (Section 1.1.2), and descending and ascending relatives (Section 1.1.3).

#### **1.1.1. Spouse**

Spouses of the EU mobile citizen fall within the scope of application of Article 2(2)(a) of Directive 2004/38 whatever their nationality. Pursuant to the case law of the Court, the

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<sup>5</sup> Art. 14(1) Directive 2004/38. First-time jobseekers have stronger residence rights. See further below, section 2.

<sup>6</sup> Workers and self-employed retain their rights in EU law in certain circumstances; see Article 7(3) Directive 2004/38.

term spouse 'refers to a person joined to another person by the bonds of marriage'.<sup>7</sup> In the *Coman* case, the Court clarified that the term is gender neutral so that it encompasses same sex spouses, at least insofar as the marriage was entered into in another Member State pursuant to the latter's legislation, and regardless of whether the host State recognises same sex marriages. The express reference to the law of a Member State seems to indicate that whereas marriages concluded outside the EU only have to be recognised to the extent to which that would be the case pursuant to the provisions of private international law applicable (e.g. in relation to polygamous marriages), marriages concluded in any of the Member States must always be recognised, provided they do not constitute marriages of convenience since those may be excluded from the scope of the Directive.<sup>8</sup>

In order to be considered as a 'spouse', there is no other requirement than to be married to the mobile Union citizen: thus, it is irrelevant whether:

- (i) The marriage has occurred before or after the Union citizen had moved to the host State;<sup>9</sup>
- (ii) The spousal relationship was formed in the host State or elsewhere;<sup>10</sup>
- (iii) The spouse was unlawfully present in the host State before marriage;<sup>11</sup>
- (iv) The spouses live together, as long as the marriage has not been legally dissolved through annulment or divorce.<sup>12</sup>

The spouse continues to be protected, at least to a certain extent, in the case of death or departure of the main right holder; in the case of annulment of the marriage/partnership; and in the case of divorce or termination of the registered partnership.

In the case of death and departure of the main right-holder there is a difference in treatment between EU citizens and third country national spouses. If the spouse holds the nationality of a Member State then the departure or death of the main right-holder, and the divorce or annulment of the marriage,<sup>13</sup> does not affect their right to reside in the host State. However, in order to qualify for permanent residence, the former spouse has to satisfy the requirements of economic activity / independence.<sup>14</sup>

On the other hand, the third country national spouses (and family members) are only protected in the case of death of the main right holder if they have lived at least one year in the host Member State before the death of the main right holder,<sup>15</sup> and are protected if the main right holder leaves the host country only to the extent to which they have custody of children enrolled in education. In the latter case, there is also no need for the 1 year requirement to be satisfied.<sup>16</sup> Directive 2004/38 also provides for the retention of the right to reside of the spouse in the case of divorce, annulment or termination of the registered partnership. This development sought not only to ensure some basic rights for former spouses, but also to ensure that residency rights could not be used as a blackmailing tool to force an unwilling spouse to remain married, especially but not only in cases of domestic violence (addressed below). For this reason, Article 13 Directive 2004/38 provides that third country national spouses retain their right to reside in the host State in case of divorce, annulment or termination of the registered partnership, as long as the marriage / registered partnership has lasted, prior to the divorce proceedings, at least 3 years of which one in the host Member State; or the third country national has custody of the Union

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<sup>7</sup> Judgment of 5 June 2018, *Coman*, C-673/16, EU:C:2018:385, para 34.

<sup>8</sup> Article 35 Directive 2004/38.

<sup>9</sup> Judgment of 25 July 2008, *Metock*, C-127/08, EU:C:2008:449.

<sup>10</sup> Judgment of 25 July 2008, *Metock*, C-127/08, EU:C:2008:449.

<sup>11</sup> Judgment of 25 July 2008, *Metock*, C-127/08, EU:C:2008:449.

<sup>12</sup> Judgment of 13 February 1985, *Diatta*, C-267/83, EU:C:1985:67.

<sup>13</sup> Article 13(1) Directive 2004/38.

<sup>14</sup> Article 12(1) Directive 2004/38.

<sup>15</sup> Article 12(2) Directive 2004/38.

<sup>16</sup> Article 12(3) Directive 2004/38.

citizen's children or access to minor children, if a court has ruled that that should be in the host State; or this is warranted by particularly difficult circumstances, such as domestic violence. Furthermore, the former spouse might gain a right to stay in the host country when this is instrumental to securing children's rights to education. We shall consider in detail children's carers rights, as well as divorce and domestic violence further below.<sup>17</sup>

In the above instances the third country national family member must satisfy the conditions of economic activity (workers or self-employed) or self-sufficiency (sufficient resources and comprehensive health insurance); or must be the 'members of the family, already constituted in the host Member State, of a person satisfying these requirements'.<sup>18</sup> Provided that one of these conditions is satisfied, the third country national is eligible to also gain permanent residency.

### **1.1.2. Registered partner**

Directive 2004/38 provides rights also for registered partners; this step, much awaited by many, was crucial to ensure at least some protection for same sex couples; and yet, the rights of registered partners are only recognised to the extent to which the host Member State recognises registered partnerships as equivalent to marriage.<sup>19</sup> This compromise was necessary because of the opposition in some countries to recognition of same sex couples. As we mentioned above, the Court has however held that when it comes to the right of residence the protection given to spouses applies also to same sex spouses since the term spouse is gender neutral. As we shall see below, when the Member State does not recognise registered partnerships then the partner would fall within the scope of Article 3(2)(b) of Directive 2004/38 so that their entry would have to be facilitated.

The principles outlined above for spouses, also apply to registered partners falling under the scope of Article 2(2) of the Directive: so the registered partner is protected upon death /departure of the main right holder or termination of the partnership always if they are Union citizens, and in more limited circumstances if they are third country nationals (registered partner must have resided in the host State for at least a year before the death of the main right holder; partnerships must have lasted 3 years of which one in the host country; there is no protection in the case of departure of the main right holder; and partners are protected if they have custody of children in education).

### **1.1.3. Descending and ascending relatives**

Article 2(2)(c) protects the direct descendants of the main right-holder or her spouse/registered partner (when the host Member State recognises registered partnerships) provided they are either under 21 years of age or dependent,<sup>20</sup> whereas article 2(2)(d) protects dependent relatives in the ascending line, again both of the main right-holder and of her spouse/registered partner. Children/parents of a non-registered partner, or of the registered partner in a country where registered partnerships are not recognised, do not fall within the personal scope of Article 2(2)(c) and (d), and are therefore not considered 'protected family members' pursuant to the Directive.

Direct descendants are those who have a parent-child relationship with the main right holder or her spouse/partner, regardless of whether such relationship is biological or

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<sup>17</sup> See sections 3; 4.2; and 4.3 respectively.

<sup>18</sup> Article 13(2) Directive 2004/38.

<sup>19</sup> This is in some way a codification of the Judgment of 17 April 1986, *Reed*, C-59/85, EU:C:1986:157, where the Court, in order to guarantee equal treatment between unmarried partners of nationals and of EU workers held that the right to have a partner was a social advantage and hence covered by Article 7(2) Regulation 1612/68 (then). The Commission had originally proposed that the registered partner would always be defined as a family member, but as mentioned in the text, some Member States opposed it, and hence the compromised solution.

<sup>20</sup> See Judgment of 2 April 2020, *Caisse pour l'avenir des enfants v FV, GW*, C-802/18, EU:C:2020:269, on the different definition of family member for the purposes of social security co-ordination and Directive 2004/38.



legal;<sup>21</sup> as we shall see below, a child who has been placed in the permanent legal guardianship of a citizen of the Union under the Algerian *kafala* system is not protected by Article 2(2)(c) because that placement does not create any parent-child relationship between them. However the child might fall within the scope of Article 3(2)(a).<sup>22</sup>

Whereas the age criterion for descendants is objective, the assessment of dependency for both descendants and ascendants is a matter of fact and must be interpreted broadly.<sup>23</sup> Since it is a matter of fact, it is not necessary for the right-holder or her spouse /partner to be legally obliged to support the descendant; nor are the reasons for such dependence relevant, as long as it exists in the country from where the applicant came from before joining the Union citizen, and that material support is provided by the main right holder or her spouse/partner. Finally, the dependent ascendants of students are not protected by Article 2(2)(d) but rather fall within the scope of Article 3(2).<sup>24</sup>

## 1.2. 'Other' family members (article 3(2) Directive 2004/38)

Article 3(2)(a) Directive 2004/38 provides the duty to facilitate entry and residence of other family members who 'are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen'. Here it should be immediately noticed that the family members relevant for the purposes of Article 3(2)(a) are only those of the main right-holder, to the exclusion then of those of the registered partner/spouse.

In *SM* the Court elaborated on the notion of 'family member', in relation to a child under the Algerian *Kafala* system, which is comparable to legal guardianship but not, according to the Court of Justice, to adoption. Because of the latter, a child under the *Kafala* system could not be considered as a direct descendant; she could, however, be considered as an extended 'family member' of the Union citizen. Thus, whereas the notion of descendant is interpreted in a formalistic way, the notion of 'other family member' is more flexible, capable of accommodating also those not linked to the Union citizen by either blood or legal ties, but for whom the Union citizen has assumed responsibility, through a legal undertaking to the child's country of origin, in terms of the care, education and protection.<sup>25</sup> The notion of dependency, as per above, is a factual notion and in *Rahman* the Court held that the legislature had deliberately left undefined whether such dependency must persist in the host State or whether it would be sufficient for it to exist in the Member State of origin.<sup>26</sup> In any event the Court clarified that 'the situation of dependence must exist in the country from which the family member concerned comes, *at the very least* at the time when he applies to join the Union citizen on whom he is dependent.'<sup>27</sup>

Article 3(2)(b) refers to the partner in a durable relationship duly attested; the situation of non-registered partners will be considered further below. Here it is sufficient to point out that Directive 2004/38 does not specify how to attest the durable relationship, hence leaving broad discretion to the Member States. This said, it should be remembered that the Charter of Fundamental Rights applies in relation to Article 3(2) situations,<sup>28</sup> so that the right to private and family life of the claimants and, where applicable, the best interest

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<sup>21</sup> The Court has clarified that the children of the spouse/registered partners benefit also (indirectly) from the right to equal treatment in relation to social advantages granted to Union mobile workers, provided that the EU worker supports that child, which is an assessment of fact; Judgment of 15 December 2016, *Depesme and Kerrou*, C-401 to 403/15, EU:C:2016:955

<sup>22</sup> Judgment of 26 March 2019, *SM*, C-129/18, EU:C:2019:448.

<sup>23</sup> Judgment of 16 January 2014, *Reyes*, C-423/12, EU:C:2014:16; and in the context of ascendants Judgment of 9 January 2007, *Jia*, C-1/05, EU:C:2007:1.

<sup>24</sup> Article 7(4) Directive 2004/38.

<sup>25</sup> Judgment of 26 March 2019, *SM*, C-129/18, EU:C:2019:448, para 59.

<sup>26</sup> Judgment of 5 September 2012, *Rahman*, C-83/11, EU:C:2012:519, paras 44 and 45.

<sup>27</sup> Judgment of 5 September 2012, *Rahman*, C-83/11, EU:C:2012:519, operative part para 2, emphasis added.

<sup>28</sup> See Judgment of 26 March 2019, *SM*, C-129/18, EU:C:2019:448, para 71.

of the child, may tilt the balance in favour of entry/residence even when the 'other family member' does not fulfil all the criteria set out in the domestic legislation.

Generally, the Directive does not define what a duty to 'facilitate' entry and residence entails, beside indicating that the 'host Member State must undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people'. The duty to facilitate entry will be examined in more detail below.

## **2. THE RIGHTS OF FAMILY MEMBERS**

Section 2.1 analyses the rights that are available *qua* family member of a Union citizen, in particular their rights to exit and entry (2.1.1), to reside (2.1.2), to work (2.1.3), and to equal treatment (2.1.4). The rights described in this section constitute a floor, which is raised for certain categories of family members. Section 2.2 sets out those rights that are only available *qua* family member of an EU mobile worker or self-employed person. Section 2.3 adds further detail as to the position of the family members of frontier workers. Sections 2.4 and 2.5 outline the rights of family members of jobseekers and returning EU citizens respectively. Finally, section 2.6 analyses the position of 'other' family members. While family members of Union citizens, whether they are Union citizens or third-country nationals, might be able to obtain residence and other rights from other sources, this report only discusses the rights *qua* family member of a Union citizen.

### **2.1. Rights available to all protected family members**

#### **2.1.1. Right to exit and entry**

Provided they hold a valid passport, the third-country family members of Union citizens have the right to leave the territory of a Member State to travel to another Member State, without requirements of exit visas or similar.<sup>29</sup>

They also have the right to enter the territory of a Member State. In addition to their valid passport, they must have an entry visa, a valid residence card, or a permanent residence card, unless the requirement to possess an entry visa is waived under the Schengen *acquis* or national law.<sup>30</sup>

#### **2.1.2. Right to reside**

This section first sets out the sources of the right to reside, and then briefly discusses their possible extinction. The residence rights of the EU citizen main right-holder and her family members depend on the duration of residence in the host State, with cut-off points after three months and five years. Unlike others, Union citizens and their family members, whether or not they hold the nationality of a Member State, cannot be required to

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<sup>29</sup> Art. 4(1)-(2) Directive 2004/38.

<sup>30</sup> Art. 5(1)-(2) Directive 2004/38, which adds that 'Member States shall grant such persons every facility to obtain the necessary visas. Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure.' See further art. 5(4) Directive 2004/38. Third-country spouses of EU citizens have 'the right to enter the territory of the Member States or to obtain a visa for that purpose' (Judgment of 31 January 2006, *Commission v Spain*, C-503/03, EU:C:2006:74, paragraph 42; see also European Commission, 'Communication on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States' (COM(2009)313final), p. 6). On the impact of the Schengen *acquis* on these rights, see Guild, E., Peers, S., and Tomkin, J., *The EU Citizenship Directive: A Commentary*, Oxford, 2nd edn 2019, p. 94-97. The CJEU recently exempted the holders of a *permanent* residence card from the requirement to obtain an entry visa, even though they are not mentioned by art. 5 Directive 2004/38 (Judgment of 18 June 2020, *Ryanair*, C-754/18, EU:C:2020:478). The fact that a residence card or permanent residence card is issued by a non-Schengen State is irrelevant, as Directive 2004/38 does not distinguish on the basis of Schengen membership (*ibid.*).

participate in civic integration programmes.<sup>31</sup> Specificities regarding the family members of EU mobile workers, self-employed persons and jobseekers will be discussed later.

*a) The first three months*

The right to reside for up to three months of EU family members only depends on them having a valid identity card or passport.<sup>32</sup> Third-country family members accompanying or joining an EU citizen have a right to reside for up to three months, without any conditions or any formalities other than holding a valid passport.<sup>33</sup> Family members, whether they are Union citizens or not, retain this initial right to reside unconditionally if the main right holder is economically active or a jobseeker; or as long as they do not pose 'an unreasonable burden on the social assistance system of the host Member State',<sup>34</sup> if the main right holder is economically inactive. They may be required to report their presence within a reasonable period of time.<sup>35</sup>

*b) From 3 months to 5 years*

Art. 7 Directive 2004/38 'exhaustively'<sup>36</sup> lists the conditions for the right to reside for more than three months. Under art. 7(1)(a)-(c), EU citizens essentially have such a right (a) if they have or retain<sup>37</sup> the status of worker or self-employed person; or (b) if they possess 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; or (c) if they are students and satisfy some further conditions. For family members residing *qua* Union citizen, it is worth recalling here that sufficient resources can be obtained from any source or person, including a (more or less distant) relative.<sup>38</sup>

The family members of such EU citizen principals who accompany or join them in the host State<sup>39</sup> also have a right to reside, whether they are Union citizens (art. 7(1)(d)) or third-country nationals (art. 7(2)).<sup>40</sup> Where the principal's right to reside depends on her studies (which is not the case if a student has or retains the status of worker or self-employed person),<sup>41</sup> only her spouse, registered partner and dependent children have the right of residence.<sup>42</sup> There is no requirement that family members live under the same roof as the EU citizen principal.<sup>43</sup> In *Metock*, the CJEU held that the right to reside of third-country family members was not conditional on (i) whether they had previously lawfully resided in another Member State; (ii) how they entered the host State; or (iii) when and where the marriage took place or the family was founded.<sup>44</sup>

Art. 7(1)(d) and art. 7(2) Directive 2004/38 grant derived rights to reside, conditional upon the EU citizen principal satisfying the conditions of art. 7(1)(a)-(c). Can family members derive a right to reside from an EU citizen principal who no longer satisfies those conditions,

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<sup>31</sup> Jesse, M., 'Integration measures, integration exams, and immigration control: P and S and K and A', *Common Market Law Review*, 53 (2016) 1065, p. 1076.

<sup>32</sup> Art. 6(1) Directive 2004/38.

<sup>33</sup> Art. 6 Directive 2004/38.

<sup>34</sup> Art. 14(1) Directive 2004/38. On the position of the family members of mobile workers and jobseekers, see below, sections 2.2 and 2.4.

<sup>35</sup> Art. 5(5) Directive 2004/38.

<sup>36</sup> Guild, E., Peers, S., and Tomkin, J., *The EU Citizenship Directive*, Oxford, 2019, p. 128.

<sup>37</sup> Art. 7(3) Directive 2004/38.

<sup>38</sup> E.g. Judgment of 2 October 2019, *Bajratari*, C-93/18, EU:C:2019:809.

<sup>39</sup> See further Judgment of 8 November 2012, *Iida*, C-40/11, EU:C:2012:691, paragraphs 61-64.

<sup>40</sup> On administrative formalities and residence cards, see art. 8-11 and art. 25-26 Directive 2004/38.

<sup>41</sup> Judgment of 21 February 2013, *L. N.*, C-46/12, EU:C:2013:97; Guild, E., Peers, S., and Tomkin, J., *The EU Citizenship Directive*, Oxford, 2019, p. 129-130, 143, 150.

<sup>42</sup> Art. 7(4) Directive 2004/38, which adds that 'Article 3(2) shall apply to his/her dependent direct relatives in the ascending lines and those of his/her spouse or registered partner.'

<sup>43</sup> Judgment of 8 November 2012, *Iida*, C-40/11, EU:C:2012:691, paragraphs 58-59.

<sup>44</sup> Judgment of 25 July 2008, *Metock*, C-127/08, EU:C:2008:449.



but has acquired the right of permanent residence laid down in art. 16 Directive 2004/38?<sup>45</sup> While the Directive is silent on this issue, the EFTA Court compellingly concluded that the right of permanent residence entails a *derived* right of residence for family members, which is not conditional upon the possession of sufficient resources: 'It follows from the scheme and purpose of the Directive that the right to permanent residence, which represents the highest level of integration under the Directive, cannot be read as not including the right to live with one's family, or be limited such as to confer on family members a right of residence derived from a different, lower status.'<sup>46</sup>

While, in principle, the family member's right to reside is derived, Directive 2004/38 insulates some family members from the EU citizen principal. The impact of separation on the position of family members will be examined in greater detail in section 4.2. Suffice it to say here that art. 13 Directive 2004/38 provides for the retention of the right to reside following divorce, annulment of marriage or termination of registered partnership. To retain their right to reside under art. 13(1), EU family members must meet the conditions of art. 7(1)(a)-(d) Directive 2004/38. Third-country family members must, in addition to meeting conditions equivalent to art. 7(1)(a), (b) or (d), be in one of the following situations: (a) the marriage or registered partnership lasted three years or more, including one year in the host State; or (b) the third-country national has custody of the Union citizen's children; or (c) the retention of the right to reside is warranted by particularly difficult circumstances, such as domestic violence; or (d) the third-country national has the right of access to a minor child, provided that the court has ruled that such access must be in the host Member State, and for as long as is required.<sup>47</sup>

Art. 12 Directive 2004/38 describes the circumstances in which family members retain the right to reside in the event of the Union citizen's death or departure from the host Member State.<sup>48</sup> The right of residence of family members who are Union citizens is not affected by the Union citizen principal's death or departure, provided that, before acquiring the right of permanent residence, they meet the conditions of art. 7(1) Directive 2004/38.<sup>49</sup>

Different rules apply to family members who are third-country nationals, who shall retain their right of residence 'exclusively on a personal basis' in the event of the Union citizen's death under two sets of conditions listed in art. 12(2) Directive 2004/38. First, the family members should 'have been residing in the host Member State as family members for at least one year before the Union citizen's death.' Second, unless and until they have acquired the right of permanent residence, they should satisfy conditions equivalent to those of art. 7(1)(a), (b) or (d) Directive 2004/38.

Art. 12(3) Directive 2004/38 offers some additional protection to children and the parent who has actual custody of the children, regardless of their nationality. They retain their right to reside following the EU citizen principal's departure or death, if and as long as the children are enrolled at an educational establishment of the host State and reside there. As we shall see in more detail below, they also retain their right to reside following the loss of worker status of the parent pursuant to Article 10 Regulation 492/2011.<sup>50</sup>

While they are less protected against the departure of the EU citizen principal than EU family members, third-country family members can derive a right to reside from e.g. art. 12(3) or art. 13 Directive 2004/38, or from art. 10 Regulation 492/2011.<sup>51</sup>

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<sup>45</sup> On the related, but distinct, question of whether family members can acquire the right of *permanent* residence, see below, section 2.1.2.c.

<sup>46</sup> EFTA Court Judgment of 26 July 2011, *Clauder*, E-4/11, [2011] EFTA Ct. Rep. 216, in particular paragraph 43.

<sup>47</sup> Art. 13(2) Directive 2004/38.

<sup>48</sup> The reasons for departure are immaterial (Guild, E., Peers, S., and Tomkin, J., *The EU Citizenship Directive*, Oxford, 2019, p. 165, footnote 276).

<sup>49</sup> Art. 12(1) Directive 2004/38.

<sup>50</sup> See below, section 3.2.

<sup>51</sup> See below, section 3.2.

c) *The right of permanent residence*

Art. 16(1) Directive 2004/38 entitles Union citizens to the right of permanent residence after five years of legal and continuous residence in the host State. Once acquired, 'the right of permanent residence should not be subject to any further conditions'.<sup>52</sup> There is no need, therefore, to be economically active or self-sufficient. The right of permanent residence entails full equal treatment and brings greater protection against expulsion.<sup>53</sup> Third-country family members can acquire a right of permanent residence through art. 16(2) and art. 18 Directive 2004/38.<sup>54</sup>

Art. 16(2) entitles third-country family members of EU citizens to the right of permanent residence when they 'have legally resided with the Union citizen in the host Member State for a continuous period of five years.' The EU citizen principal must satisfy the conditions of art. 16, meaning that her residence should comply with the conditions of the directive.<sup>55</sup> The third-country family members, for their part, must 'necessarily and concurrently have a right of residence under Article 7(2) of Directive 2004/38, as family members accompanying or joining that citizen.'<sup>56</sup> Periods of residence that are lawful on other grounds, including art. 10 Reg. 492/2011,<sup>57</sup> do not count towards permanent residence if they do not satisfy the conditions laid down in Directive 2004/38. The meaning of 'resid[ing] with the Union citizen in the host Member State' was addressed in *Ogieriakhi*. The CJEU ruled that to read those words as setting a requirement to share a residence and married life with the EU citizen would render the third-country national vulnerable to his spouse's unilateral decisions and 'would be contrary to the spirit of that directive'.<sup>58</sup> Art. 16(2) does not require the spouses to share a roof during the five-year period; the fact that the claimants had split up and resided with their new partners did not prevent them from acquiring the right of permanent residence. Marriage lasts until it is terminated by the competent authority. In *Onuekwere*, the CJEU added a further condition for prisoners.<sup>59</sup> A third-country family member's periods of imprisonment in the host State cannot be taken into consideration for his acquisition of the right of permanent residence under art. 16(2) Directive 2004/38. Moreover, such periods interrupt the continuity of residence, effectively resetting the five-year clock.

Art. 17 Directive 2004/38 sets out derogations from art. 16 enabling some categories of persons to acquire the right of permanent residence before the end of the five-year period. Art. 17(1) lays out the conditions under which the EU citizen principal acquires an expedited right of permanent residence. Art. 17(2) relaxes these conditions where his or her spouse or registered partner is a national of the host State or lost that State's nationality upon marrying him or her. Art. 17(3) provides that, where the worker or self-employed person has acquired such an expedited right of permanent residence, her family members who are residing with her in the host State shall also acquire that right, regardless of their nationality. Art. 17(4) grants an expedited right of permanent residence to the family members of a worker or self-employed person who dies while still working but before acquiring permanent residence status in the host State, if (i) the surviving spouse lost the nationality of that State following marriage to the deceased; or (ii) at the time of death, the deceased had resided there continuously for two years; or (iii) the death was caused by an accident at work or an occupational disease. In addition, the family members must have resided with the deceased in the host Member State.

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<sup>52</sup> Judgment of 21 December 2011, *Ziolkowski and Szeja*, C-424/10 and C-425/10, EU:C:2011:866, paragraph 41; recital 18 Directive 2004/38. On administrative formalities and permanent residence cards, see art. 19-21 and art. 25 Directive 2004/38; Judgment of 18 June 2020, *Ryanair*, C-754/18, EU:C:2020:478.

<sup>53</sup> Art. 24(2) and art. 28(2) Directive 2004/38.

<sup>54</sup> Third-country nationals can also qualify for long-term resident status under Directive 2003/109.

<sup>55</sup> Judgment of 8 May 2013, *Alarape*, C-529/11, EU:C:2013:290, paragraphs 34-35.

<sup>56</sup> *Ibid.*, paragraph 36.

<sup>57</sup> See below, section 3.2.

<sup>58</sup> Judgment of 10 July 2014, *Ogieriakhi*, C-244/13, EU:C:2014:2068, paragraph 40.

<sup>59</sup> Judgment of 16 January 2014, *Onuekwere*, C-378/12, EU:C:2014:13.

Art. 18 Directive 2004/38 opens a second gateway to the right of permanent residence, which it grants to the third-country family members of a Union citizen who have legally resided for a period of five consecutive years in the host State and who satisfy the conditions laid down in art. 12(2) and 13(2) Directive 2004/38.

Neither art. 16(2) nor art. 18 Directive 2004/38 expressly grant a right of permanent residence to persons who derive a right to reside from art. 12(3) Directive 2004/38 (i.e. the studying child and her custodial parent following departure or death of the Union citizen). They can nonetheless obtain the right of permanent residence, because 'residence pursuant to Article 12(3) is residence *pursuant to the Directive*, not pursuant to national law or other EU legislation, and so it clearly meets the criteria referred to in recital 17 in the preamble.'<sup>60</sup>

*d) Restrictions to and termination of the right to reside*

Directive 2004/38 also lays down exceptions and restrictions to free movement rights. The rights of entry and residence can be restricted on grounds of public policy, public security or public health, under the strict conditions of Chapter VI of Directive 2004/38.<sup>61</sup> Art. 27 provides that restrictions based on public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned, which should represent 'a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.' Art. 29 deals with restrictions based upon public health. Art. 30, art. 31 and art. 33 offer procedural protection to the person whose free movement rights are restricted. Art. 32 limits the duration of exclusion orders.

Most provisions of Chapter VI apply equally to Union citizens and their family members, regardless of their nationality.<sup>62</sup> An exception is found in art. 28 Directive 2004/38, which provides in three levels of protection against expulsion. While Union citizens and their family members, regardless of their nationality, benefit from consideration of their circumstances when an expulsion decision on grounds of public policy or public security is contemplated (art. 28(1)), and they cannot be expelled 'except on *serious* grounds of public policy or public security' if they have the right of permanent residence (art. 28(2)), only Union citizens benefit from the highest level of protection: if Union citizens are minors and expulsion is not in their best interest, or if they have resided in the host State for ten years, expulsion can only be based on '*imperative* grounds of public security' (art. 28(3)).<sup>63</sup>

The absence of a right to reside is another ground for expulsion. Art. 14 Directive 2004/38 provides that Union citizens and their family members retain (i) their right of residence under art. 6 as long as they do not pose an unreasonable burden on the social assistance system of the host State<sup>64</sup> and (ii) their right of residence under art. 7, 12, and 13 as long as they meet the conditions set out therein. Expulsion decisions can be taken where those conditions are not, or no longer, met. Third-country nationals, for instance, can in principle be expelled after they lose their right to reside following the departure of their spouse from the host State.<sup>65</sup> Those expulsion powers are however limited. Art. 14(2) Directive 2004/38 regulates the manner and frequency of verification. Verification may not be systematic. Rather, it should be performed only in specific cases where there is a reasonable doubt regarding whether a Union citizen or family member fulfils the conditions for a right to reside. Moreover, while recourse to the host State's social assistance system can indicate

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<sup>60</sup> Guild, E., Peers, S., and Tomkin, J., *The EU Citizenship Directive*, Oxford, 2019, p. 223, emphasis in the original. But see Opinion of AG Bot of 15 January 2013, *Alarape*, C-529/11, EU:C:2013:9, paragraphs 85-89.

<sup>61</sup> '[T]he provisions of Articles 27 and 28 of Directive 2004/38 are applicable only if the person concerned currently derives from that directive a right of residence in the host Member State which is either temporary or permanent' (Judgment of 10 September 2019, *Chenchooliah*, C-94/18, EU:C:2019:693, paragraph 87).

<sup>62</sup> This is explicit in art. 27(1) and art. 28(2) Directive 2004/38.

<sup>63</sup> Emphases added.

<sup>64</sup> On the position of the family members of mobile workers and jobseekers, see below, sections 2.2 and 2.4.

<sup>65</sup> Judgment of 10 September 2019, *Chenchooliah*, C-94/18, EU:C:2019:693.

a lack of resources, which could terminate the right to reside, it shall not *automatically* lead to expulsion.<sup>66</sup> Art. 15 Directive 2004/38 provides that some of the procedural safeguards of art. 30 and 31 Directive 2004/38 shall apply by analogy to decisions restricting the free movement of Union citizens and their family members;<sup>67</sup> that expiry of identity cards or passports is no grounds for expulsion; and that the host State shall not impose a ban on entry in the context of an expulsion decision. In *Chenchooliah*, the CJEU clarified that the protection against expulsion provided by art. 15 applies even where the person concerned no longer has the status of 'beneficiary' within the meaning of art. 3(1) Directive 2004/38 because her spouse left the host State.<sup>68</sup>

As a final point, it should be noted that Member States may refuse any right conferred by Directive 2004/38, including residence rights, in the case of abuse of rights or fraud, such as marriages of convenience, provided the measure is proportionate and complies with the procedural safeguards of Articles 30 and 31.<sup>69</sup>

### **2.1.3. Right to work**

Art. 23 Directive 2004/38 provides that third-country family members 'who have the right of residence or the right of permanent residence in a Member State shall be entitled to take up employment or self-employment there.'<sup>70</sup> This right covers all types of employment, and entails a right to equal treatment that extends to the access to regulated professions and the recognition of qualifications and diplomas.<sup>71</sup> It does not depend on the Union citizen being economically active.<sup>72</sup> An important issue is whether third-country family members can access posts in the public sector. This is often denied to them in practice.<sup>73</sup> Under art. 45(4) TFEU, EU citizens cannot rely on the free movement of workers to access certain posts in the public service. On the basis of art. 23 and 24 Directive 2004/38, the Commission rightly argues that the third-country family members of Union citizens 'should have access to posts in the public sector in the same way as the EU migrant workers.'<sup>74</sup>

### **2.1.4. Right to equal treatment**

#### *a) The scope of the right to equal treatment*

The right to equal treatment can be based on several, overlapping grounds, all of which prohibit both direct and indirect discrimination. Particularly important is art. 24 Directive 2004/38, which grants a right to equal treatment to EU citizens 'residing on the basis of this Directive' in the host State as well as their lawfully residing third-country family members, subject to other provisions of EU law. In *Dano*, the CJEU inferred that 'a Union citizen can claim equal treatment with nationals of the host Member State *only* if his

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<sup>66</sup> Art. 14(3) Directive 2004/38.

<sup>67</sup> This analogical application only covers those rules of art. 30-31 that can be applied, adjusted as appropriate, to decisions taken on grounds other than public policy, public security, or public health (Judgment of 10 September 2019, *Chenchooliah*, C-94/18, EU:C:2019:693).

<sup>68</sup> *Ibid.*

<sup>69</sup> Art. 35 Directive 2004/38. See also recital 28 Directive 2004/38.

<sup>70</sup> This right to work starts upon entry in the host State (Guild, E., Peers, S., and Tomkin, J., *The EU Citizenship Directive*, Oxford, 2019, p. 126). Third-country family members who retain the right to reside under art. 12(2) also retain their right to work (*ibid.*, p. 167-168). The right to work cannot be made conditional upon possession of a work permit (Judgment of 27 October 2005, *Commission v Luxembourg (work permit)*, C-165/05, EU:C:2005:661) or a residence card (art. 25(1) Directive 2004/38). Neither is there a requirement as to the distance between the family member's place of activity and the migrant worker's place of residence (Judgment of 13 February 1985, *Diatta*, 267/83, EU:C:1985:67, paragraph 19). EU family members are entitled to work in any Member State by virtue of art. 45 TFEU.

<sup>71</sup> Judgment of 7 May 1986, *Gül*, 131/85, EU:C:1986:200.

<sup>72</sup> Guild, E., Peers, S., and Tomkin, J., *The EU Citizenship Directive*, Oxford, 2019, p. 242-243.

<sup>73</sup> Ziller, J., 'Free Movement of European Union Citizens and Employment in the Public Sector', *Online Journal on Free Movement of Workers within the European Union*, 2011, p. 6, p. 17.

<sup>74</sup> European Commission, 'Free movement of workers in the public sector' (Commission Staff Working Document, SEC(2010)1609 final), p. 12.

residence in the territory of the host Member State complies with the conditions of Directive 2004/38.<sup>75</sup> *Dano* confines the right to equal treatment for economically inactive citizens to lawful residents, at least where Directive 2004/38 applies, without deriving additional protection from primary law, such as the equal treatment principle laid down in art. 18 TFEU.

Art. 24(2) Directive 2004/38 provides derogations, which affect Union citizens and family members alike. Social assistance<sup>76</sup> can be withheld from economically inactive citizens (and their family members) during the first three months and from jobseekers (and their family members) as long as they reside *qua* jobseeker, but not from workers, self-employed persons and their family members.<sup>77</sup> The host State can also deny economically inactive citizens and their family members 'maintenance aid for studies, including vocational training, consisting in student grants or student loans'<sup>78</sup> until they acquire the right of permanent residence; the exclusion again does not apply to workers, self-employed persons, and their family members.

The above holds for cases covered by Directive 2004/38, which does not directly apply to the relationship between EU citizens (and their family members) and their State of origin or a State they left. The claims of those EU citizens and family members are to be analysed under art. 18, art. 20, art. 21, art. 45, art. 49, art. 56 TFEU, Directive 2004/38 by analogy or Regulation 492/2011, depending on their nationality, their economic status, their family situation and the existence of a cross-border element.<sup>79</sup>

#### *b) The substance of the right to equal treatment*

To justify a difference in treatment, Member States must demonstrate that they pursue objective considerations of public interest in a proportionate manner.<sup>80</sup> The main objective justification as regards the access to benefits is the existence of a real link between the claimant and the host State. The CJEU recognises that it is legitimate for Member States to seek to ensure that applicants have a real or genuine link to their society or labour market.<sup>81</sup> However, according to settled case-law, the proof required to demonstrate the genuine link must not be too exclusive in nature or unduly favour one element which is not necessarily representative of the real and effective degree of connection between the claimant and the Member State, to the exclusion of all other representative elements'.<sup>82</sup> As will be seen, mobile EU workers and their family members are much less exposed, if at all, to the real link justification than economically inactive EU citizens and their family members.<sup>83</sup>

The CJEU has shed some light on what constitutes a relevant connection, and identified a non-exhaustive number of social, economic, and even cultural factors. As will be discussed in sections 2.2 and 2.3, economic ties are particularly revealing of integration and assist mobile workers, self-employed persons, and their family members in claiming benefits.

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<sup>75</sup> Judgment of 11 November 2014, *Dano*, C-333/13, EU:C:2014:2358, paragraph 69, emphasis added.

<sup>76</sup> Defined e.g. in Judgment of 19 September 2013, *Brey*, C-140/12, EU:C:2013:565; Judgment of 15 September 2015, *Alimanovic*, C-67/14, EU:C:2015:597, paragraphs 44-46.

<sup>77</sup> Judgment of 19 September 2013, *Brey*, C-140/12, EU:C:2013:565, paragraph 56; recital 21 Directive 2004/38.

<sup>78</sup> Defined in Judgment of 4 October 2012, *Commission v Austria (reduced fares on public transport for students)*, C-75/11, EU:C:2012:605, paragraphs 54-56; Judgment of 2 June 2016, *Commission v the Netherlands (travel costs)*, C-233/14, EU:C:2016:396, paragraphs 86-94.

<sup>79</sup> See below.

<sup>80</sup> E.g. Judgment of 11 July 2002, *D'Hoop*, C-224/98, EU:C:2002:432, paragraph 36.

<sup>81</sup> E.g. Judgment of 11 July 2002, *D'Hoop*, C-224/98, EU:C:2002:432; Judgment of 15 March 2005, *Bidar*, C-209/03, EU:C:2005:169.

<sup>82</sup> Judgment of 26 February 2015, *Martens*, C-359/13, EU:C:2015:118, paragraph 37.

<sup>83</sup> See below, sections 2.2.2 and 2.3.



The CJEU also draws attention to social links forged through (stable) residence,<sup>84</sup> nationality,<sup>85</sup> as well as family circumstances.<sup>86</sup>

The CJEU has on occasion greatly valued family links as real links. Marriage to a national of the State in question residing there contributes to demonstrating the requisite level of integration for a person claiming benefits as a jobseeker.<sup>87</sup> And the former employment of one of the parents of a dependent and economically inactive citizen, claiming *qua* EU citizen, indicates integration.<sup>88</sup> Family ties therefore serve not only to bring persons within the scope of the right to equal treatment, but also to defeat attempts at justifying *prima facie* discrimination.

## **2.2. The family members of mobile workers and self-employed persons**

The above describes the rights available to the protected family members of all EU citizens, whether economically active or not. The following pages will detail the *additional* rights of certain categories of family members, starting with the family members of EU mobile workers and self-employed persons.

Their right to reside is insulated from the requirements of sufficient resources set in art. 6, 7 and 14 Directive 2004/38. Neither is it conditional upon the possession of comprehensive sickness insurance cover. Their residence cannot be terminated as long as the Union citizen is a worker or self-employed person.<sup>89</sup> Some of those family members can also be admitted to the right of permanent residence before the end of the five-year period.<sup>90</sup> All of this applies even when the family member is economically inactive.

This section focuses on the right to equal treatment of the family members of mobile workers and self-employed persons, with further detail, in section 2.3, on non-residents. The privileged position of mobile workers and their family members is not limited to the substance of their rights, but extends to their enforcement and practical implementation, which is facilitated by Directive 2014/54.

### **2.2.1. The scope of the right to equal treatment**

Most of the equal treatment case-law is based, not on art. 24 Directive 2004/38, but on an older and complementary equal treatment provision. Mobile workers are entitled to equal treatment as regards social advantages<sup>91</sup> under art. 7(2) Regulation 492/2011 (previously art. 7(2) Regulation 1612/68), which is 'the particular expression' of art. 45(2) TFEU.<sup>92</sup> Art. 7(2) can also be relied upon by the family members of EU mobile workers, even if they are third-country nationals and if they are economically inactive.<sup>93</sup> The family members covered by art. 7(2) Regulation 492/2011 are those listed in art. 2(2) Directive

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<sup>84</sup> E.g. Judgment of 15 March 2005, *Bidar*, C-209/03, EU:C:2005:169, paragraph 59.

<sup>85</sup> E.g. Judgment of 18 July 2013, *Prinz and Seeberger*, C-523/11 and C-585/11, EU:C:2013:524, paragraph 38.

<sup>86</sup> E.g. Judgment of 15 September 2005, *Ioannidis II*, C-258/04, EU:C:2005:559, paragraph 33; Judgment of 18 July 2013, *Prinz and Seeberger*, C-523/11 and C-585/11, EU:C:2013:524, paragraph 38.

<sup>87</sup> Judgment of 25 October 2012, *Prete*, C-367/11, EU:C:2012:668, paragraphs 44, 48, 50.

<sup>88</sup> Judgment of 21 July 2011, *Stewart*, C-503/09, EU:C:2011:500, paragraph 100; Judgment of 26 February 2015, *Martens*, C-359/13, EU:C:2015:118, paragraphs 41, 44.

<sup>89</sup> Art. 14(4)(a) Directive 2004/38.

<sup>90</sup> Art. 17 Directive 2004/38.

<sup>91</sup> I.e. 'all [advantages] which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory' (Judgment of 31 May 1979, *Even*, 207/78, EU:C:1979:144, paragraph 22).

<sup>92</sup> E.g. Judgment of 20 June 2013, *Giersch*, C-20/12, EU:C:2013:411, paragraph 35.

<sup>93</sup> Judgment of 20 June 1985, *Deak*, 94/84, EU:C:1985:264. Art. 7(2) can even be invoked after the death of the worker by his family remaining in the State in which he worked (Judgment of 30 September 1975, *Cristini*, 32/75, EU:C:1975:120).

2004/38.<sup>94</sup> Family members 'qualify only indirectly for the equal treatment accorded to the worker himself by Article 7 of Regulation No 1612/68.<sup>95</sup> The logic is one of communicating vessels: if the dependent family member of a mobile worker is denied an advantage, the maintenance expenditure of the worker increases concomitantly.<sup>96</sup> A family member can only rely on art. 7(2) to obtain benefits if they constitute social advantages for the mobile worker.<sup>97</sup> And that will only be the case where the family member is (presumed to be) 'dependent on' or supported by the mobile worker, or where they are married or in a registered partnership.<sup>98</sup> Concretely, no dependency requirements apply to spouses or direct descendants under the age of 21.<sup>99</sup> Once it is established that there is a social advantage for the worker, the family members can invoke art. 7(2) themselves.<sup>100</sup>

While there is no equivalent to Regulation 492/2011 for self-employed persons, much the same principles apply on the basis of the freedom of establishment.<sup>101</sup> Those who lack the status of worker, self-employed person or their family member fall back on the inferior set of equal treatment rights discussed above in section 2.1.4.

### 2.2.2. The substance of the right to equal treatment

Since 2007, the CJEU accepts that the real link defence may be invoked against mobile workers and their family members. Yet, it adds that:

'[a]s regards migrant workers and frontier workers, the fact that they have participated in the employment market of a Member State establishes, in principle, a sufficient link of integration with the society of that Member State, allowing them to benefit from the principle of equal treatment, as compared with national workers, as regards social advantages [...], whether or not linked to a contract of employment'.<sup>102</sup>

Unlike economically inactive EU citizens, mobile workers and their family members are fully shielded from the objective justification of avoiding an unreasonable burden, which cannot be invoked against them.<sup>103</sup> So far, the CJEU has not allowed the real link to affect workers who reside in the State in which they work;<sup>104</sup> as discussed in section 2.3, non-resident workers and their family members are more exposed to a real link justification. With one major objective justification banned and another greatly weakened, it is hardly surprising

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<sup>94</sup> Judgment of 15 December 2016, *Depesme and Others*, C-401/15 to C-403/15, EU:C:2016:955, paragraphs 51, 55; Judgment of 2 April 2020, *Caisse pour l'avenir des enfants*, C-802/18, EU:C:2020:269, paragraph 51; Judgment of 12 July 1984, *Castelli*, 261/83, EU:C:1984:280, paragraph 10. The notion of dependency is construed in much the same way as in art. 2(2) Directive 2004/38 (e.g. Judgment of 18 June 1987, *Lebon*, 316/85, EU:C:1987:302, paragraphs 20-22; Judgment of 15 December 2016, *Depesme and Others*, C-401/15 to C-403/15, EU:C:2016:955, paragraphs 58, 60, 62; see above, section 1.1).

<sup>95</sup> Judgment of 18 June 1987, *Lebon*, 316/85, EU:C:1987:302, paragraph 12.

<sup>96</sup> For discussion and criticism, see de Witte, F., 'Who funds the mobile student? Shedding some light on the normative assumptions underlying EU free movement law: Annotation to Case C-542/09, *Commission v the Netherlands*', *Common Market Law Review*, 50, 2013, 203.

<sup>97</sup> Judgment of 18 June 1987, *Lebon*, 316/85, EU:C:1987:302, paragraph 12.

<sup>98</sup> Judgment of 26 February 1992, *Bernini*, C-3/90, EU:C:1992:89, paragraph 25; Judgment of 18 July 2007, *Hartmann*, C-212/05, EU:C:2007:437; Judgment of 10 September 2009, *Commission v Germany (savings-pension bonus)*, C-269/07, EU:C:2009:527, paragraphs 65-66.

<sup>99</sup> Direct descendants are 'presumed to be dependent until the age of 21 years' (Judgment of 15 December 2016, *Depesme and Others*, C-401/15 to C-403/15, EU:C:2016:955, paragraph 62).

<sup>100</sup> E.g. Judgment of 26 February 1992, *Bernini*, C-3/90, EU:C:1992:89, paragraph 26.

<sup>101</sup> Judgment of 8 June 1999, *Meeusen*, C-337/97, EU:C:1999:284; Opinion of AG Wathelet of 2 June 2016, *Bragança Linares Verruga*, C-238/15, EU:C:2016:389, footnote 8. See also van der Mei, A. P., *Free Movement of Persons Within the European Community: Cross-Border Access to Public Benefits*, Oxford, 2003, p. 41-42. Art. 10 Reg. 492/2011 (discussed below, section 3.2) does not apply to self-employed persons (Judgment of 6 September 2012, *Czop and Punakova*, C-147/11 and C-148/11, EU:C:2012:538, paragraphs 30-33).

<sup>102</sup> Judgment of 14 June 2012, *Commission v the Netherlands (study finance)*, C-542/09, EU:C:2012:346, paragraph 65.

<sup>103</sup> E.g. *ibid.*, paragraphs 57-58, 69.

<sup>104</sup> Except *ibid.*, which failed the proportionality test.

that resident workers and their family members have relied on art. 7(2) Regulation 492/2011 with great success.<sup>105</sup>

### 2.3. The family members of frontier workers

Frontier workers have long been among the more controversial of mobile workers, as they typically spend their working time in one State and the remainder of their time in another, thus forging strong, but non-exclusive, bonds with each. The question of which State should organise their social protection has been especially vexed, as Member States have attempted to attach residence conditions to social advantages, especially where these are not strongly connected to the status of worker.

Frontier workers in the strictest sense — mobile workers who commute to a neighbouring Member State, which is not their State of origin, on a daily or weekly basis — are but the most visible group of non-residents whose family members merit separate treatment. Legally, neither the frequency of the border-crossing nor the commuting distance matters. And while the classic frontier worker takes up work abroad while continuing to reside in one Member State, the CJEU accepts that ‘reverse’ frontier workers, who take up residence abroad while continuing to work in one Member State, are also mobile workers, even if they work in their home State.<sup>106</sup> More broadly still, similar issues arise for the family members of self-employed persons established in a Member State other than the one in which the family lives.<sup>107</sup> Therefore, this section will be concerned with the family members of mobile workers and self-employed persons residing in a Member State other than the one in which they are economically active (‘non-resident workers and self-employed persons’).<sup>108</sup> The reluctance of the State of work to export social advantages for the worker tends to intensify when the advantages are intended, not for the worker herself, but for her family member, whose personal connections to its territory can be very tenuous indeed.

This section proceeds in two steps. First, the source of the right to reside and to equal treatment of the family members of non-resident workers and self-employed persons will be discussed. Then, their ‘real links’ will be analysed — while the case-law does not concern self-employed persons, it can be assumed the same would apply *mutatis mutandis*.<sup>109</sup>

Directive 2004/38 only applies to ‘Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members [...] who accompany or join them.’<sup>110</sup> Non-resident workers and self-employed persons are covered by Directive 2004/38 as workers or self-employed persons in their State of economic activity, and as self-sufficient persons in their State of residence — assuming that they are not nationals of either State and that the activity generates sufficient resources.<sup>111</sup> Their family members, however, are only covered by Directive 2004/38 *qua* family member in the State of residence; indeed, they neither accompany nor join the EU citizen principal in her State of work.

If, as is likely, non-resident workers and self-employed persons are nationals of their State of residence or their State of economic activity, the situation is somewhat more complicated, as Directive 2004/38 does not directly govern their relationship to *that*

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<sup>105</sup> E.g. Judgment of 30 September 1975, *Cristini*, 32/75, EU:C:1975:120; Judgment of 12 July 1984, *Castelli*, 261/83, EU:C:1984:280; Judgment of 20 June 1985, *Deak*, 94/84, EU:C:1985:264.

<sup>106</sup> E.g. Judgment of 2 April 2020, *Landkreis Südliche Weinstraße*, C-830/18, EU:C:2020:275, paragraphs 22, 24-25.

<sup>107</sup> E.g. Judgment of 8 June 1999, *Meeusen*, C-337/97, EU:C:1999:284.

<sup>108</sup> Strictly speaking, this section is not concerned with the non-resident family members of resident workers, though there are analogies (e.g. Judgment of 26 February 1992, *Bernini*, C-3/90, EU:C:1992:89).

<sup>109</sup> See above, footnote 101.

<sup>110</sup> Art. 3(1) Directive 2004/38.

<sup>111</sup> European Commission, COM(2009)313, p. 4; Guild, E., Peers, S., and Tomkin, J., *The EU Citizenship Directive*, Oxford, 2019, p. 54. See also art. 17(1)(c) Directive 2004/38.



State.<sup>112</sup> Accordingly, family members of an EU frontier worker residing in her State of origin are not directly covered by Directive 2004/38, although they 'might be governed by other provisions of EU law, or even the Directive by analogy'.<sup>113</sup>

Art. 7(2) Regulation 492/2011 can be invoked, even if the worker<sup>114</sup> and/or her family members<sup>115</sup> reside outside the host State. No distinction is made as to whether workers moved their place of work to one State while remaining resident in another, or whether they moved their place of residence to one State while remaining professionally active in another.<sup>116</sup>

While the CJEU maintains that 'frontier workers have [...] in principle, a sufficient link of integration with the society of their host State',<sup>117</sup> in practice they are much more vulnerable to a real link justification than workers who reside in their State of activity. A 'frontier worker is not always integrated in the Member State of employment in the same way as a worker who is resident in that State.'<sup>118</sup> The same applies to the frontier worker's family members.<sup>119</sup> All judgments in which the CJEU considered additional integration requirements to be appropriate (albeit disproportionate in all but one case) concern non-resident workers or their non-resident family members.<sup>120</sup>

Mrs Geven was a frontier worker in minor employment in Germany.<sup>121</sup> Her claim for the German child-raising allowance was rejected, as it was reserved to residents and non-residents in more than minor employment. The CJEU allowed Germany to require workers to demonstrate additional links, be it through residence or through a substantial occupation. Ms Hartmann, who lived in Austria with her family, claimed the same child-raising allowance.<sup>122</sup> Her husband worked in Germany as a civil servant. The CJEU observed that frontier workers other than civil servants are granted the allowance provided their occupation exceeds a certain threshold. Germany had to export its child-raising allowance to Ms Hartmann, because her husband worked there full-time. The juxtaposition of the two judgments — handed down the same day — would suggest that the strength of the economic link is paramount, while it matters less whether the mobile worker (*Geven*) or his or her spouse (*Hartmann*) is claiming a benefit.

Later case-law has elaborated on the strength of the economic link, while emphasising the importance of the identity of the claimant. Three cases concern claims for portable study finance made by children of frontier workers active in Luxembourg; the families resided in neighbouring countries.<sup>123</sup> The Luxembourg authorities rejected the claims, because the students resided abroad (*Giersch*); because the parent had not worked in Luxembourg for a continuous period of five years (*Bragança Linares Verruga*); or because the parent had not worked there for five years in the seven years preceding the claim (*Aubriet*) — these are three iterations of the Luxembourg legislation. Although indirectly discriminatory, the CJEU considered those conditions to be appropriate to secure the legitimate objective of increasing the level of education of the Luxembourg population by reserving portable study finance to students who have such a link to Luxembourg that they are reasonably likely to

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<sup>112</sup> Guild, E., Peers, S., and Tomkin, J., *The EU Citizenship Directive*, Oxford, 2019, p. 54.

<sup>113</sup> *Ibid.*, emphasis in original; Judgment of 12 March 2014, *S. and G.*, C-457/12, EU:C:2014:136, discussed below, section 2.5.

<sup>114</sup> E.g. Judgment of 2 April 2020, *Landkreis Südliche Weinstraße*, C-830/18, EU:C:2020:275, paragraph 23.

<sup>115</sup> E.g. Judgment of 26 February 1992, *Bernini*, C-3/90, EU:C:1992:89.

<sup>116</sup> E.g. Judgment of 2 April 2020, *Landkreis Südliche Weinstraße*, C-830/18, EU:C:2020:275, paragraphs 22, 24-25.

<sup>117</sup> E.g. Judgment of 10 July 2019, *Aubriet*, C-410/18, EU:C:2019:582, paragraph 32.

<sup>118</sup> Judgment of 20 June 2013, *Giersch*, C-20/12, EU:C:2013:411, paragraph 65.

<sup>119</sup> See Judgment of 14 December 2016, *Bragança Linares Verruga*, C-238/15, EU:C:2016:949, paragraph 56.

<sup>120</sup> Judgment of 14 June 2012, *Commission v the Netherlands (study finance)*, C-542/09, EU:C:2012:346 also covered resident workers.

<sup>121</sup> Judgment of 18 July 2007, *Geven*, C-213/05, EU:C:2007:438.

<sup>122</sup> Judgment of 18 July 2007, *Hartmann*, C-212/05, EU:C:2007:437.

<sup>123</sup> Judgment of 20 June 2013, *Giersch*, C-20/12, EU:C:2013:411; Judgment of 14 December 2016, *Bragança Linares Verruga*, C-238/15, EU:C:2016:949; Judgment of 10 July 2019, *Aubriet*, C-410/18, EU:C:2019:582.

return to reside and (seek) work there. However, those conditions were disproportionate. In *Giersch*, the CJEU found reliance upon a sole condition of residence to be too exclusive and insufficiently representative of the actual degree of attachment of a student to Luxembourg. The fact that a student and his or her parents reside in a neighbouring State and the circumstance that his or her parents worked in Luxembourg for a significant period suffice to establish the requisite connection, and hence the reasonable probability of return. By way of less restrictive alternative, the CJEU suggested that a State could make entitlement to a loan or the non-reimbursement thereof dependent on the beneficiary working and residing in Luxembourg after completing her degree. In *Bragança Linares Verruga*, the waiting period was disproportionate, as the parents had worked over five years in Luxembourg with only a few short breaks. And in *Aubriet*, the reference period led the Luxembourg authorities to ignore about 15 years of work on their territory. Still, the three judgments seem to create some space for making social advantages for family members conditional upon their integration and/or the worker's integration, at least where the claimants may never have set foot in the State whose portable study finance they claim — they were non-resident and economically inactive students who studied outside Luxembourg, and whose parents were frontier workers.

The picture that emerges is a sliding scale where more integrated claimants enjoy a more secure right to equal treatment in respect of benefits. It could be represented in simplified form by a hierarchy *within* the class of mobile workers and their family members, with resident workers and their family members at the apex;<sup>124</sup> followed by non-resident workers in full and durational employment, who are trailed<sup>125</sup> by their family members (*Hartmann*; *Giersch*; *Bragança Linares Verruga*; *Aubriet*); and, at the bottom, other non-resident workers (*Geven*) and their family members. But these are not neatly delineated categories. Non-resident workers and their families are less vulnerable to a real link defence where more than one family member (and especially the beneficiary) is connected to the Member State of work.<sup>126</sup> Consider *Landkreis Südliche Weinstraße*, which concerned a refusal to cover the cost of public transport to and from a German school, on the basis that the pupil resided outside the relevant *Land*.<sup>127</sup> Had a real link justification been attempted, the family could have pointed not only to the fact that his German mother was a mobile worker active in Germany, but also to the fact that the German pupil himself, while residing in France, spent every school day in Germany, which the CJEU has previously recognised as indicative of a real link.<sup>128</sup>

## **2.4. The family members of jobseekers**

Key for the rights of jobseekers is whether they have already worked in the host State. If that is the case, they retain worker status if they are 'in duly recorded involuntary unemployment after having been employed for more than one year and ha[ve] registered as a jobseeker with the relevant employment office'.<sup>129</sup> If they meet those conditions except that they became unemployed within the first year or after completing a fixed-term employment contract of less than a year, they retain worker status for no less than six months.<sup>130</sup> The rights of workers and their family members are as set out above.

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<sup>124</sup> In a judgment that admittedly preceded the application of the real link to mobile workers, the CJEU stated that 'dependent children of migrant workers *who are residing in [the State of work]* derive their right to a tide over allowance from Article 7(2) of Regulation No 1612/68 regardless of whether in that situation there is a real link with the geographic employment market concerned' (Judgment of 15 September 2005, *Ioannidis II*, C-258/04, EU:C:2005:559, paragraph 36, emphasis added).

<sup>125</sup> E.g. Judgment of 14 December 2016, *Bragança Linares Verruga*, C-238/15, EU:C:2016:949, paragraph 56.

<sup>126</sup> Cf. Judgment of 14 December 2016, *Bragança Linares Verruga*, C-238/15, EU:C:2016:949, where both parents worked in the State in question.

<sup>127</sup> Judgment of 2 April 2020, *Landkreis Südliche Weinstraße*, C-830/18, EU:C:2020:275.

<sup>128</sup> Judgment of 23 October 2007, *Morgan and Bucher*, C-11/06 and C-12/06, EU:C:2007:626, paragraph 45.

<sup>129</sup> Art. 7(3)(b) Directive 2004/38, which also applies to self-employed persons (Judgment of 20 December 2017, *Gusa*, C-442/16, EU:C:2017:1004). See also judgment of 11 April 2019, *Tarola*, C-483/17, EU:C:2019:309.

<sup>130</sup> Art. 7(3)(c) Directive 2004/38.

Other jobseekers ('first-time jobseekers') are considered as a specific type of economically inactive citizen. The conditions for their right to reside increase over three periods. During the first three months of their stay, they and their family members have a right to reside under art. 45 TFEU and art. 6 Directive 2004/38, discussed above. Even though, as soon as they register as a jobseeker, they *also* derive a right to reside from art. 14(4)(b) Directive 2004/38, the conditions laid down in that provision (i.e. evidence of work-seeking and of having a genuine chance of being engaged) do not apply initially: during the first three months, the right to reside of jobseekers and their family members is conditional only on possession of a valid identity document.<sup>131</sup>

After the first three months, first-time jobseekers and their family members enjoy a right to reside on the basis of art. 45 TFEU<sup>132</sup> and art. 14(4)(b) Directive 2004/38.<sup>133</sup> From the moment they register as jobseekers, the host State must grant them a reasonable period of time to familiarise themselves with 'potentially suitable employment opportunities and [to] take the necessary steps to obtain employment.'<sup>134</sup> During that time, the host State can require them to produce evidence that they are seeking work, but it cannot require them to show that they have a genuine chance of being hired. The Court considered that a period of six months from the date of registration was not insufficient, but did not set a precise minimum duration.<sup>135</sup>

The third and last period starts when the reasonable period of time comes to an end. The host State can then make the right to reside conditional upon evidence of job seeking and evidence that the jobseeker has a genuine chance of being engaged.<sup>136</sup>

In other words, the residence rights of first-time jobseekers and their family members are unconditional during the first three months; conditional upon seeking employment during a reasonable period after registration as jobseeker; and afterwards also conditional upon having a genuine chance of being engaged. Should jobseekers fail to meet one of those conditions, they and their family members might still be able to claim a right to reside *qua* (family member of a) self-sufficient EU citizen.<sup>137</sup>

In their capacity of persons 'residing on the basis of this Directive', jobseekers and their family members are in principle entitled to equal treatment on the basis of art. 24(1). However, art. 24(2) Directive 2004/38 entitles Member States to deny them 'social assistance' as long as they reside *qua* jobseekers.

Art. 7(2) Regulation 492/2011 entitles jobseekers to equal treatment only as regards access to employment, and not as regards social and tax advantages.<sup>138</sup> In *Collins*, *Ioannidis*, *Vatsouras* and *Prete*, the CJEU allowed jobseekers to rely on art. 45(2) TFEU as regards benefits of a financial nature intended to facilitate access to employment in the labour market, though the State in question can require the applicant to have a genuine link to its labour market.<sup>139</sup> The CJEU construed that category of benefits narrowly in *Alimanovic*: while the benefits at stake both ensured that basic needs are met and facilitated access to the labour market, their *predominant* function was to cover the

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<sup>131</sup> Judgment of 17 December 2020, *G. M. A. v État belge*, C-710/19, EU:C:2020:1037, paragraphs 34-36.

<sup>132</sup> Judgment of 26 February 1991, *Antonissen*, C-292/89, EU:C:1991:80.

<sup>133</sup> Judgment of 15 September 2015, *Alimanovic*, C-67/14, EU:C:2015:597, paragraphs 52, 56-58.

<sup>134</sup> Judgment of 17 December 2020, *G. M. A. v État belge*, C-710/19, EU:C:2020:1037, operative part.

<sup>135</sup> Judgment of 17 December 2020, *G. M. A. v État belge*, C-710/19, EU:C:2020:1037, paragraphs 40-42; see also Judgment of 26 February 1991, *Antonissen*, C-292/89, EU:C:1991:80, paragraph 21.

<sup>136</sup> On the manner of determining the existence of such a genuine chance, see Judgment of 17 December 2020, *G. M. A. v État belge*, C-710/19, EU:C:2020:1037, paragraph 47.

<sup>137</sup> Art. 7(1)(b), art. 7(1)(d) and art. 7(2) Directive 2004/38.

<sup>138</sup> Judgment of 18 June 1987, *Lebon*, 316/85, EU:C:1987:302, paragraph 26; Judgment of 23 March 2004, *Collins*, C-138/02, EU:C:2004:172, paragraph 31.

<sup>139</sup> Judgment of 23 March 2004, *Collins*, C-138/02, EU:C:2004:172; Judgment of 15 September 2005, *Ioannidis*, C-258/04, EU:C:2005:559; Judgment of 4 June 2009, *Vatsouras and Koupatantze*, C-22/08 and C-23/08, EU:C:2009:344; Judgment of 25 October 2012, *Prete*, C-367/11, EU:C:2012:668.

recipients' minimum subsistence costs, so as to enable them to lead a life in dignity.<sup>140</sup> Therefore, the CJEU qualified those benefits as social assistance rather than financial benefits facilitating the access to the labour market, and denied the claimants the right to equal treatment. It is clear that jobseekers' right to equal treatment based on art. 45(2) TFEU does not extend to their family members, as the 'predominant function' of benefits for family members is not to facilitate the jobseeker's access to the labour market.

In sum, in EU law the residence rights of first-time jobseekers and their family members are superior to those of other economically inactive EU citizens. Their equal treatment rights are limited as regards social benefits, all the more so for family members for whom *Collins* and *Vatsouras* seem meaningless.

## 2.5. The returning EU citizen and reverse discrimination

Directive 2004/38 can only be invoked against a Member State different from that of nationality.<sup>141</sup> However, in interpreting the free movement provisions the Court has held that an EU national returning to her own State after having exercised a free movement right is protected by the Treaty in the same way as if she was a EU mobile citizen (*Surinder Singh* doctrine).<sup>142</sup> The rationale behind this interpretation is that if the returning EU citizen could not bring her family back home with her, then her willingness to leave in the first place would be diminished. For this reason, she has the same right to be accompanied by her family members when returning home after having exercised her Treaty rights as those conferred by Directive 2004/38, which applies by analogy. Furthermore, much as is the case in relation to the provisions of Directive 2004/38, it is immaterial whether the relationship was formed in the host Member State or was already in place before the EU citizen left; and the immigration status of the spouse is irrelevant to the enjoyment of the family reunification rights under the Directive<sup>143</sup> and under the Treaty in the case of returning EU citizens.<sup>144</sup> This means that even if a Member State does not allow marriage to rectify the illegal immigration status of the spouse of its citizens, it is open to said citizens to move to another Member State and, after a certain time, return to their state of origin benefiting from the analogical application of Directive 2004/38<sup>145</sup> However, in the *O. and B.* ruling the Court clarified that it is not sufficient to briefly move to another Member State and then come back home to trigger the application by analogy of Directive 2004/38. Rather, returning citizens must have created or strengthened their family life during 'genuine' residence, which is to say that they must have resided in the host State pursuant to Articles 7 or 16 Directive 2004/38 (i.e. for three months or more, being either economically active, economically independent or permanently resident).<sup>146</sup> As we have seen in the abovementioned case of *Coman* the Court also applied this case law to the same sex spouse of a returning Romanian citizen, even though Romania did not recognize same sex marriages. The same reasoning applies also to the unmarried partner under Article 3(2) Directive 2004/38. In *Banger* the Court held that when a Union citizen returns to her home State after having exercised her residence rights in another Member State under the conditions provided by Directive 2004/38, then the home State must 'facilitate' the provision of authorisation for the unregistered partner and the safeguards in Article 3(2) (as interpreted by the Court) apply by analogy.<sup>147</sup> The reasons for moving are immaterial to the enjoyment of rights in EU free movement law.<sup>148</sup>

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<sup>140</sup> Judgment of 15 September 2015, *Alimanovic*, C-67/14, EU:C:2015:597, paragraphs 44-46.

<sup>141</sup> E.g. Judgment of 5 May 2011, *McCarthy*, C-434/09, EU:C:2011:277.

<sup>142</sup> Judgment of 7 July 1992, *Surinder Singh*, C-370/90, EU:C:1992:296.

<sup>143</sup> Judgment of 25 July 2002, *MRAX v Belgian State*, C-459/99, EU:C:2002:461; Judgment of 25 July 2008, *Metock*, C-127/08, EU:C:2008:449.

<sup>144</sup> Judgment of 12 March 2014, *O. and B.*, C-456/12, EU:C:2014:135.

<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid.*

<sup>147</sup> Judgment 12 July 2018. *Banger*, C-89/17, EU:C:2018:570.

<sup>148</sup> Judgment of 23 September 2003, *Akrich*, C-109/01, EU:C:2003:491.

Finally, in the case of frontier workers the Court has clarified that Article 45 TFEU is to be interpreted so as to confer on their family members a derived right to reside in the frontier worker's State of nationality if refusal to grant such a right would discourage the frontier worker from 'effectively exercising' her rights under Article 45 TFEU.<sup>149</sup>

It is necessary to briefly mention the phenomenon of reverse discrimination, i.e. the less favourable treatment of own nationals *vis-à-vis* EU mobile citizens. In particular, the rights to family reunification conferred by Union law to EU mobile citizens can be, depending on the Member State, more generous than those conferred by national law. In those instances, lacking another EU law connection (circular migration as described above or *Ruiz Zambrano* rights as described below) the situation is regulated exclusively by national law so that the static citizen may have fewer rights than the mobile EU citizen. At times, the right to equal treatment provided by domestic constitutional law might ensure that reverse discrimination is addressed. But lacking that and given that the Charter does not apply if there is no connecting factor to EU law, reverse discrimination might arise, in particular in relation to those whose spouse was irregularly present in the national territory before marriage; and same sex partners in those countries where same sex partnerships are not recognized. Furthermore, it should be remembered that EU law confers several procedural advantages, both in terms of direct effect, and in terms of the procedural protection in case of expulsion.<sup>150</sup> The advantages bestowed on the mobile Union citizen might therefore be very sizeable. It is also for this reason that in *Lounes* the Court clarified that a mobile Union citizen who has acquired the nationality of the host State is still protected under Article 21(1) TFEU applying conditions which must not be stricter than those provided for by Directive 2004/38.<sup>151</sup> The third country national spouse can in such a situation rely on EU law, rather than having to satisfy the more restrictive conditions imposed by domestic law.

## 2.6. Other family members

We have seen above that EU law distinguishes between two different types of family members and in so doing only very partially recognizes the varied forms that familial relationships (including those not based on blood) might take. This traditional approach is then reflected in the legislative framework so that only members of the family interpreted in a 'traditional' sense have automatic family reunification rights. To mitigate this, at least in part, Article 3(2) of Directive 2004/38 provides that Member States have a duty to facilitate entry in relation to any other family member who is a member of the household of the Union citizen or her dependant or when there are serious health conditions, as well as the unmarried partner in a duly attested durable relationship..

### 2.6.1. The duty to facilitate entry

Member States have a duty to facilitate the entry of 'other family members': the Court had the chance to explain what this duty entails in the *Rahman* case,<sup>152</sup> where the national court enquired, *inter alia*, whether the Member State had to enact a legislative instrument to facilitate entry and whether Article 3(2) was capable of having direct effect, i.e. being invoked directly in front of national courts. After having stressed the difference between protected family members, with their automatic rights, and 'other' family members, the Court explained that Article 3(2) imposes a duty on Member States to confer a special advantage to the latter in comparison with other migrants. This special advantage takes the form of a duty by the competent authority to carry out an *extensive* examination of the personal circumstances of the EU citizen and a duty to provide reasons for the denial. Furthermore, whereas the Member States are free to select the criteria to be taken into

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<sup>149</sup> Judgment of 12 March 2014, *S. and G.*, C-457/12, EU:C:2014:136. On circular migrants see Spaventa, E., 'Family rights for circular migrants and frontier workers: O and B, and S and G', *Common Market Law Review*, 52 (2015) 753.

<sup>150</sup> See e.g. Judgment of 10 September 2019, *Chenchooliah*, C-94/18, EU:C:2019:693.

<sup>151</sup> Judgment of 14 November 2017, *Lounes*, C-165/16, EU:C:2017:862.

<sup>152</sup> Judgment of 5 September 2012, *Rahman*, C-83/11, EU:C:2012:519.



account in determining dependency, they must be contained in legislation; they must be consistent with a normal reading of the term 'facilitate' and 'dependency'; and they may not deprive Article 3(2) of its effectiveness. Finally, applicants have also a EU law right to judicial review of the decision.<sup>153</sup> These procedural guarantees are very important in providing a more effective protection to the EU citizen and her family, curtailing the normally broad discretion of immigration authorities.<sup>154</sup>

### **2.6.2. Which rights for other family members?**

As we have seen above, protected family members fall within the personal scope of application of Directive 2004/38 so that they have the same rights as if they were Union citizens, including the right to work and the right to equal treatment. On the other hand, from a first reading of Directive 2004/38 it seems that other family members have fewer rights. As mentioned above, they hold procedural rights in relation to denial of entry,<sup>155</sup> and, once admitted to the host territory they also have the right to obtain a residence card (Article 10(2)(e) and (f) Directive 2004/38). It seems however that whether they are able to work and access welfare provision is entirely dependent on national law.<sup>156</sup> Here, and lacking any case law on this matter, two issues are worth mentioning. First, the 'other' family members fall within the scope of EU law if their entry has been facilitated pursuant to Article 3(2), so that the Charter of Fundamental Rights applies.<sup>157</sup> Second, it should be queried whether any potential denial of the right to work is compatible with the EU Treaty free movement provisions, especially in relation to a partner in a durable relationship duly attested. Here, it is clear that especially in those instances where the couple is prevented from legally marrying or entering in a partnership, or the latter is not recognized in the host state, denial of the right to work for the partner might act as a barrier to the right to move of the Union citizen.<sup>158</sup> Furthermore, the same reasoning might apply to access to welfare provision when denial of welfare to the partner would leave the Union citizen destitute, forcing her to leave the host Member State. It is also clear that, since the denial of rights to the other family member would be construed, in this interpretation, as a limitation to the right to free movement, it would be subject to justification, including the proportionality assessment. It is in this context that the strength of the familial link (stronger for instance for a partner or for a minor child who is not legally bound to the main right holder) could be relevant.

## **3. THE RIGHTS OF CHILDREN**

We have seen above that biological and adopted children of the mobile Union citizen, her spouse or registered partner (if the host State recognizes registered partnerships) are fully

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<sup>153</sup> See also Judgment of 26 March 2019, *SM*, C-129/18, EU:C:2019:448, discussed above in section 1.2.

<sup>154</sup> For a very interesting, if now partially out of date, review of national legislation and practice on Directive 2004/38 generally, including on Article 3(2), see Neergaard, U., Jacqueson, C., and Holst-Christensen, N., (eds), *Union Citizenship: Development, Impact and Challenges*, FIDE Report, 2014, Nic Shuibhne, N., and Shaw, J., General Rapporteurs, Copenhagen, 2014; on some idiosyncrasies between national (especially UK) practices and EU law see Shaw, J., and Miller, N., 'When legal worlds collide: an exploration of what happens when EU free movement law meets UK immigration law', *European Law Review*, 38, 2013, 137.

<sup>155</sup> See Judgment of 5 September 2012, *Rahman*, C-83/11, EU:C:2012:519; Judgment of 12 July 2018, *Banger*, C-89/17, EU:C:2018:570, where the Court clarified that Article 47 Charter and Article 31(1) Directive 2004/38 apply to these situations so that the right to judicial review include both legal and factual circumstances.

<sup>156</sup> For a more optimistic view, in terms of deriving some rights from Directive 2004/38 also for 'other' family members, see Guild, E., Peers, S., and Tomkin, J., *The EU Citizenship Directive*, Oxford, 2019, p. 82-86, although it is not altogether clear which rights they would derive.

<sup>157</sup> *Mutatis mutandis* see judgment of 12 July 2018, *Banger*, C-89/17, EU:C:2018:570, where the Court applied the Charter to denial of residence.

<sup>158</sup> The denial of the possibility to be accompanied by a non-registered partner was linked to the free movement rights of the main right holder in Judgment of 12 July 2018, *Banger*, C-89/17, EU:C:2018:570, where the Court accepted that Article 3(2)(b) applied by analogy, through Article 21 TFEU, to the partner of a returning migrant.

protected by Directive 2004/38. In this section we will look at the way the rights conferred by Union law apply specifically to the situation of children.

### **3.1. The rights of children and the best interest of the child**

Directive 2004/38 and EU law apply also to children. They might be primary right holders, when they themselves are mobile Union citizens; they might be protected as family members of a Union citizen; or they might also be protected as Union citizens through Article 20 TFEU, without the need for a migratory element. Furthermore, whenever EU law applies, the Charter of Fundamental Rights applies. Particularly relevant in this respect is Article 24 of the Charter, which provides for the rights of children, including the principle pursuant to which both public and private authorities must give primary consideration to the best interests of the child; and the children's right to maintain a personal relationship and contact with both parents, unless that is contrary to their interest.<sup>159</sup> Equally important is Article 14 of the Charter, which provides for the right to education. Whereas the latter has never found its way to a ruling of the Court, Article 24 has been instrumental in ensuring a purposive interpretation of EU law (generally and in the context of residence rights).<sup>160</sup> The best interests of the child also limit expulsion powers.<sup>161</sup>

### **3.2. Right to education**

We have mentioned before that family members, including children, of EU mobile citizens enjoy a general right to equal treatment by virtue of Article 24 Directive 2004/38. In the case of children of workers and self-employed persons, this right to equal treatment also includes the right to access maintenance aid for studying, including for vocational training. Other children can be refused such aid unless and until they acquire the right of permanent residence.<sup>162</sup> After five years of lawful residence pursuant to Directive 2004/38, children can also become 'permanent resident' and access the above mentioned benefits regardless of whether their parents are economically active or not.

Beside the general right to equal treatment, there are more specific provisions contained in Article 10 Regulation 492/2011 (previously Article 12 Regulation 1612/68) and in Article 12(3) Directive 2004/38. Article 12 of Regulation 1612/68 of the Council must be interpreted as meaning that it refers to any form of education, including university courses.<sup>163</sup>

Article 10 Regulation 492/2011 therefore provides that workers' children have a right to access general education (including university courses), apprenticeships and vocational training under the same conditions as nationals of the host Member State<sup>164</sup>, provided the child resides in the Member State where the worker works<sup>165</sup>. It also extends to scholarships and grants to study abroad,<sup>166</sup> which cannot be made conditional upon a residence requirement since the equal treatment derives from the parent's status as a EU mobile worker, and not from their residence in the host territory.

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<sup>159</sup> Article 24 Charter is based on the UN Convention on the Rights of the Child, especially Articles 3, 9, 12 and 13.

<sup>160</sup> In the context of Directive 2004/38 see e.g. Judgment of 26 March 2019, *SM*, C-129/18, EU:C:2019:448 discussed above; in the context of Article 20 TFEU see e.g. Judgment of 13 September 2016, *Rendón Marín*, C-165/14, EU:C:2016:675 and generally the *Ruiz-Zambrano* case law.

<sup>161</sup> Article 28(3)(b) Directive 2004/38, discussed above, section 2.1.2.d.

<sup>162</sup> Art. 24(2) Directive 2004/38; Judgment of 18 November 2008, *Förster*, C-158/07, EU:C:2008:630.

<sup>163</sup> Judgment of 15 March 1989, *Echternach and Moritz*, 389/87, EU:C:1989:130.

<sup>164</sup> Judgment of 13 February 1985, *Gravier*, 293/83, EU:C:1985:69; Judgment of 15 March 1989, *Echternach and Moritz*, 389/87, EU:C:1989:130.

<sup>165</sup> Judgment of 27 September 1988. *Belgian State v René Humbel and Marie-Thérèse Edel*, 263/86, EU:C:1988:451

<sup>166</sup> Judgment of 13 November 1990, *Di Leo*, 308/89, EU:C:1990:400; Judgment of 14 June 2012, *Commission v the Netherlands (study finance)*, C-542/09, EU:C:2012:346.

Article 10 Regulation 492/2011 has been instrumental in granting a right to reside to children of mobile workers independent from the main right-holder's continued presence in the host territory. In particular, when a worker's child has started education in the host State, she has a right to continue residing there until she finishes her education even if her worker parent has left the host country or has lost worker status. Furthermore, as we shall see below, in order to ensure the full effectiveness of this right, the child's primary carer also gains a derivative right to reside in the host State regardless of nationality. Pursuant to the case law of the Court, Article 10 Regulation 492/2011 is unconditional, i.e. neither the child nor her primary carer must satisfy any condition beside schooling; there is no need to prove sufficient resources, comprehensive health insurance or economic activity.<sup>167</sup> In order to gain residency rights, it does not matter whether the child only started her education after her worker parent has already left the host country.<sup>168</sup> However, residence gained for the purposes of education through Article 10 Regulation 492/2011, which does not satisfy the conditions of Directive 2004/38, does not count towards the five year period for permanent residence.<sup>169</sup> The Grand Chamber recently ruled that residence based on Article 10 Regulation 492/2011 entitles the children in education and their primary carers to equal treatment as regards social advantages, including social assistance, even if the parents have lost the status of mobile worker and are seeking work.<sup>170</sup> The derogation from equal treatment laid down in Article 24(2) Directive 2004/38 does not apply to them.

The Court has refused an analogical interpretation of Article 10 to other EU mobile citizens, so that it does not apply to self-employed or economically inactive citizens.<sup>171</sup> However, Article 12(3) Directive 2004/38, so far not interpreted by the Court, bestows similar rights also to the children of self-employed and economically inactive Union citizens. In particular, it provides that the death or departure of the Union citizen does not entail the loss of residence rights of the children who are enrolled in an educational establishment and of their carers, if the children reside in the host State and until the completion of their studies. The relationship between Article 10 Regulation 492/2011 and Article 12(3) Directive 2004/38 is not altogether clear. In particular, whereas the latter applies also to children who have yet to start their education, Article 12(3) seems to apply only to those who are already enrolled in education at the time of the death or departure of the main right holder. Furthermore, Article 10 also applies when the worker has not left, whereas Article 12(3) only applies when the Union citizen has died or left the country. So, if the worker lost her status and residence rights under Directive 2004/38, but remained in the country, her children are protected by Article 10 Regulation 492/2011, but if the same happened to a self-employed person, her children would not be equally guaranteed residency. And yet, it is difficult to support this interpretation having regard to both Article 14 (right to education) and Article 24 (best interest of the child) of the Charter.

Finally, a brief mention should be made of Directive 77/486 on the education of children of mobile workers.<sup>172</sup> It provides that Member State must ensure free tuition to facilitate reception of workers' and former workers' children of mandatory school age resident in their territory, including language tuition. Furthermore, Member States must also promote the teaching of the culture and mother tongue of said children. However, it is not clear

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<sup>167</sup> Judgment of 23 February 2010, *Ibrahim*, C-310/08, EU:C:2010:80; Judgment of 23 February 2010, *Teixeira*, C-480/08, EU:C:2010:83.

<sup>168</sup> Judgment of 23 February 2010, *Teixeira*, C-480/08, EU:C:2010:83.

<sup>169</sup> Judgment of 8 May 2013, *Alarape*, C-529/11, EU:C:2013:290.

<sup>170</sup> Judgment of 6 October 2020, *Jobcentre Krefeld*, C-181/19, EU:C:2020:794.

<sup>171</sup> Judgment of 6 September 2012, *Czop and Punakova*, C-147/11 and C-148/11, EU:C:2012:538.

<sup>172</sup> Directive 77/486 on the education of children of migrant workers, OJ 1977 L 199/32; there is very scant reference in the literature to Directive 77/486, with the exception of Cullen, H., 'From Migrants to Citizens? European Community Policy on Intercultural Education', *International and Comparative Law Quarterly*, 45, 1996, see also Arzoz, X., 'Accommodating linguistic difference: five normative models of language rights', *European Constitutional Law Review*, 6, 2010, who only discusses it briefly. As for the institutions, see European Parliament Report of the Education of Children of Migrant Workers, Doc 1-329/81 PE 73.415/fin, June 1981; and Report on the implementation in the Member States of Directive 77/486/EEC on the education of the children of migrant workers, COM(88)787final, both referred to by H. Cullen.



how far these obligations stretch since the Directive also refers to national circumstances and legal systems; and there is no case law on the Directive.

### 3.2.1. The derived rights of carers

As mentioned above, the right to education bestowed on workers' children also entails an unconditional right to reside in the host State for the (other) parent/carer. The reason for this is that children's rights cannot be enjoyed independently from an adult; furthermore the Court has given a generous interpretation to this right, extending it also to the parent/carer of a child in university education,<sup>173</sup> provided the adult child continues to require the presence and care of the parent/carer. The derived right to reside of parents/carers is of paramount importance to ensure not only the possibility for the child to actually exercise her Article 10 rights, but also to ensure that she is able to maintain meaningful contact with her parents. For instance in *Baumbast and R*,<sup>174</sup> the parents had divorced, so that the former spouse of the EU worker no longer enjoyed the right to reside in the host Member State (the case predated Directive 2004/38). The couple's children were in education, lived with their American mother and had regular contact with their father. When Mrs R was refused leave to remain, the Court clarified that the right to education of her children also bestowed upon her a right to remain in the United Kingdom. In *NA*,<sup>175</sup> the right to education of the child of a victim of domestic violence was instrumental in securing the mother's right to stay after the father had returned to his home State before commencement of divorce proceedings. Article 10 Regulation 492/2011 has therefore proven instrumental also in ensuring the continued rights of primary carers (usually women). Article 12(3) Directive 2004/38 directly bestows a right to reside to the carer of a child in education once the main right holder has died or has left the country, so codifying the case law although, as mentioned above, the respective scope of application of Article 10 vis-à-vis Article 12(3) is still unclear.

### 3.3. Right to reside of EU mobile children

Children might be EU citizens and as such have a potential right to reside in other Member States. Yet, they cannot independently exercise that right, not only because if young in age they need to be cared for, but also because below a certain age it is legally impossible (bar some very limited exceptions) for them to directly exercise an economic activity or, if young in age, to have access to own sufficient resources to satisfy the criterion of economic independence.

It is for this reason that the Court has developed a body of law to ensure that children's free movement rights could be guaranteed when the carer/parent of the child is not a Union citizen and therefore might not have an autonomous right to reside in the host State. In order to make the child's right to reside possible, the sufficient resources required by Article 7(1)(b) Directive 2004/38 can be provided by a third party (usually the parent/carer).<sup>176</sup> Some questions arise, however, when the parent is unable to work due to the lack of a work visa and does not have other resources to draw on. *Alokpa* related to young children of French nationality who had been born in Luxembourg and had always resided there.<sup>177</sup> Their mother, a third country national, was unable to work since, even though she had a job offer, she lacked the requisite work permit. And, being unable to work, Ms Alokpa was unable to provide resources sufficient for the purposes of establishing lawful residency of her children pursuant to Article 7(1)(b) Directive 2004/38. The Advocate General, the Commission and the German Government agreed that the condition of sufficient resources could be satisfied by the 'definitive prospect of sufficient resources'

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<sup>173</sup> Judgment of 8 May 2013, *Alarape*, C-529/11, EU:C:2013:290.

<sup>174</sup> Judgment of 17 September 2002, *Baumbast and R.*, C-413/99, EU:C:2002:493.

<sup>175</sup> Judgment of 30 June 2016, *NA*, C-115/15, EU:C:2016:487.

<sup>176</sup> Judgment of 19 October 2004, *Zhu and Chen*, C-200/02, EU:C:2004:639. Judgment of 16 July 2015, *Kuldip Singh*, C-218/14, EU:C:2015:476.

<sup>177</sup> Judgment of 10 October 2013, *Alokpa*, C-86/12, EU:C:2013:645.

arising from a job offer. “A different interpretation”, argued AG Mengozzi, “would deprive the freedom of movement enjoyed by citizens of the Union of its practical effect, whereas the objective of Directive 2004/38 is precisely to strengthen the right to freedom of movement”.<sup>178</sup> However, the Court decided that derivative rights to reside could not be established in the host State if the children lacked sufficient resources.

In a subsequent case, *Bajratari*,<sup>179</sup> the issue related to Irish children in Northern Ireland, whose only resources came from the irregular work of their Albanian father. The Court held that the Directive does not indicate the source of the sufficient resources; and that the sufficient resources requirement served to ensure that economically inactive citizens would not become unreasonable burdens. It was open to the host State to check that that was not the case, but whether the resources were obtained through regular or irregular work was irrelevant.

### 3.3.1. The derived right to reside of carers of EU children

We have seen above that children have an independent right to reside in the host State provided they have at their disposal sufficient resources so as not to become an unreasonable burden on the host State.<sup>180</sup> This right could not be exercised unless the child’s carer/parent was also allowed to remain with them, and for this reason the carer/parent also gains a right to reside. However, this right to reside is purely instrumental: in other words, the carer/parent is not a ‘family member’ for the purposes of Article 2(2) since in order to be protected the parents of the Union citizen must be dependent on the Union citizen, and not vice versa. As we have seen in *Alokpa* this has important consequences because the third country national parent/carer does not gain a right to work and a right to equal treatment pursuant to Directive 2004/38. Furthermore whereas the periods of residence of the child pursuant to Directive 2004/38 are counted towards the right to permanent residence, that is arguably not the case for her parents/carers (with the exception possibly of when the parent/carer themselves satisfy the conditions provided for in Directive 2004/38),<sup>181</sup> whose right to reside as a matter of Union law will end once they are no longer needed by their children, although it should be remembered that parents/carers might be also protected by national law, including by national and international human rights law.

The derived right to reside of carers through the children’s right to reside can be distinguished from that provided for children in education. In the former case, the children themselves are exercising their right to reside, which means that they must have sufficient resources and (theoretically) comprehensive health insurance,<sup>182</sup> and their residence could

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<sup>178</sup> See Opinion of AG Mengozzi of 21 March 2013, *Alokpa*, C-86/12, EU:C:2013:197, para 28.

<sup>179</sup> Judgment of 2 October 2019, *Bajratari*, C-93/18, EU:C:2019:809

<sup>180</sup> We have seen in section 3.2 that former workers’ children and their carers derive a right to reside which is unconditional provided the child is in education.

<sup>181</sup> See in relation to the (stronger) rights of parents of workers’ children in education, Judgment of 8 May 2013, *Alarape*, C-529/11, EU:C:2013:290, operative part ‘The parent of a child who has attained the age of majority and who has obtained access to education on the basis of Article 12 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community as amended by Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, may continue to have a derived right of residence under that article if that child remains in need of the presence and care of that parent in order to be able to continue and to complete his or her education, which it is for the referring court to assess, taking into account all the circumstances of the case before it. 2.Periods of residence in a host Member State which are completed by family members of a Union citizen who are not nationals of a Member State solely on the basis of Article 12 of Regulation No 1612/68, as amended by Directive 2004/38, where the conditions laid down for entitlement to a right of residence under that directive are not satisfied, may not be taken into consideration for the purposes of acquisition by those family members of a right of permanent residence under that directive.’; see also Judgment of 23 February 2010, *Teixeira*, C-480/08, EU:C:2010:83, para 87.

<sup>182</sup> There is no case as yet as to whether the comprehensive health insurance requirement is a proportionate limitation to the right to reside. The *Dano* case, but also the *Förster* and the *Alimanovic* cases, seem to indicate an absolute presumption of compatibility between Directive and Treaty provisions (Judgment of 11 November 2014, *Dano*, C-333/13, EU:C:2014:2358; Judgment of 18 November 2008, *Förster*, C-158/07,

be terminated should they cease to meet those conditions (following the *Dano* ruling it is not clear whether termination would be subject to a proportionality assessment and compliance with Charter rights).<sup>183</sup> On the other hand, the right to continue in education is not conditional upon demonstrating sufficient resources and comprehensive health insurance, but only on demonstrating that the parent who has left the host State or died was lawfully resident in the host State for the purposes of the Directive.

### 3.4. The rights of static Union citizens children and their carers

As mentioned above, Directive 2004/38 does not apply to claims against the Union citizens' Member State of origin; furthermore Article 21 TFEU only applies to Union citizens who intend to exercise, are exercising or are returning from having exercised their free movement rights. The static citizen is therefore mostly excluded from the protection of EU free movement law, including from the protection of the EU family reunification regime. This said, the Court has held that Article 20 TFEU, which establishes Union citizenship, grants some rights to static Union citizens. In particular, and beside the constraints it imposes on the lawful withdrawal of Member State citizenship,<sup>184</sup> it imposes limits on the extent to which Member States might expel a family member of their own citizens if to do so risks forcing the Union citizen to leave the EU territory, thus depriving her of the 'genuine enjoyment of the substance of the rights conferred by virtue of their [EU citizenship] status'.<sup>185</sup> This so-called *Ruiz-Zambrano* case law applies when there is a situation of 'dependency' between the EU citizen and the family member. In *K.A.*, the Court clarified that the assessment of dependency is different in relation to adults and children.<sup>186</sup> If the Union citizen is a child, dependency is presumed if the third country national is the sole carer of the child. On the other hand, in relation to other parents/carers, it must be established that the child is dependent on the third country national carer.<sup>187</sup> This is to be done having regard also to the best interest of the child, so that the fact that the child could continue to reside in her Member State with the other parent is not enough to exclude a relationship of dependency between the child and the third country national parent. Furthermore, the fact that the parent has criminal convictions is not enough to exclude the applicability of Article 20 TFEU.<sup>188</sup>

In the case of relationships between adults, on the other hand, dependency for the purposes of establishing a derived right to reside through Article 20 TFEU 'is conceivable only in exceptional cases, where, having regard to all the relevant circumstances, there could be no form of separation of the individual concerned from the member of his family on whom he is dependent'.<sup>189</sup> To this end, mere financial dependency is not enough. In the more recent case of *RH*,<sup>190</sup> the Court also clarified that if the relationship of dependency has been demonstrated then the Member State is prevented from refusing the right to reside to the family member based only on the lack of sufficient resources. The *Ruiz-*

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EU:C:2008:630; Judgment of 15 September 2015, *Alimanovic*, C-67/14, EU:C:2015:597). The *Bajratari* case however reintroduces a proportionality assessment but only in relation to the exclusion of some resources from those that are relevant for the purposes of Article 7(1)(b) Directive 2004/38. The issue should be clarified in the pending Case C-535/19 *A v Latvijas Republikas Veselības ministrija*. In relation to permanent residence see also pending case C-247/20 *VI v Commissioners for Her Majesty's Revenue and Customs*.

<sup>183</sup> Judgment of 11 November 2014, *Dano*, C-333/13, EU:C:2014:2358. In this case the applicability of the Charter was explicitly excluded because the conditions involved were not based on EU law.

<sup>184</sup> Judgment of 2 March 2010, *Rottmann*, C-135/08, EU:C:2010:104; Judgment of 12 March 2019, *Tjebbes and Others*, C-221/17, EU:C:2019:189.

<sup>185</sup> Judgment of 8 March 2011, *Ruiz Zambrano*, C-34/09, EU:C:2011:124, paragraph 42; Judgment of 6 December 2012, *O and S*, C-356 and 357/11, EU:C:2012:776, paragraph 45; Judgment of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354, paragraph 61.

<sup>186</sup> Judgment of 8 May 2018, *K.A.*, C-82/16, EU:C:2018:308.

<sup>187</sup> See also Judgment of 6 December 2012, *O and S*, C-356 and 357/11, EU:C:2012:776.

<sup>188</sup> Judgment of 13 September 2016, *CS*, C-304/14, EU:C:2016:674; Judgment of 13 September 2016, *Rendón Marín*, C-165/14, EU:C:2016:675.

<sup>189</sup> Judgment of 8 May 2018, *K.A.*, C-82/16, EU:C:2018:308, paragraph 65; see generally Hylten-Cavallius, K., 'Who cares? Caregivers' derived residence rights from children in EU free movement law', *Common Market Law Review*, 57, 2020.

<sup>190</sup> Judgment of 27 February 2020, *RH*, C-836/18, EU:C:2020:119.

*Zambrano* case law also gives rise to a right to a work permit when this is instrumental to the possibility of the Union citizen being able to stay within the territory of the EU.<sup>191</sup>

#### 4. CRITICAL REMARKS

In the previous sections we have given an outline of the personal and material scope of the family reunification provisions applicable to Union citizens generally and, where appropriate, mobile workers more specifically. In this section we will highlight some remaining problems in the current EU legal framework; all in all, even though family reunification rules for Union citizens are comparatively generous, they are still based on a rather traditional family model.<sup>192</sup> In this section we will focus on those family members that might find themselves in a more vulnerable situation, leaving aside the problems stemming from the economic dimension of Union free movement law, which inherently penalize caregivers within the family context, whose unpaid work does not fall within the scope of primary protection.

##### 4.1. Non-Spousal relationships

Directive 2004/38 is premised on a formalistic notion of family which fails to take into account the changing customs across many of the Member States. Eurostat reported in 2018, with data up to 2016, that 43% of births across the EU are outside of marriage—a steadily growing trend since 2000.<sup>193</sup> As may be expected there are huge regional variations, which reflect cultural and societal norms. And yet, having regard to those statistics,<sup>194</sup> which do not take into account childless non-spousal relationship, it is apparent how Directive 2004/38 fails to protect a potentially significant part of the population. In particular, and as has been detailed above, partners of mobile Union citizens who are neither married nor registered partners (where applicable) have only a right for their entry and residence to be *facilitated*. The Directive does not expressly provide for a continued right to reside after the death or departure of the main right holder, or after the breakdown of the relationship. They are also not (explicitly) protected in case of domestic violence, in which case they remain entirely dependent on the mobile Union citizen, a situation which the Directive sought to avoid in relation to spouses and registered partners in order to reduce existing power imbalances within family units. Furthermore, this lack of (explicit) protection affects third country nationals as well as economically inactive Union citizens. In this way, for instance, the EU citizen non married (and where applicable non registered) partner of an EU mobile citizen who follows her partner but who cannot or does not want to work, possibly because of child caring responsibilities, would be entirely devoid of protection in EU law unless she/he is wealthy enough to purchase comprehensive health insurance or she/he is able to derive the right to reside from her/his children.

It is also unclear whether the non-registered partner would qualify for the right to permanent residence since they do not have a 'right to reside' pursuant to Article 7 Directive 2004/38.

This said, if national law recognizes special rights or privileges for non-registered partners then, following the earlier ruling in *Reed*, those have to be extended, at least, to the partner of the EU worker,<sup>195</sup> since they are considered social advantages for the purposes of Article 7(2) Regulation 492/2011. And, arguably, such equal treatment would have to be extended

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<sup>191</sup> Judgment of 8 March 2011, *Ruiz Zambrano*, C-34/09, EU:C:2011:124.

<sup>192</sup> For a more positive assessment of the developments of the case law, see Strumia, F., 'The Family in EU Law After the SM Ruling: Variable Geometry and Conditional Deference', *European Papers*, 4, 2019, 389. The perpetuation of a traditional family model is further compounded by the lack of recognition, in free movement law, for the work performed by care givers free of charge.

<sup>193</sup> See <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20180809-1>.

<sup>194</sup> For more recent statistics that have yet to be compounded for the EU as a whole, see [http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=demo\\_frate&lang=en](http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=demo_frate&lang=en).

<sup>195</sup> See Judgment of 17 April 1986, *Reed*, 59/85, EU:C:1986:157.

to any citizen lawfully resident pursuant to Directive 2004/38 by virtue of the general non-discrimination right contained in Article 24(1) of the same Directive.

## 4.2. Divorced and separated partners

Directive 2004/38 sought to address the issue of divorced spouses to avoid the situation in which the EU citizen might leverage the derivative rights of his spouse to ensure that she would not divorce him when that would entail the loss of residence rights not only in the host Member State but in the EU as a whole. Moreover, there were concerns that victims of domestic violence would be locked into a violent relationship for fear of losing residence rights.<sup>196</sup> For this reason, as we have seen above, Directive 2004/38 provides for the continued right to reside for divorced persons, provided, in the case of third country national spouses, that the marriage has lasted at least 3 years of which one in the host Member State (the same regime applies for annulment and termination of registered partnership).

Whereas the inclusion of divorced persons in the personal scope of the Directive is naturally to be welcomed, the Court has given a narrow interpretation of the continued right to reside affecting, especially in cases of domestic violence, the additional protection provided by the Directive. In particular, in *Kuldip Singh*,<sup>197</sup> the Court held that the third country national spouse is protected only insofar as divorce proceedings are commenced when the EU national right-holder is still in the host territory. This choice has real consequences: it means that a spouse can leave (or threaten to leave) the host State, and in doing so deprive her or his partner of the protection that would have been otherwise afforded by the Directive. In those cases, the divorced partner would only have a right to reside to the extent to which this can be derived from the couple's children.

The matter is different for separated spouses or registered partners, who benefit from the Court's formalistic interpretation. In particular, and consistently with *Diatta* and *Surinder Singh*,<sup>198</sup> as long as the couple has not legally dissolved the marriage or registered partnership, the spouse or partner continues to have the derivative right to reside in the host State. This is the case even if the couple is no longer cohabiting, and if they have entered into a new relationship.<sup>199</sup>

## 4.3. Domestic violence

Article 13(2)(c) Directive 2004/38 also provides for continued residence rights where this is warranted by 'particularly difficult circumstances' such as domestic violence. However, in the *NA* case, the Court of Justice considered the right to retain residence, in line with the above-mentioned *Kuldip Singh* ruling.<sup>200</sup> In *NA*, a Pakistani woman had been the victim of domestic violence at the hand of her German husband whilst they lived together in the UK; the husband then returned to Germany and divorced her under Islamic law. Ms NA subsequently divorced her husband under British law, but when she applied for a retained right to reside she was denied it on the grounds that her former husband was no longer exercising Treaty rights in the UK. The Court of Justice held that the solution reached by the Secretary of State was correct: Article 13(2)(c), and Article 13 in general, is a derogation from the regime provided by the Directive insofar as it confers a right to reside to third country nationals only if they are family members of Union citizens. The Court inferred from the fact that Article 12 of the Directive only confers a continued right to

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<sup>196</sup> See the explanations to the Commission's proposed draft, COM(2001)257final.

<sup>197</sup> Judgment of 16 July 2015, *Kuldip Singh*, C-218/14 EU:C:2015:476.

<sup>198</sup> Judgment of 13 February 1985, *Diatta*, 267/83, EU:C:1985:67; Judgment of 7 July 1992, *Surinder Singh*, C-370/90, EU:C:1992:296.

<sup>199</sup> Judgment of 10 July 2014, *Ogieriakhi*, C-244/13, EU:C:2014:2068. The spouse or partner of an EU citizen who has left the host State gains procedural rights from the Directive (Judgment of 10 September 2019, *Chenchooliah*, C-94/18, EU:C:2019:693).

<sup>200</sup> Judgment of 30 June 2016, *NA*, C-115/15, EU:C:2016:487.



reside to the third country national in the event of death of the main right holder and not in the event of his departure, that the 'protection' provided in Article 13(2)(c) is only available insofar as the perpetrator of violence has not left the country before the commencement of divorce proceedings. Whereas Ms NA was able to derive her right to reside in the UK from her children, the case makes uncomfortable reading showing a clear lack of understanding by the Court of the dynamics of domestic violence<sup>201</sup> so that victims are only protected to the extent to which they manage to institute divorce proceedings before their abuser leaves the country, which is no easy task.<sup>202</sup> In the NA case, for instance, the violent husband left the family home following an attack on his wife in October and left the UK in December of the same year. If the NA ruling were to be confirmed, the additional protection provided in Article 13(2)(c) would be greatly reduced for victims of domestic violence.

A recent preliminary ruling request from a Belgian court has also enquired more broadly as to the compatibility of Article 13(2) with the non-discrimination provisions insofar as it requires victims of domestic violence to satisfy the requirements of work or economic independence, compared to Article 15(3) of the Family Reunification Directive<sup>203</sup> which provides that Member States must lay down provisions for autonomous residence permits in particularly difficult circumstances without providing for conditions. Whereas the comparability of the two provisions is not obvious (Directive 2004/38 also provides for unconditionality after five years), the case raises the interesting point as to the effective protection of victims of domestic violence, especially in those cases where they are unable to work either because of personal circumstances or because of market conditions.<sup>204</sup>

#### **4.4. Children in care**

As we have seen children are potential right-holders in EU law: they can have autonomous rights to reside if they are EU nationals and have sufficient resources (and comprehensive health insurance); they have an unconditional right to remain if they are in education and are children of workers even once the worker has left the host State or ceased to be a worker; and they have a right not to be forced out of the EU territory through the expulsion of their third country national parent. However, there is no provision in EU law for the situation of EU national children who, for whatever reason, have been taken into the care system in the host State. Here, the problem arises once the child leaves the care system (usually at the age of majority) since her periods of stay in the care system would not qualify as residence pursuant to Directive 2004/38, and she might not have any residence rights through her parents (for instance if the parents are in custody, or economically inactive without being self-sufficient). Moreover, the right to education through the provisions of Regulation 492/2011 or Directive 2004/38 only applies to the extent to which at least one of the parents has or had a right to reside through work, self-employment, or self-sufficiency, or had already gained the right to permanent residence. This situation therefore leaves a significant gap in protection for vulnerable young adults once they are no longer part of the care system, so that, regardless of the time spent in the host State, they are not protected by EU law unless they are economically active or independent.

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<sup>201</sup> To this effect, and in a different context, see also Judgment of 17 October 2018, *UD v XB*, C-393/18 PPU, EU:C:2018:835, alongside the Opinion of AG Saugmandsgaard Øe in that case.

<sup>202</sup> To this end, see also AG Wathelet in the Opinion of 14 April 2016, *NA*, C-115/15, EU:C:2016:259 who suggested a different interpretation so that, in cases of domestic violence it would be irrelevant whether the perpetrator of the domestic violence was still resident in the host State. The scholarship has also been critical of the Court's approach; see e.g. C. Briddick 'Combatting or enabling domestic violence? Evaluating the residence rights of migrant victims of domestic violence in Europe' (2020) *ICLQ* 1013; H. Oosterom-Staples 'Residence rights for caring parents who are also victims of domestic violence', (2017) *EJML* 396.

<sup>203</sup> Directive 2003/86 of 22 September 2003 on the right to family reunification OJ 2003, L 251, p. 12.

<sup>204</sup> Case C-930/19 *X v Belgium*, case pending at the time of writing.

## 4.5. Children of same sex couples

As mentioned above, there is no uniformity of treatment in relation to same sex couples across the EU: this can raise barriers to free movement not only in relation to partners when they are either unregistered or the host State does not recognise registered partnerships (after *Coman* same sex spouses are covered by Article 2(2)(a) Directive 2004/38) but also in relation to children, when the child is not biologically or legally related to the main right holder. For instance the child might have been adopted by the same sex couple, but the host State does not recognize same sex, or single parent, adoptions; or, the child is the biological or adopted child of the partner, and the family moves into a Member State where partnerships are not recognized. Pending case law<sup>205</sup> might shed light on the free movement rights of an EU child with two same sex married parents.

### 4.5.1. The adoptive relationship

Many Member States do not recognize the joint adoption of same sex couples, or the second parent adoption, so that they would not grant a right to the non-biological (same sex) partner to adopt the child.<sup>206</sup> Whereas there is no case law on this issue, some guidance might be inferred from the principles established by the Court in other instances. In particular, in the *SM* case<sup>207</sup> the Court clarified that the notion of direct descendant in Article 2(2)(c) Directive 2004/38 must be given an 'independent and uniform' interpretation throughout the EU, and that it entails a parent-child relationship, whether biological or legal. The concept of a 'direct descendant' of a citizen of the EU must consequently be understood as including both the biological and the adopted child of such a citizen, since it is established that adoption creates a legal parent-child relationship between the child and the citizen of the EU concerned.

In the *Coman* case the Court held that, for the purpose of granting a derived right to reside, Member States, even when they do not provide for same sex marriage within their territory, must recognize the same sex marriage validly contracted in another Member State. For this reason, and having also regard to the best interest of the child as provided for in the Charter, there should be little doubt that the adopted child of same sex couples would derive residence rights pursuant to Directive 2004/38.

The rulings in *Coman* and *SM* also leave unanswered another related question, i.e. whether the same reasoning would apply to adoptions occurring outside the EU.

### 4.5.2. Biological/adoptive child of the registered/long-term partner

A slightly more difficult situation arises in relation to cases in which, because of legal or other constraints, the child is legally or biologically related only to the third country national registered partner, and the couple is moving to a place where partnerships are not recognized. As we have seen above, for the purpose of residence rights, the children of the spouse and registered partner, if the registered partnership is recognized in the host Member State, are covered by Directive 2004/38.

On the other hand, and as pointed above, there is no provision for the children of the partner with whom the Union citizen has a registered partnership and the latter is not

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<sup>205</sup> See pending reference in Case C-490/20 *V.M.A. v Stolichna Obsthina, Rayon 'Pancharevo'*

<sup>206</sup> For comparative data, see [https://www.ilga-europe.org/sites/default/files/Attachments/index\\_2018\\_small.pdf](https://www.ilga-europe.org/sites/default/files/Attachments/index_2018_small.pdf); European Parliament Briefing, The Rights of LGBTI People in the European Union (May 2019), [https://www.europarl.europa.eu/ReqData/etudes/BRIE/2019/637950/EPRS\\_BRI\(2019\)637950\\_EN.pdf](https://www.europarl.europa.eu/ReqData/etudes/BRIE/2019/637950/EPRS_BRI(2019)637950_EN.pdf).

<sup>207</sup> Judgment of 26 March 2019, *SM*, C-129/18, EU:C:2019:248.

recognised in the host State, or in the case the couple is in a durable relationship but the partnership is unregistered. In this case, if the child does not have a legal relationship with the Union citizen, she would not be covered by the notion of direct descendant in article 2(2)(c). However, also having regard to the best interest of the child, it could be argued that a child in such a situation could fall within the scope of Article 3(2)(a) as a dependant or member of the household of the Union citizen.





## CONCLUSIONS

This report considered the rights of family members of Union mobile citizens generally, and workers more particularly. It is clear that EU law offers significant protection, although at the present stage of development of the case law there are also some areas in which protection could be improved. Firstly, it should always be remembered that the rights of family members are derivative, meaning that, with some exceptions, they would be lost if the Union citizen no longer satisfies the conditions provided for in Directive 2004/38 or indeed leaves the host State. In a world where labour relationships are changing, with higher job insecurity and increasingly atypical employment relationships, this might place (especially third-country) family members in a vulnerable situation. Secondly, Directive 2004/38 is the result of a political compromise and as such fails to recognize changing family structures, which are not necessarily based upon marriage. Furthermore, Directive 2004/38 has only partially addressed the problem of discrimination of mobile Union citizens who are in a same sex relationship whose right to family life remains too dependent on whether the host country recognizes registered partnerships as equivalent to marriage. This framework might also result in lesser protection for the children of those couples. Thirdly, some developments in the case law seem to threaten the heightened protection Directive 2004/38 provides for divorced spouses and victims of domestic violence and it is to be hoped that, especially in cases of domestic violence, the Court will reconsider its own case law.

Despite these lacunae, the EU on the whole protects the family members of EU mobile citizens effectively and to a high standard, which in certain cases well exceeds the standard provided by national law. It recognizes children as potential right holders, in relation to both education and residence. The Court's purposive interpretation has ensured that those children's rights could be enjoyed in practice, granting a derivative residence right to their parent or carer if that is instrumental to the child's enjoyment of her rights.

## Annex1: Summaries of relevant case law on the rights of family members of EU citizens (in chronological order)

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**1. JUDGMENT OF 11 APRIL 1973, MICHEL S., C-76/72, EU:C:1973:46**

Michel S. was the disabled son of an Italian worker in Belgium who was refused disability-related benefits because he had not established his residence in Belgium before the incapacity was first diagnosed. According to the CJEU the 'social advantages' referred to by Article 7 of Regulation 1612/68 include measures provided by national legislation with a view to allowing the rehabilitation of workers with disabilities. At the time, the CJEU held that social advantages only cover benefits 'which, being connected with employment, are to benefit the workers themselves.' The CJEU later departed from that view, adopting a much broader definition of social advantages and accepting that family members of mobile workers can rely on Article 7(2) Regulation 1612/68 (now Article 7(2) Regulation 492/2011). The CJEU in Michel S. accepted that Article 12 of Regulation 1612/68 covers measures enabling the disabled children of migrant workers to realise or improve their aptitude for work.

**2. Judgment of 3 July 1974, Casagrande, C-9/74, EU:C:1974:74**

Casagrande is the child of an Italian worker in Germany, who attended secondary school and claimed an educational grant, which was refused because based on German law this grant was only provided to German nationals, stateless persons and aliens granted asylum. According to the CJEU this is not in line with Article 12 Regulation 1612/68. That provision protects the children of mobile workers against discrimination as regards not only admission to educational courses, but also general measures intended to facilitate educational attendance.

**3. Judgment of 30 September 1975, Cristini, C-32/75, EU:C:1975:120**

The Italian widow of an Italian migrant worker who worked in France, where she still resides, can rely on Article 7(2) Regulation 1612/68 to waive the nationality condition that applies to social advantages such as a French reduction in railway fares for large families. The ruling was seminal in that it enabled family members to derive equal treatment rights from Article 7(2) Regulation 1612/68 with regard to social advantages.

**4. Judgment of 27 October 1982, Morson and Jhanjan, C-35 and 36/82, EU:C:1982:368**

The applicants are nationals of Suriname. They applied for permission to reside in the Netherlands in order to stay in that country with their daughter and son respectively, who are Dutch nationals of whom they are dependants. Their applications were refused whereupon they requested a review. Community law does not prohibit a Member State from refusing to allow a relative, as referred to in Article 10 of Regulation 1612/68, of a worker employed within the territory of that State who has never exercised the right to freedom of movement within the Community to enter or reside within its territory if that worker has the nationality of that State and the relative the nationality of a third country. The Court confirmed that the provisions on the freedom of movement for workers can be invoked only if the case comes within the area Union law applies to.

**5. Judgment of 12 July 1984, Castelli, C-261/83, EU:C:1984:280**

Mrs Castelli was an Italian national living in Belgium with her son, who had worked in Belgium before retiring. Having never worked in Belgium, she claimed a minimum subsistence benefit for old people, which was refused because she was neither a Belgian national nor a national of a country with which Belgium had concluded a reciprocal agreement. On the basis of Article 10 Regulation 1612/68 and Regulation 1251/70, the CJEU reasoned that, as a dependent relative in the ascending line of a former worker, she fell within the class of beneficiaries of Regulation 1612/68. A worker's dependent relatives in the ascending line can rely upon Article 7(2) Regulation 1612/68 to claim social advantages such as the benefit at issue regardless of the existence of a reciprocal agreement.

**6. Judgment of 13 February 1985, *Diatta*, C-267/83, EU:C:1985:67**

The claimant, a third-country national, was married to a French national working in Germany, where they both lived. After some time, they separated, lived apart, and had the intention to divorce. Her application for an extension of her residence permit was refused. The Court ruled that Article 10 Regulation 1612/68 does not require the family members to live under the same roof. The marriage is not dissolved until it has been terminated by the competent authority; living apart and even intending to divorce does not affect the marital bond for the purpose of the residence right granted by Article 10 Regulation 1612/68.

**7. Judgment of 13 February 1985, *Gravier*, C-293/83, EU:C:1985:69**

This case concerned the access of EU nationals to education and vocational training. Access to and participation in courses of instruction and apprenticeship are not unconnected to Union law. In this case, Belgium obliged students, who are nationals of other Member States such as France, to pay a charge or a registration fee as a condition of access to vocational training. This fee was not imposed on students who are nationals of the host Member State. This unequal treatment based on nationality must be regarded as prohibited discrimination.

**8. Judgment of 20 June 1985, *Deak*, C-94/84, EU:C:1985:264**

The third-country national son of an EU migrant worker, with whom he lived in Belgium, claimed the Belgian tideover allowance—an unemployment benefit for graduates looking for their first job. His application was rejected on the basis of his nationality. The CJEU considered that he was entitled to equal treatment under Article 7 Regulation 1612/68, which opposed the nationality condition, even though he was a third-country national.

**9. Judgment of 17 April 1986, *Reed*, C-59/85, EU:C:1986:157**

Two unmarried British nationals in a stable relationship were living together in the Netherlands. While Mr W., who was working in the Netherlands, had a residence permit, Miss Reed's application for a residence permit was rejected. The CJEU first found that she could not derive a right to reside from Article 10 Regulation 1612/68, as the concept of 'spouse' in that provision only covers marital relationships. Yet, the Netherlands granted the unmarried partners of Netherlands nationals, with whom they were in a stable relationship, a residence right under certain conditions. The CJEU qualified the right of residence of the unmarried partner as a social advantage for the worker within the meaning of Article 7(2) Regulation 1612/68. Therefore, where a Member State offers such a right to its own nationals, it must make it available to migrant workers under the same conditions.

**10. Judgment of 7 May 1986, *Gül*, C-131/85, EU:C:1986:200**

Mr Gül, a doctor of Cypriot nationality whose spouse is a British national, was refused by the competent German authority to renew his authorization to practise medicine in Germany. Article 11 of Regulation 1612/68 must be interpreted as meaning that the right of the spouse of a worker entitled to move freely within the Union to take up any activity as an employed person carries with it the right to pursue occupations subject to a system of administrative authorization and to special legal rules governing their exercise, such as the medical profession, if the spouse shows that he has the professional qualifications and diplomas required by the host Member State for the exercise of the occupation in question.

**11. Judgment of 18 June 1987, *Lebon*, C-316/85, EU:C:1987:302**

The case concerned the refusal of a Belgian minimum subsistence benefit to a French citizen living in Belgium. The CJEU held that she could not claim such benefit on the basis of her father's capacity of former migrant worker under Article 7(2) Regulation 1612/68,

because she was neither dependent upon him nor under the age of 21. Nor could she claim the benefit as a job seeker, because Article 7(2) Regulation 1612/68 reserves the right to equal treatment with regard to social advantages to workers. The CJEU characterised the notion of dependency for the purpose of Article 7(2) Regulation 1612/68 as a factual situation: dependent is the family member who is supported by the worker, regardless of the reasons for the support or the family member's capacity to obtain paid employment.

**12. Judgment of 27 September 1988, *Commission v Belgium*, C-42/87, EU:C:1988:454**

Belgian legislation distinguished different categories of (non-university) higher education students on the basis of their nationality. Belgian and Luxembourg students were fully eligible for finance by the State. The same was true for restricted categories of non-Belgian and non-Luxembourg students, who can number up to 2% of the Belgian cohort. The costs of the education of other students were not borne by the State, and higher education establishments could refuse their admission. According to the CJEU, this constitutes discrimination on grounds of nationality prohibited under Article 7 EEC Treaty (now Article 18 TFEU). It is also prohibited by Article 12 Regulation 1612/68 as regards the children of a migrant worker who was employed in Belgium but who no longer resides there or is deceased.

**13. Judgment of 15 March 1989, *Echternach and Moritz*, C-389/87, EU:C:1989:130**

This case concerned proceedings brought by two students of German nationality against the decision of the competent Netherlands authorities refusing to award them study grants. A child of a worker of a Member State who has been in employment in another Member State retains the status of member of a worker's family within the meaning of Regulation 1612/68 when that child's family returns to the Member State of origin and the child remains in the host State, even after a certain period of absence, in order to continue his studies, which he could not pursue in the State of origin. The Court held that in this situation a child of a Union worker retains the status of member of a worker's family within the meaning of Regulation 1612/68. Article 12 of Regulation 1612/68 of the Council must be interpreted as meaning that it refers to any form of education.

**14. Judgment of 13 November 1990, *Di Leo*, C-308/89, EU:C:1990:400**

Carmina di Leo, an Italian national, was refused an educational grant by the German authorities on the ground that the educational grant applied for by her was awarded only to Germans within the meaning of the German Basic Law, to stateless persons and to foreigners entitled to asylum. According to the Court, Article 12 of Regulation 1612/68 must be interpreted as meaning that children coming within that provision are to be treated as nationals for the purposes of the award of educational grants, not only where the education or training is pursued in the host State but also where it is provided in a State of which those children are nationals.

**15. Judgment of 26 February 1992, *Bernini*, C-3/90, EU:C:1992:89**

The Italian daughter of an Italian migrant worker active in the Netherlands, where she had resided since early childhood, claimed study finance to study in Italy. Her application was refused because she was considered to reside in Italy during her studies; no such residence condition applied to Dutch students. On the assumption that Ms Bernini did not retain worker status herself, the CJEU held that study finance constitutes a social advantage not only for the child, but also for the worker, provided the latter continues to support the former. The child can then rely itself on Article 7(2) to claim social advantages that are granted directly to students. That provision precludes residence conditions imposed only on non-nationals.



**16. Judgment of 4 May 1995, *Gaal*, C-7/94, EU:C:1995:118**

Mr Gaal, a Belgian national living in Germany since early childhood, claimed a German education allowance to continue his university studies in the United Kingdom. It was rejected on the ground that he was a non-national who had already reached the age of 21 and was not dependent on his parents. These are the conditions to benefit from the rights to reside or work under Articles 10(1) and 11 Regulation 1612/68. According to the CJEU, those conditions do not apply to Article 12 Regulation 1612/68. Students who are neither dependent nor under the age of 21 can therefore rely on that provision to claim study finance, provided they meet the other conditions for doing so.

**17. Judgment of 8 June 1999, *Meeusen*, C-337/97, EU:C:1999:284**

The applicant was the Belgian daughter of a Belgian self-employed person directing and owning a company established in the Netherlands, and of his Belgian wife, whom he employed. Her claim for portable study finance was rejected because she resided in Belgium—a residence condition that applied only to non-Dutch students. The ruling clarifies that the dependent child of a self-employed person can rely on the freedom of establishment to disregard a residence condition attached to a social advantage. 'The principle of equal treatment [laid down in Article 52 Treaty, now Article 49 TFEU] is also intended to prevent discrimination to the detriment of descendants who are dependent on a self-employed worker.'

**18. Judgment of 17 September 2002, *Baumbast and R*, C-413/99, EU:C:2002:493**

Children of a citizen of the European Union who have installed themselves in a Member State during the exercise by their parent of rights of residence as a migrant worker in that Member State are entitled to reside there in order to attend general educational courses there, pursuant to Article 12 of Regulation 1612/68. The fact that the parents of the children concerned have meanwhile divorced, the fact that only one parent is a citizen of the Union and that parent has ceased to be a migrant worker in the host Member State and the fact that the children are not themselves citizens of the Union are irrelevant in this regard. Where children have the right to reside in a host Member State in order to attend general educational courses pursuant to Article 12 of Regulation 1612/68, that provision must be interpreted as entitling the parent who is the primary carer of those children, irrespective of his/her nationality, to reside with them in order to facilitate the exercise of that right notwithstanding the fact that the parents have meanwhile divorced or that the parent who has the status of citizen of the European Union has ceased to be a migrant worker in the host Member State.

**19. Judgment of 19 October 2004, *Zhu and Chen*, C-200/02, EU:C:2004:639**

A Chinese mother gave birth in Northern Ireland in order to enable her child to acquire the Irish nationality, so that they could acquire the right to reside in the UK. A long-term residence permit in the UK was however refused to them. The CJEU found the situation not to be purely internal, even though the Irish child had not exercised her right to free movement. Rather, through her mother she had sickness insurance and sufficient resources. Directive 90/364, which laid down those requirements and would later be replaced by Directive 2004/38, is indifferent to the origin of the resources. Therefore, the daughter had a right to reside in the UK. Her mother is not 'dependent' on her daughter. Yet, the child's enjoyment of her right to reside presupposes that her primary carer can reside there with her. Therefore, both mother and daughter had a right to reside in the UK.

**20. Judgment of 30 March 2006, *Mattern*, C-10/05, EU:C:2006:220**

The third-country national spouse of a Luxembourg national with whom he resided in Belgium applied for a Luxembourg work permit in vain. Assuming that the Luxembourg national was a migrant worker, which was for the national court to verify, the CJEU held that 'it follows from the actual wording of Article 11 of [Regulation 1612/68] that the right

of a national of a third country married to a Community national to have access to the labour market may be relied on *only* in the Member State where that Community national pursues an activity as an employed or self-employed person.' Therefore, the third-country family member of a migrant worker active in Belgium cannot rely on that provision to ground a right to work in another Member State.

**21. Judgment of 9 January 2007, Jia, C-1/05, EU:C:2007:1**

The Chinese parents-in-law of a German national established in Sweden as a self-employed person applied in vain for a Swedish residence permit as dependent family members of their Chinese son and their daughter-in-law. The Court held that the parents-in-law of a Union citizen are 'dependent family members' when their social and financial conditions are such that, in the country where they came from before applying for a residence permit in the Union, they could not support themselves without the material assistance of the EU citizen and her spouse. Such relation can be demonstrated by any appropriate means, including a certificate from the country where they come from, while a mere statement from the EU citizen or her spouse that they support their relatives is not enough.

**22. Judgment of 11 December 2007, Eind, C-291/05, EU:C:2007:771**

Mr Eind, a Dutch national, worked for several years in the UK and returned to the Netherlands with his third country national daughter who stayed with him in the UK. His daughter was refused a residence permit in The Netherlands because her father asked for a social assistance. The Court ruled that when a worker returns to the Member State of which he is a national, after being gainfully employed in another Member State, a third-country national who is a member of his family has a right under Article 10(1)(a) of Regulation 1612/68 to reside in the Member State of which the worker is a national, even where that worker does not carry out any effective and genuine economic activities. The fact that a third-country national who is a member of an EU worker's family did not, before residing in the Member State where the worker was employed, have a right under national law to reside in the Member State of which the worker is a national has no bearing on the determination of that national's right to reside in the latter State.

**23. Judgment of 18 July 2007, Hartmann, C-212/05, EU:C:2007:437**

Ms Hartmann claimed the German child-raising allowance, which was available to persons residing in Germany and to frontier workers in more than minor employment there. However, claimants who resided in another Member State and whose spouse worked in the German civil service were excluded. Such was Ms Hartmann's situation. A provision of the annex to Regulation 1408/71 prevented it from applying. The CJEU first held that 'reverse' frontier workers such as Mr Hartmann (i.e. nationals of the State of work who transfer their place of residence to another Member State while remaining employed) are migrant workers. It then held that the non-working spouse of a migrant worker can rely on Article 7(2) Regulation 1612/68 to claim a benefit that constitutes a social advantage for the worker. The indirect discrimination entailed by the residence condition is not justified on the basis of the real link, as Mr Hartmann worked full-time in Germany.

**24. Judgment of 18 July 2007, Geven, C-213/05, EU:C:2007:438**

Mrs Geven, a Dutch frontier worker engaged in minor employment in Germany, claimed the German child-raising allowance. Her application was rejected as she neither resided in Germany nor worked there in more than minor employment. Because of the provision of an annex, Regulation 1408/71 did not apply. The CJEU analysed her claim under Article 7(2) Regulation 1612/68, on which frontier workers can rely to claim social advantages such as the benefit at stake. The residence condition was indirectly discriminatory yet justified in the light of the real link: the alternative requirements of residence and of more than minor employment were appropriate and proportionate to ensure that the benefit was reserved to those who have a sufficiently close connection with German society.

**25. Judgment of 25 July 2008, *Metock*, C-127/08, EU:C:2008:449**

Third-country nationals, who married EU citizens residing in Ireland, saw their applications for residence cards rejected because they had not previously lawfully resided in another Member State or because they were staying illegally at the time of the marriage. The CJEU ruled that Directive 2004/38 precludes such conditions: the residence rights of third-country family members do not depend on their prior lawful residence in another Member State, on where and when the marriage took place, or on the way in which the family members entered the host State.

**26. Judgment of 23 February 2010, *Ibrahim*, C-310/08, EU:C:2010:80**

Ms Ibrahim was a Somali national married to a Danish citizen. The couple lived in the UK with four children. After the Danish husband left the UK and the couple got separated, Ms Ibrahim was denied housing assistance for herself and her children because she had no right to reside in the UK under Union law. In circumstances such as those of the main proceedings in this case, the children of a national of a Member State who works or has worked in the host Member State and the parent who is their primary carer can claim a right of residence in the latter State on the sole basis of Article 12 of Regulation 1612/68, without such a right being conditional on their having sufficient resources and comprehensive sickness insurance cover in that State.

**27. Judgment of 23 February 2010, *Teixeira*, C-480/08, EU:C:2010:83**

After some years of intermittent work in the UK, a Portuguese national became unemployed and applied for housing assistance. She was the primary carer of her daughter who was attending school in the UK. The British authorities rejected her claim since she did not have a right to reside. The Court ruled that Ms Teixeira had such right under Article 12 Regulation 1612/68—which Directive 2004/38 did not supersede—in her capacity of primary carer of her daughter. The right of the child of a migrant worker or former worker in education is an independent right of residence which does not depend on any other condition. The right of the primary carer subsists as long as the child, even if no longer a minor, needs the presence of the parent to pursue her education.

**28. Judgment of 21 July 2011, *Stewart*, C-503/09, EU:C:2011:500**

A UK national with Down's Syndrome applied unsuccessfully for the UK short-term incapacity benefit in youth whilst she was living in Spain. She did not fulfil the requirement of ordinary and past presence in the UK, as she and her parents had moved to Spain several years before the application. The CJEU considered the presence requirement inconsistent with Article 21 TFEU, since it penalises citizens who have exercised their Treaty rights. It held that, while it is justifiable to require the establishment of a real link between the claimant and the State in question, presence in the latter cannot be the exclusive criterion, since other elements are equally representative of a genuine connection. These included the applicant's link with the social security system of the competent State; her family circumstances, as she completely depended on her parents, who had worked in the UK and were receiving British retirement pensions; and the fact that she grew up in that State.

**29. EFTA Court Judgment of 26 July 2011, *Clauder*, E-4/11, [2011] EFTA Ct. Rep. 216**

The applicant, a German pensioner receiving old-age pensions and supplementary welfare benefits in Liechtenstein, requested a residence permit for his second wife, also a German national. His request was turned down because he lacked sufficient resources for himself and his wife not to be a burden on the Liechtenstein social assistance system; the amount of his supplementary welfare benefits would increase if his wife were allowed to join him, even if she were to take up work. While Directive 2004/38 is silent on the matter, the EFTA Court held that the right of permanent residence implies a derived right of residence for

family members, which is not conditional upon the possession of sufficient resources. This is in line with the Commission's submissions in that case.

**30. Judgment of 14 June 2012, *Commission v the Netherlands* (study finance), C-542/09, EU:C:2012:346**

Dutch portable funding for students was subject to a condition of previous residence in the Netherlands for three out of six years before enrolment at higher education abroad. The CJEU found this measure discriminatory against migrant workers who had resided in the Netherlands for less than three years and frontier workers, and thus inconsistent with Article 45 TFEU and Article 7(2) Regulation 1612/68, which ensures equal treatment in respect of social advantages, including study finance for migrant workers' children, if their parents still support them. The CJEU rejected the argument that, to avoid applicants for social benefits becoming an unreasonable burden on the host States' finances, they need to show their integration in the host society through durational residence. A residence criterion is inappropriate for mobile workers and their families, since their employment already 'establishes, in principle, a sufficient link of integration', *inter alia*, because they contribute to finance the host State's social policies through their taxes.

**31. Judgment of 5 September 2012, *Rahman*, C-83/11, EU:C:2012:519**

Third-country nationals applied for a right to reside as the brother, half-brother and nephew of the third-country spouse of an Irish national working in the UK. As 'other' family members, falling under art. 3(2)(a) rather than 2(2) Directive 2004/38, they were entitled, not to an automatic right to reside, but to an extensive examination of their personal circumstances. The CJEU granted the host State a wide discretion in deciding on the relevant criteria, but required that those be laid down in legislation; that they be 'consistent with the normal meaning of the term 'facilitate' and of the words relating to dependence used in Article 3(2) [and that they] do not deprive that provision of its effectiveness.' Moreover, the applicant is entitled to a judicial review of whether the decision remained within the bounds of the discretion imparted by the Directive. The CJEU further clarified that the family member should not have to have resided in the same State as the EU citizen before moving to the host State; and that 'the situation of dependence must exist, in the country from which the family member concerned comes, at the time when he applies to join the Union citizen on whom he is dependent.'

**32. Judgment of 6 September 2012, *Czop and Punakova*, C-147/11 and C-148/11, EU:C:2012:538**

The claimants applied for income support, which was refused to them on the ground that they lacked a right to reside. The CJEU found that the claimants had a right to reside under Article 12 Regulation 1612/68 (as the primary carer of a migrant worker's child who is attending educational courses) or Article 16 Directive 2004/38 (as a Union citizen who legally resided in the host State for a continuous period of five years). The ruling's main import, however, is that the right to reside of children in education and their primary carers, established in *Ibrahim* and *Teixeira* on the basis of Article 12 Regulation 1612/68, is limited to the children of (former) migrant workers, and does not extend to the children of self-employed persons.

**33. Judgment of 25 October 2012, *Prete*, C-367/11, EU:C:2012:668**

The claimant, a French national, married a Belgian national with whom she settled in Belgium. Her application for the Belgian tideover allowance—an unemployment benefit for graduates looking for their first job—was rejected because she had completed her secondary education in France rather than in Belgium. The question was whether the ensuing indirect discrimination under Article 39(2) EC (now Article 45(2) TFEU) could be justified on the basis that she lacked a real link to the Belgian labour market. The CJEU replied in the negative. When listing her connections to the Belgian labour market, it

emphasised the importance of the marital tie: 'The existence of close ties, in particular of a personal nature, with the host Member State where the claimant has, following her marriage with a national of that Member state, settled and now habitually resides are such as to contribute to the appearance of a lasting connection between the claimant and the Member State in which she has newly established herself, including with the labour market of the latter'.

**34. Judgment of 8 November 2012, *Iida*, C-40/11, EU:C:2012:691**

Mr Iida, a Japanese national working and living in Germany, applied in vain for a residence permit as the family member of Union citizens, since his spouse and his daughter had German nationality and they used to live together in Germany with him before they moved to Austria. The Court found that while he was not a dependent family member of his daughter because he was supporting her and not the other way around, he was nonetheless a family member of his spouse under Article 2(2)(a) Directive 2004/38 even if they lived separately, although they were not divorced. However, since he was claiming residence in the State of origin of his family members, where they no longer resided, he did not fall within the scope of application of the Directive which only applies to family members joining or accompanying the EU citizen in the host Member State. Neither could he rely on *Zambrano* or on *Zhu and Chen*.

**35. Judgment of 8 May 2013, *Alarape and Tijani*, C-529/11, EU:C:2013:290**

Article 12 Regulation 1612/68 grants the parent of a child over the age of 21 a right to reside, where the child is still in (higher) education and 'continues to need the presence and the care of that parent in order to be able to pursue and complete his or her education.' This need is a factual matter which is for the national court to assess, taking into account some CJEU guidance. The two routes to permanent residence for third-country family members—Article 16(2) and Article 18 Directive 2004/38—presuppose that their period of five years' residence satisfies the conditions laid down in Directive 2004/38. Periods of residence completed 'solely on the basis of Article 12 of Regulation 1612/68 cannot therefore have any effect on the acquisition of a right of permanent residence under Directive 2004/38.'

**36. Judgment of 13 June 2013, *Hadj Ahmed*, C-45/12, EU:C:2013:390**

The Algerian claimant had joined her French partner (with whom she had a durable relationship that was formalised neither through marriage nor through a registered partnership under Article 2(2)(b) Directive 2004/38) in Belgium. They had a French child. After they separated, she no longer received family benefits for her other, Algerian child, from a previous union, because of a five-year residence condition that did not apply to Belgian nationals and certain categories of foreigners. The CJEU held that, as its wording indicates, Article 13(2) Directive 2004/38 does not provide in a right to reside for third-country family members following the break-up of relationships that are neither a marriage nor a registered partnership.

**37. Judgment of 20 June 2013, *Giersch*, C-20/12, EU:C:2013:411**

The applicants were the children of frontier workers active in Luxembourg, who claimed Luxembourg study finance in order to study in Belgium and the UK. Their claims were rejected because they resided in States adjacent to Luxembourg. The CJEU rehearsed its case-law according to which the dependent children of frontier workers can rely on Article 7(2) Regulation 1612/68 to claim benefits that constitute a social advantage to the migrant worker on a foot of equality. It found the residence condition indirectly discriminatory. The CJEU accepted that the aim of increasing the proportion of Luxembourg residents holding a higher education degree is legitimate. While a residence condition is appropriate to that end, seeing as resident students may be more likely to settle in Luxembourg than non-



resident students, it is disproportionate. The CJEU floated requirements to return and durational work requirements as options for the Luxembourg legislature.

**38. Judgment of 10 October 2013, *Alokpa*, C-86/12, EU:C:2013:645**

When she gave birth in Luxembourg to her children with French nationality, Mrs Alokpa, a Togolese national, applied in vain for a Luxembourg residence permit in her capacity as family member of Union citizens. The Court held that Mrs Alokpa could only derive from Article 21 TFEU and Directive 2004/38 a residence right as primary carer of her children—who had always lived in Luxembourg—if they satisfied the requirements of sufficient resources and comprehensive sickness insurance cover laid down in Directive 2004/38. In any case, she could not rely on the *Zambrano* right of residence under Article 20 TFEU, which only arises when a Union citizen would have to leave the territory of the Union rather than a particular Member State. Seeing as the family could have a right to reside in France, the refusal of a residence right in Luxembourg would not oblige the Union citizens to leave the territory of the Union.

**39. Judgment of 16 January 2014, *Onuekwere*, C-378/12, EU:C:2014:13**

The claimant, a third-country national, married an Irish national, with whom he lived in the UK. His application for the right of permanent residence was refused, even though he had lawfully resided in the UK for about nine years, because he had spent about three years in prison. The CJEU held that periods of imprisonment cannot be taken into account for the acquisition of the right of permanent residence under Article 16(2) Directive 2004/38 and interrupt the continuity of residence. This conclusion was based on (i) the consideration that that provision requires the third-country family member to reside 'with the Union citizen' and (ii) the fact that the imposition of a prison sentence shows the non-compliance by the convicted with the host State's values expressed in its criminal law and thus undermines the link of integration tying him to that State, whereas the acquisition of the right of permanent residence is conditional upon that link.

**40. Judgment of 14 January 2014, *Reyes*, C-423/12, EU:C:2014:16**

Ms Reyes, a citizen of the Philippines older than 21 years, applied unsuccessfully for residence in Sweden where her mother, a German national, lived and on whom she claimed she was dependent since she could not find a job in the Philippines and was living on her mother's financial support. The Court held that, under Article 2(2)(c) Directive 2004/38, a relation of dependence exists between a direct descendant older than 21 years and her EU citizen parent when the child cannot support herself, irrespective of the reasons for that dependence. Such situation of dependence must exist in the State where she comes from at the time when she applies to join the Union citizen. The possibility that she may become independent by starting to work in the host Member State after having joined her family there is irrelevant and cannot affect the assessment of dependence.

**41. Judgment of 12 March 2014, *O and B*, C-456/12, EU:C:2014:135**

Mr O. and Mr B. were third-country nationals married to EU citizens. After two months of common residence in the host State, Mr. O's spouse had returned to their State of origin. In both cases, the Union citizens stayed with their spouses in the host State on a discontinuous basis (holidays or weekends). The third-country spouses unsuccessfully applied for a right to reside in their spouses' State of origin. The CJEU reiterated that such a refusal is in principle capable of hindering the free movement rights under Article 21 TFEU. Yet, such a barrier only arises if the previous residence in the host State was 'sufficiently genuine so as to enable that citizen to create or strengthen family life in that Member State.' That is only the case for medium-term residence under Article 7 Directive 2004/38 and permanent residence under Article 16. By contrast, short-term residence under Article 6, even when aggregated, does not give rise to such a residence right.



**42. Judgment of 12 March 2014, S. & G., C-457/12, EU:C:2014:136**

Ms S. is the mother-in-law of a Dutch citizen and Ms G. is married to a Dutch citizen. They are both third country nationals claiming a right of residence in the Netherlands with their Dutch sponsors, who both travel to Belgium for work on a daily or at least weekly basis. The CJEU held that, as the sponsors resided in their Member State of origin, Directive 2004/38 does not apply. Article 45 TFEU vests a derived right to reside for their family members in the sponsors' Member State of origin, provided the workers would otherwise be discouraged from exercising their free movement rights. The referring court should establish whether granting a right to reside would be 'necessary to guarantee the citizen's effective exercise of the fundamental freedom guaranteed by Article 45 TFEU.'

**43. Judgment of 10 July 2014, Ogieriakhi, C-244/13, EU:C:2014:2068**

The claimant, a third-country national, brought a claim for State liability against Ireland on the ground that the wrongful refusal to grant him a residence permit led to his dismissal. During the relevant period, he had been married to a French national, but after a couple of years they had separated, and moved in with other partners. The CJEU held that their separation—meaning that not only they did not reside together but also there was no true sharing of married life together—did not affect his acquisition of the right of permanent residence.

**44. Judgment of 26 February 2015, Martens, C-359/13, EU:C:2015:118**

The claimant, a Dutch national studying in the Netherlands Antilles, was asked to reimburse Dutch study finance because she had not resided in the Netherlands for at least three of the six years before enrolment and her father had stopped working in the Netherlands. The CJEU approached the case as a claim *qua* EU citizen rather than *qua* dependent child of a former frontier worker. It held that the student can rely on Article 21(1) TFEU against her State of origin to oppose restrictions on free movement such as the three-out-of-six-years rule. While the wish to ensure the existence of a genuine link is legitimate, a residence condition is too exclusive as it disregards other factors connecting the student to the Netherlands, such as the employment of the family member on whom she depends.

**45. Judgment of 16 July 2015, Kuldip Singh, C-218/14, EU:C:2015:476**

The claimants, third-country nationals living in Ireland, applied for residence permits under Article 13(2)(a) Directive 2004/38, which, in some circumstances, allows a third-country national to retain a right to reside in the host State after the divorce from a migrant EU citizen. The Irish authorities turned down their demands since their former spouses had left Ireland before the divorce proceedings had started. The Court confirmed that, since third-country nationals only enjoy a derived right of residence in the host State under Article 7(2) of the Directive as long as their EU family member resides in that State, that right ends when the EU citizen settles elsewhere. Therefore, if the EU citizen spouse leaves the country before the divorce proceeding begins, the non-EU spouse has no right which could be 'retained' under Article 13(2)(a) of the Directive.

**46. Judgment of 15 September 2015, Alimanovic, C-67/14, EU:C:2015:597**

The Swedish claimants were a mother and her three children who returned to Germany after an absence of about a decade. The mother and her eldest daughter worked in temporary jobs lasting just under a year. One year after becoming unemployed, they lost the right to German subsistence allowances for the long-term unemployed and social allowances for the two youngest children. The referring court stated that their residence right was based exclusively on their status as jobseekers. As the predominant function of the benefits is to ensure minimum means of subsistence, it is social assistance rather than a financial benefit intended to facilitate access to the labour market. Having established that Ms Alimanovic and her eldest daughter no longer have a right to reside as former workers, the CJEU held that their right of residence was based on Article 14(4)(b) Directive

2004/38, which does not entitle them to equal treatment as regards social assistance (Article 24(2) Directive 2004/38). No individual assessment of the circumstances was necessary to comply with the principle of proportionality.

**47. Judgment of 30 June 2016, NA, C-115/15, EU:C:2016:487**

NA was a Pakistani national who had been the victim of domestic violence at the hand of her German husband whilst they lived together in the UK. They had two German children, who had always lived in the UK. Before divorce proceedings had started, the husband then left the UK, after which NA unsuccessfully applied for a retained right of residence. The Court held that, if the Union citizen leaves the host State before the start of divorce proceedings, the third-country spouse does not retain her derived right of residence, even when she has been victim of domestic violence, because the departure of the mobile EU citizen already brought that right to an end and a petition for divorce cannot revive it. Yet, NA had a right to reside under Article 12 Regulation 1612/68 as the primary carer of her children, even if the migrant worker had left the host State before they began to attend school. NA could also claim a right to stay under Article 21 TFEU and Directive 2004/38 if her children fulfilled the conditions provided for in Article 7 of the Directive.

**48. Judgment of 14 December 2016, Bragança Linares Verruga, C-238/15, EU:C:2016:949**

The claimant resided in France with his parents and studied in Belgium. His application for portable Luxembourg study finance was rejected on the basis that neither of his parents had *continuously* worked in Luxembourg for the five years preceding the application, though each had worked there for a longer period in total. The CJEU held that the condition for non-residents students to be the child of migrant workers who have worked there for a continuous period of five years is indirectly discriminatory. It considered such a condition to be appropriate to increase the number of Luxembourg residents with a higher education degree, as it can establish a link between the workers and Luxembourg society while making a return of the student after graduation reasonably likely. The condition was however disproportionate, as the parents had worked in Luxembourg for a longer period of time, interrupted only by short breaks.

**49. Judgment of 15 December 2016, Depesme, C-401/15 to C-403/15, EU:C:2016:955**

Non-Luxembourg-resident students claimed Luxembourg study finance to study in their home States, on the grounds that their stepfathers, with whom they lived and who contributed to their maintenance, were employed in Luxembourg. Their applications were rejected because they were not the children of migrant workers. The CJEU held that its settled case-law, according to which the children of migrant workers can rely on Article 7(2) Regulation 492/2011 and Article 45 TFEU to claim social advantages such as study finance in the State of work, provided the worker continues to support them, equally applies to the children of the spouse or registered partner of that worker, provided the worker supports the child. The CJEU thus drew a link between the family members protected by Article 7(2) Regulation 492/2011 and those protected by Article 2(2) Directive 2004/38.

**50. Judgment of 14 November 2017, Lounes, C-165/16, EU:C:2017:862**

A Spanish citizen, after having lived in the UK for many years under the conditions established in Directive 2004/38, had become a naturalised British citizen, while keeping her Spanish nationality. Her Algerian husband applied unsuccessfully for a residence permit as a family member of an EU citizen. The Court ruled that the family member of a mobile Union citizen does not lose the derived right of residence under Article 21 TFEU simply because the EU citizen has become naturalised in the host State. If that were the case, the naturalised citizen who has moved would unjustifiably receive the same treatment as a

citizen of the host State who has never moved. She would also be in a less favourable position than an EU citizen in the host State who has only the nationality of origin, an outcome inconsistent with the logic of gradual integration in the host State underlying the rights conferred to Union citizens, such as family reunification. The conditions for residence cannot be stricter than those established in Directive 2004/38, which applies by analogy.

**51. Judgment of 8 May 2018, *K.A.*, C-82/16, EU:C:2018:308**

The claimants were third-country nationals subject to a decision of deportation accompanied by an entry ban. They applied unsuccessfully for a residence permit in Belgium as family members of Belgian citizens who had not exercised their Treaty rights. Belgian law required that, before applying for family reunification, a person subject to an entry ban ought to leave the country and preliminarily ask for the removal of the entry ban. It also prevented the assessment on the merits of applications for residence permits submitted by claimants subject to an entry ban. The Court noted that this way national authorities could not verify whether the applicants could invoke the exceptional derived right of residence under Article 20 TFEU, which arises when an EU citizen dependent on these third-country nationals would otherwise have to leave the territory of the Union along with them. However, a relation of dependency does not in principle exist between an adult and her ascendants or her cohabiting partner, because adults can live an independent life apart from their family, save for exceptional cases. On the contrary, if the EU citizen is a minor, all relevant circumstances must be assessed in the light of the respect of the family life and the best interest of the child. The relation of dependency is presumed if the third-country national is the sole carer of the child. In other cases, the national authorities must assess whether legal, financial, or emotional dependency exists between the child and her third-country national family member.

**52. Judgment of 5 June 2018, *Coman*, C-673/16, EU:C:2018:385**

Mr Coman (a Romanian and American citizen) and Mr Hamilton (an American citizen) married in Belgium, where Mr Coman lived and worked. They were told that Mr Hamilton would not have a right to reside for more than three months in Romania, which neither allowed nor recognised same-sex marriage. The CJEU held that if family life is created or strengthened in the host State during a period of genuine residence, Article 21(1) TFEU requires that a derived right to reside be granted to the Union citizen's third-country spouse upon his return to his State of origin under conditions that are no stricter than those of Directive 2004/38. The CJEU reasoned that the notion of 'spouse' in Article 2(2)(a) Directive 2004/38 is gender-neutral and does not refer to national law. It therefore covers the same-sex marriage lawfully concluded in a Member State, which another Member State must recognise for the purpose of granting a derived right to reside, without being able to invoke its own legislation or objective justifications to justify doing otherwise.

**53. Judgment of 12 July 2018, *Banger*, C-89/17, EU:C:2018:570**

The claimant, a third-country national, resided with her UK partner in the Netherlands, where he was working. When they decided to move to the UK together, her application for a residence card was rejected, as they were neither married nor civil partners. As the UK is the Union citizen's State of origin, Directive 2004/38 does not apply. Yet, the partner with whom an EU citizen who returns to his State of origin has a durable, duly attested, relationship can rely on Article 3(2)(b) Directive 2004/38 by analogy to have her entry and residence facilitated and personal circumstances extensively examined. The duly attested partner in a durable relationship can avail of the procedural safeguards of Article 31(1) Directive 2004/38 and must have access to a redress procedure enabling her to challenge refusals of residence cards.

**54. Judgment of 26 March 2019, SM, C-129/18, EU:C:2019:448**

Two French parents obtained the guardianship of SM under the Algerian *kafala* system. Under Algerian law, they had parental responsibility for her. The CJEU held that the concept of 'direct descendant' in Article 2(2)(c) Directive 2004/38 is to be interpreted uniformly and broadly as covering 'any parent-child relationship, whether biological or legal'.<sup>208</sup> While that concept thus covers adopted children, it does not extend to the *kafala* system, which does not entail a parent-child relationship. Still, such children are 'other family members' within the meaning of Article 3(2)(a) Directive 2004/38. The discretion which Member States have is limited both by Directive 2004/38 and by the Charter provisions on the right to respect for private and family life and the best interests of the child. The CJEU elaborated on the criteria to be taken into consideration. Should the assessment show that child and guardians 'are called to lead a genuine family life and that that child is dependent on its guardians, the requirements relating to the fundamental right to respect for family life, combined with the obligation to take account of the best interests of the child, demand, in principle, that that child be granted a right of entry and residence'.<sup>209</sup>

**55. Judgment of 10 July 2019, Aubriet, C-410/18, EU:C:2019:582**

The claimant resided with his father in France. His claim for Luxembourg portable study finance to study in France was refused, because his father had not worked in Luxembourg for five years within the reference period of seven years. The condition of five years out of seven applied only to non-resident students; therefore, it was indirectly discriminatory, and the claimant—as the child, under the age of 21, of a migrant worker—could rely on art. 7(2) Regulation 492/2011 as well as art. 45 TFEU to contest it. The condition was appropriate to ensure that a higher proportion of the Luxembourg population is highly educated, which is a legitimate objective. The seven-year reference period was however disproportionate, as it led to the disregarding of the fact that the student's father had worked in Luxembourg for more than 17 out of the 23 years leading up to the claim.

**56. Judgment of 10 September 2019, Chenchooliah, C-94/18, EU:C:2019:693**

The Irish authorities sought to expel a third-country national following the return of her spouse, a Union citizen, to his Member State of origin. The expulsion decision entailed an indefinite entry ban. The CJEU held that, after his return, albeit still a family member, she was no longer a beneficiary of the directive within the meaning of Article 3(1) Directive 2004/38, as she no longer accompanied or joined him in the host State. Still, a person who used to have a right to reside on the basis of Directive 2004/38 and who is the addressee of an expulsion decision can avail of the protection of Article 15 Directive 2004/38, which entails the application by analogy of the procedural safeguards of Article 30-31 Directive 2004/38 and opposes the addition of an entry ban to an expulsion decision. The loss of the status of 'beneficiary' entails the loss of the associated rights of movement and residence, but not the inapplicability of Directive 2004/38 when the host State decides to expel the person concerned.

**57. Judgment of 2 October 2019, Bajratari, C-93/18, EU:C:2019:809**

The British authorities refused to grant Mrs Bajratari, an Albanian national, a residence permit as the mother of children of Irish nationality who were all born and had always lived in Northern Ireland. According to the immigration authorities, her children did not satisfy the condition of sufficient resources under Directive 2004/38, since they could only rely on their Albanian father's income from unlawful work performed without residence card and work permit. The Court ruled that Mrs Bajratari could enjoy a derived residence right under Article 21 TFEU and Directive 2004/38 as primary carer of her children. Even if the

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<sup>208</sup> Judgment of 26 March 2019, SM, C-129/18, EU:C:2019:448, paragraph 54.

<sup>209</sup> Ibid., paragraph 71.

children's resources came from their parent's unlawful work, they met the requirements of the Directive, which does not establish any condition as to the origin of the resources. Although the risk of loss of resources is greater if the work is unlawful, a presumption of insufficient resources in such case is a disproportionate obstacle to the EU citizens' right to move.

**58. Judgment of 27 February 2020, *RH*, C-836/18, EU:C:2020:119**

Spanish immigration law imposed on Spanish nationals who had never exercised their freedom of movement a condition of sufficient resources for family reunification with non-EU citizens. RH, a Moroccan national living in Spain with his Spanish spouse, saw his request for a residence permit rejected for that reason. The Court ruled that the application without a case-by-case assessment of the condition of self-sufficiency may compromise the effectiveness of Article 20 TFEU, which is the basis of an exceptional derived right of residence for third-country family members, when the denial of such right would compel the EU citizen to leave the Union along with that family member on whom she is dependent. Although the Member States retain the power to limit this right, the requirement of sufficient resources is disproportionate when a relation of dependency exists. Yet, this relation does not arise between two married adults solely because of the obligation to live together imposed by national law.

**59. Judgment of 2 April 2020, *Caisse pour l'avenir des enfants*, C-802/18, EU:C:2020:269**

Following an amendment limiting them to children of the person subject to Luxembourg law, a frontier worker lost his Luxembourg family allowances for his spouse's child, who lived with them and whom the frontier worker supported. Had they resided in Luxembourg, the claimant would have continued to receive the family allowances for his stepchild. The CJEU conceded that, as a family benefit covered by Regulation 883/2004, the notion of 'member of the family' was to be defined under Luxembourg law (Article 1(i) Regulation 883/2004). Yet, it continued that this definition ought to comply with EU law, which included Article 7(2) Regulation 492/2011. That provision grants a right to equal treatment, not only to the worker and his children, but also to the children of his spouse or registered partner. The distinction on the basis of the place of residence of the worker is indirectly discriminatory and unjustified.

**60. Judgment of 2 April 2020, *Landkreis Südliche Weinstraße*, C-830/18, EU:C:2020:275**

The claimant was a German pupil residing with his German parents in France. The Landkreis Südliche Weinstraße refused to cover the cost of public transport to and from school for the sole reason that he resided outside of Rhineland-Palatinate. As the claimant's mother was a migrant worker active in Germany, the question was whether a condition to reside in a particular Land contravenes Article 7(2) Regulation 492/2011. The CJEU first confirmed that a regional residence condition is indirectly discriminatory, as it is liable to affect frontier workers specifically, even though according to the referring court it mostly affects national workers residing in other German Länder. The CJEU accepted that the efficient organisation of the school system is an objective justification capable of justifying indirect discrimination. However, the residence condition is insufficiently connected to that goal for it to be considered to pursue it. At any rate, it is not necessary, as less restrictive alternatives exist.

**61. Judgment of 18 June 2020, *Ryanair*, C-754/18, EU:C:2020:478**

In this case the Court clarifies the exemption for TCN family members of EU citizens from holding a visa when entering a Member State other than the Member State where they are permanent resident. The short stay visa exemption in Article 5(2) of Directive 2004/38 means that the possession of a permanent residence card referred to in Article 20 of that



Directive also applies to a TCN family member of a Union citizen with a permanent residence card. The fact that the permanent residence card is issued by a Member State which is not part of the Schengen area is irrelevant. As a Member State can only issue a permanent residence card ex Article 20(1) of Directive 2004/38 to persons who have the status of TCN family member of an EU citizen, possession of a permanent residence card constitutes sufficient proof that the holder of that card is a family member of a Union citizen. The person concerned is entitled, without further verification or justification, to enter the territory of a Member State without a short stay visa under Article 5(2) Directive 2004/38.

**62. Judgment of 6 October 2020, *Jobcenter Krefeld*, C-181/19, EU:C:2020:794**

The claimant, the Polish father of two children in education, claimed German minimum subsistence benefits in vain after he became unemployed. The Grand Chamber ruled that children and parents who have a right to reside based on Article 10 Regulation 492/2011 can rely on the principle of equal treatment laid down in Article 7(2) of that regulation when claiming social advantages, even if the parent has lost the status of mobile worker. The derogation from equal treatment for jobseekers' social assistance claims, which is laid down in Article 24(2) Directive 2004/38, does not apply to those who derive a right to reside from Article 10 Regulation 492/2011, even if they also derive a right to reside from Article 14(4)(b) Directive 2004/38. Articles 7(2) and 10 Regulation 492/2011, as well as Article 4 Regulation 883/2004, oppose legislation excluding persons lawfully residing on the basis of Article 10 Regulation 492/2011 from benefits which constitute social advantages within the meaning of Article 7(2) Regulation 492/2011 and special non-contributory cash benefits within the meaning of Regulation 883/2004, even if they also constitute social assistance within the meaning of Directive 2004/38.



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