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COMMISSION OF THE EUROPEAN COMMUNITIES

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**COMMUNICATION FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT AND THE COUNCIL**

**on guidance for better transposition and application of Directive 2004/38/EC on the
right of citizens of the Union and their family members to move and reside freely within
the territory of the Member States**

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(Text with EEA relevance)

1. INTRODUCTION

On 10 December 2008, the Commission adopted its report¹ on the application of Directive 2004/38/EC² which presented a comprehensive overview of how the Directive is transposed into national law and how it is applied in everyday life.

The report concluded that the overall transposition of the Directive was rather disappointing, particularly as regards Chapter VI (*which provides for the right of Member States to restrict the right of EU citizens and their family members on grounds of public policy or public security*) and Article 35 (*which authorises Member States to adopt measures to prevent abuse and fraud, such as marriages of convenience*).

The Commission announced in the report its intention to offer information and assistance to both Member States and EU citizens by issuing guidelines in the first half of 2009 on the issues identified as problematic in transposition or application. This intention was welcomed by the Council³ and by the European Parliament⁴. The guidelines state the views of the Commission and are without prejudice to the case-law of the Court of Justice (*“the Court”*) and its development.

This Communication aims to provide guidance to Member States on how to apply Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States correctly; with the objective of bringing a real improvement for all EU citizens and of making the EU an area of security, freedom and justice.

The report also identified frequent problems relating to the right of entry and residence of third country family members of EU citizens, and to requirements to submit with the applications for residence additional documents not foreseen in the Directive. The Commission announced in the report that it will step up its efforts to ensure that the Directive is correctly transposed and implemented. In order to achieve this objective, the Commission will continue to inform citizens about their rights under the Directive, in particular by

¹ COM (2008) 840 final

² Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States

³ Conclusions of the JHA Council meetings in November 2008 and February 2009

⁴ Resolution of the European Parliament of 2 April 2009 on the application of Directive 2004/38/EC (2008/2184(INI))

distributing a simplified guide for EU citizens and by making the best use of the Internet. Moreover, the Commission will meet Member States bilaterally to discuss issues of implementation and application and will use fully its powers under the Treaty.

Today more than 8 million Union citizens have taken advantage of their right to move and reside freely and now live in another Member State of the Union. The free movement of citizens constitutes one of the fundamental freedoms of the internal market and is at the heart of the European project. Directive 2004/38/EC codified and reviewed the existing Community instruments in order to simplify and strengthen the right of free movement and residence for Union citizens and their family members. As a general remark, the Commission recalls that the Directive must be interpreted and applied in accordance with fundamental rights⁵, in particular the right to respect for private and family life, the principle of non-discrimination, the rights of the child and the right to an effective remedy as guaranteed in the European Convention of Human Rights (*ECHR*) and as reflected in the EU Charter of Fundamental Rights.

The freedom of movement of persons is one of the foundations of the EU. Consequently derogations from that principle must be interpreted strictly⁶. However, the right of free movement within the EU is not unlimited and carries with it obligations on the part of its beneficiaries, which implies to obey the laws of their host country.

2. EU CITIZENS AND THEIR THIRD COUNTRY FAMILY MEMBERS – ENTRY AND RESIDENCE

The Directive⁷ applies only to EU 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.

T., a third country national, resides in the host Member State for some time. She wants to be joined there by her third country spouse. As no EU citizen is involved, the couple cannot benefit from the rights under the Directive and it remains fully up to the Member State concerned to lay down rules on the right of third country spouses to join other third country nationals, taking due account of other instruments of Community law, if applicable.

EU citizens residing in the Member State of their nationality do not normally benefit from the rights granted by Community law on free movement of persons and their third country family members remain to be covered by national immigration rules. However, EU citizens who return to their home Member State after having resided in another Member State⁸ and in certain circumstances also those EU citizens who have exercised their rights to free movement in another Member State without residing there⁹ (for example by providing services in another Member State without residing there) benefit as well from the rules on free movement of persons.

⁵ Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* (paras 97-98) and C-127/08 *Metock* (para 79)

⁶ Cases 139/85 *Kempf* (para 13) and C-33/07 *Jipa* (para 23)

⁷ Article 3(1)

⁸ Cases C-370/90 *Singh* and C-291/05 *Eind*

⁹ Case C-60/00 *Carpenter*

P. resides in the Member State of his nationality. He likes it there and has not resided in another Member State before. When he wants to bring his third country spouse, the couple cannot benefit from the rights under the Directive and it remains fully up to the Member State concerned to lay down rules on the right of third country spouses to join its own nationals.

Frontier workers are covered by Community law in both countries (*as a migrant worker in the Member State of employment and as a self-sufficient person in the Member State of residence*).

2.1. Family members and other beneficiaries

2.1.1. Spouses and partners

Marriages validly contracted anywhere in the world must be in principle recognized for the purpose of the application of the Directive. **Forced marriages**, in which one or both parties is married without his or her consent or against his or her will, are not protected by international¹⁰ or Community law. Forced marriages must be distinguished from **arranged marriages**, where both parties fully and freely consent to the marriage, although a third party takes a leading role in the choice of partner, and from marriages of convenience, defined in Section 4.2 below.

Member States are not obliged to recognise **polygamous marriages**, contracted lawfully in a third country, which may be in conflict with their own legal order¹¹. This is without prejudice to the obligation to take due account of the best interests of children of such marriages.

The Directive must be applied in accordance with the non-discrimination principle enshrined in particular in Article 21 of the EU Charter.

Partners with whom an EU citizen has a *de facto* durable relationship, duly attested, are covered by Article 3(2)(b). Persons who derive their rights under the Directive from being **durable partners** may be required to present documentary evidence that they are partners of an EU citizen and that the partnership is durable. Evidence may be adduced by any appropriate means.

The requirement of durability of the relationship must be assessed in the light of the objective of the Directive to maintain the unity of the family in a broad sense¹². National rules on durability of partnership can refer to a minimum amount of time as a criterion for whether a partnership can be considered as durable. However, in this case national rules would need to foresee that other relevant aspects (*such as for example a joint mortgage to buy a home*) are also taken into account. Any denial of entry or residence must be fully justified in writing and open to appeal.

2.1.2. Family members in direct line

Without prejudice to issues related to recognition of decisions of national authorities, the notion of **direct relatives in the descending and ascending lines** extends to adoptive

¹⁰ *Inter alia*, Article 16(2) of the Universal Declaration of Human Rights or Article 16(1)(b) of the Convention to Eliminate All Forms of Discrimination Against Women

¹¹ ECtHR case *Alilouch El Abasse v Netherlands* (6 January 1992)

¹² Recital 6

relationships¹³ or minors in custody of a permanent legal guardian. Foster children and foster parents who have temporary custody may have rights under the Directive, depending upon the strength of the ties in the particular case. There is no restriction as to the degree of relatedness. National authorities may request evidence of the claimed family relationship.

In implementing the Directive, Member States must always act in the **best interests of the child**, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.

2.1.3. *Other family members*

Article 3(2)(a) does not lay down any restrictions as to the degree of relatedness when referring to '**other family members**'.

2.1.4. *Dependent family members*

According to the case-law¹⁴ of the Court, the status of '**dependent**' family member is the result of a factual situation characterised by the fact that **material support**¹⁵ for that family member is provided by the EU citizen or by his spouse/partner. The status of dependent family members does not presuppose a right to maintenance. There is no need to examine whether the family members concerned would in theory be able to support themselves, for example by taking up paid employment.

In order to determine whether family members are dependent, it must be assessed in the individual case whether, having regard to their financial and social conditions, they need material support to meet their essential needs in their country of origin or the country from which they came at the time when they applied to join the EU citizen (*i.e. not in the host Member State where the EU citizen resides*). In its judgments on the concept of dependency, the Court did not refer to any level of standard of living for determining the need for financial support by the EU citizen¹⁶.

The Directive does not lay down any requirement as to the minimum duration of the dependency or the amount of material support provided, as long as the dependency is genuine and structural in character.

Dependent family members are required to present documentary evidence that they are dependent. Evidence may be adduced by any appropriate means, as confirmed by the Court¹⁷. Where the family members concerned are able to provide evidence of their dependency by means other than a certifying document issued by the relevant authority of the country of origin or the country from which the family members are arriving, the host Member State may not refuse to recognise their rights. However, a mere undertaking from the EU citizen to

¹³ Adoptive children are fully protected by Article 8 of the ECHR (*ECtHR cases X v Belgium and Netherlands (10 July 1975), X v France (5 October 1982) as well as X, Y and Z v. UK (22 April 1997)*).

¹⁴ Cases 316/85 *Lebon* (para 22) and C-1/05 *Jia* (paras 36-37)

¹⁵ Emotional dependence is not taken into account, see AG Tizzano in case C-200/02 *Zhu and Chen*, para 84

¹⁶ The test of dependency should primarily be whether, in the light of their personal circumstances, the financial means of the family members permit them to live at the minimum level of subsistence in the country of their normal residence (AG Geelhoed in case C-1/05 *Jia*, para 96).

¹⁷ Cases C-215/03 *Oulane* (para 53) and C-1/05 *Jia* (para 41)

support the family member concerned is not sufficient in itself to establish the existence of dependence.

In accordance with **Article 3(2)**, Member States have a certain degree of discretion in laying down criteria to be taken into account when deciding whether to grant the rights under the Directive to "**other dependent family members**". However, Member States do not enjoy unrestricted liberty in laying down such criteria. In order to maintain the unity of the family in a broad sense, the national legislation must provide for a careful examination of the relevant personal circumstances of the applicants concerned, taking into consideration their relationship with the EU citizen or any other circumstances, such as their financial or physical dependence, as stipulated in Recital 6.

Any negative decision is subject to all the material and procedural safeguards of the Directive. It must be fully justified in writing and open to appeal.

2.2. Entry and residence of third country family members

2.2.1. Entry visas

As provided in Article 5(2), Member States may require third country family members moving with or joining an EU citizen to whom the Directive applies to have an entry visa. Such family members have not only the right to enter the territory of the Member State, but also **the right to obtain an entry visa**¹⁸. This distinguishes them from other third country nationals, who have no such right.

Third country family members should be issued **as soon as possible and on the basis of an accelerated procedure** with a **free of charge short-term entry visa**. By analogy with Article 23 of the Visa Code¹⁹ the Commission considers that delays of more than four weeks are not reasonable. The authorities of the Member States should guide the family members as to the type of visa they should apply for, and they cannot require them to apply for long-term, residence or family reunification visas. Member States must grant such family members every facility to obtain the necessary visas. Member States may use premium call lines or services of an external company to set up an appointment but must offer the possibility of direct access to the consulate to third country family members.

As the right to be issued with an entry visa is derived from the family link with the EU citizen, Member States may require only the **presentation of a valid passport and evidence of the family link**²⁰ (*and also dependency, serious health grounds, durability of partnerships, where applicable*). No additional documents, such as a proof of accommodation, sufficient resources, an invitation letter or return ticket, can be required.

¹⁸ Case C-503/03 *Commission v Spain* (para 42)

¹⁹ COM(2006) 403 final/2

²⁰ Articles 8(5) and 10(2)

Member States may encourage integration of EU citizens and their third country family members by offering language and other targeted courses on a voluntary basis.²¹ No consequence can be attached to the refusal to attend them.

Residence cards issued under Article 10 of the Directive *to a family member of an EU citizen residing in the host Member State*, including those issued by other Member States, exempt their holders from the visa requirement when they travel together with the EU citizen or join him/her in the host Member State.

Residence cards not issued under the Directive can exempt the holder from the visa requirement under Schengen rules²².

2.2.2. *Residence cards*

As stipulated in Article 10(1), the right of residence of third country family members is evidenced by the issuing of a document called "*Residence card of a family member of a Union citizen*". The denomination of this residence card must not deviate from the wording prescribed by the Directive as different titles would make it materially impossible for the residence card to be recognised in other Member States as exempting its holder from the visa requirement under Article 5(2).

The format of the residence card is not fixed, so Member States are free to lay it down as they see fit²³. However, the residence card must be issued as a self-standing document and not in form of a sticker in a passport, as this could limit the validity of the card in violation of Article 11(1).

The residence card must be **issued within six months from the date of application**. The deadline must be interpreted in light of Article 10 of the EC Treaty and the maximum period of six months is justified only in cases where examination of the application involves public policy considerations²⁴.

The **list of documents**²⁵ to be presented with the application for a residence card is exhaustive, as confirmed by Recital 14. No additional documents can be requested.

Member States may require that documents be **translated, notarised or legalised** where the national authority concerned cannot understand the language in which the particular document is written, or have a suspicion about the authenticity of the issuing authority.

²¹ Cf. the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on multilingualism: an asset for Europe and a shared commitment (COM (2008) 566).

²² Article 5 of Regulation (EC) No 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (*Schengen Borders Code*)

²³ Council Regulation (EC) No 1030/2002 laying down a uniform format for residence permits for third-country nationals does not apply to family members of EU citizens exercising their right to free movement (*Article 5*) and Article 21 of the Convention implementing the Schengen Agreement.

²⁴ COM(1999)372 (*point 3.2*)

²⁵ Article 10(2)

2.3. Residence of EU citizens for more than three months

EU citizens have a right of residence in the host Member State if they are economically active there. Students and economically inactive EU citizens must have **sufficient resources** for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have **comprehensive sickness insurance** cover.

The **list of documents** to be presented with the application for residence is exhaustive. No additional documents can be requested.

2.3.1. Sufficient resources

The notion of ‘**sufficient resources**’ must be interpreted in the light of the objective of the Directive, which is to facilitate free movement, as long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State.

The first step to assess the existence of sufficient resources should be whether the EU citizen (*and family members who derive their right of residence from him or her*) would meet the national criteria to be granted the **basic social assistance benefit**.

EU citizens have sufficient resources where the level of their resources is higher than the threshold under which a minimum subsistence benefit is granted in the host Member State. Where this criterion is not applicable, the minimum social security pension should be taken into account.

Article 8(4) prohibits Member States from laying down a fixed amount to be regarded as "sufficient resources", either directly or indirectly, below which the right of residence can be automatically refused. The authorities of the Member States must take into account the personal situation of the individual concerned. Resources from a third person must be accepted²⁶.

National authorities can, when necessary, undertake checks as to the existence of the resources, their lawfulness, amount and availability. The resources do not have to be periodic and can be in the form of accumulated capital. The evidence of sufficient resources cannot be limited²⁷.

In assessing whether an individual whose resources can no longer be regarded as sufficient and who was granted the minimum subsistence benefit is or has become **an unreasonable burden**, the authorities of the Member States must carry out a proportionality test. To this end, Member States may develop for example a points-based scheme as an indicator. Recital 16 of Directive 2004/38 provides **three sets of criteria** for this purpose:

(1) duration

- For how long is the benefit being granted?

²⁶ Case C-408/03 *Commission v Belgium* (para 40 et seq.)

²⁷ Case C-424/98 *Commission v Italy* (para 37)

- Outlook: is it likely that the EU citizen will get out of the safety net soon?
 - How long has the residence lasted in the host Member State?
- (2) personal situation**
- What is the level of connection of the EU citizen and his/her family members with the society of the host Member State?
 - Are there any considerations pertaining to age, state of health, family and economic situation that need to be taken into account?
- (3) amount**
- Total amount of aid granted?
 - Does the EU citizen have a history of relying heavily on social assistance?
 - Does the EU citizen have a history of contributing to the financing of social assistance in the host Member State?

As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State, they cannot be expelled for this reason²⁸.

Only receipt of social assistance benefits can be considered relevant to determining whether the person concerned is a burden on the social assistance system.

2.3.2. *Sickness insurance*

Any insurance cover, private or public, contracted in the host Member State or elsewhere, is acceptable in principle, as long as it provides **comprehensive coverage** and does not create a burden on the public finances of the host Member State. In protecting their public finances while assessing the comprehensiveness of sickness insurance cover, Member States must act in compliance with the limits imposed by Community law and in accordance with the principle of proportionality²⁹.

Pensioners fulfil the condition of comprehensive sickness insurance cover if they are entitled to health treatment on behalf of the Member State which pays their pension³⁰.

The European Health Insurance Card offers such comprehensive cover when the EU citizen concerned does not move the residence in the sense of Regulation (EEC) No 1408/71 to the host Member State and has the intention to return, e.g. studies or posting to another Member State.

²⁸ Article 14(3)

²⁹ Case C-413/99 *Baumbast* (paras 89-94)

³⁰ Articles 27, 28 and 28a of Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to the members of their families moving within the Community. As of 1 March 2010, Regulation (EC) No 883/04 will replace it but the same principles will apply.

3. RESTRICTIONS OF THE RIGHT TO MOVE AND RESIDE FREELY ON GROUNDS OF PUBLIC POLICY OR PUBLIC SECURITY

This section builds on the Communication of 1999³¹ on the special measures concerning the movement and residence of EU citizens which are justified on grounds of public policy, public security or public health. The content of the 1999 Communication is still generally valid, even if it refers to Directive 64/221, which was repealed by Directive 2004/38. The purpose of this section is to update the content of the 1999 Communication in the light of the recent case-law of the Court and to clarify certain questions raised during the process of the implementation of the Directive.

Freedom of movement for persons is one of the foundations of the EU. Consequently the provisions granting that freedom **must be given a broad interpretation**, whereas derogations from that principle must be interpreted strictly³².

3.1. Public policy and public security

Member States may restrict the freedom of movement of EU citizens on grounds of public policy or public security. Chapter VI of the Directive applies to any action taken on grounds of public policy or public security which affects the right of persons coming under the Directive to enter and reside freely in the host Member State under the same conditions as the nationals of that State³³.

Member States retain the freedom to determine the requirements of public policy and public security in accordance with their needs, which can vary from one Member State to another and from one period to another. However, when they do so in the context of the application of the Directive, they must interpret those requirements strictly³⁴.

It is crucial that Member States define clearly the protected interests of society, and make a clear distinction between public policy and public security. The latter cannot be extended to measures that should be covered by the former.

Public security is generally interpreted to cover both internal and external security³⁵ along the lines of preserving the integrity of the territory of a Member State and its institutions. **Public policy** is generally interpreted along the lines of preventing disturbance of social order.

EU citizens may be expelled only for conduct punished by the law of the host Member State or with regard to which other genuine and effective measures intended to combat such conduct were taken, as confirmed by the case-law³⁶ of the Court.

In any case, failure to comply with the registration requirement is not of such a nature as to constitute in itself conduct threatening public policy and public security and cannot therefore by itself justify the expulsion of the person.³⁷

³¹ COM(1999)372

³² Cases 139/85 *Kempf* (para 13) and C-33/07 *Jipa* (para 23)

³³ Cases 36/75 *Rutili* (paras 8-21) and 30/77 *Bouchereau* (paras 6-24)

³⁴ Cases 36/75 *Rutili* (para 27), 30/77 *Bouchereau* (para 33) and C-33/07 *Jipa* (para 23)

³⁵ Cases C-423/98 *Albore* (para 18 et seq.) and C-285/98 *Kreil* (para 15)

³⁶ Cases 115/81 *Adoui and Cornuaille* (paras 5-9) and C-268/99 *Jany* (para 61)

³⁷ Case 48/75 *Royer* (para 51).

3.2. Personal conduct and the threat

Restrictive measures may be taken only on a case-by-case basis where the personal conduct of an individual represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of the society of the host Member State³⁸. Restrictive measures cannot be based solely on considerations pertaining to the protection of public policy or public security advanced by another Member State³⁹.

Community law precludes the adoption of restrictive measures on **general preventive grounds**⁴⁰. Restrictive measures must be based on an actual threat and cannot be justified merely by a general risk⁴¹. Restrictive measures following a criminal conviction cannot be automatic and must take into account the personal conduct of the offender and the threat that it represents for the requirements of public policy⁴². Grounds extraneous to the **personal conduct** of an individual cannot be invoked. Automatic expulsions are not allowed under the Directive.⁴³

Individuals can have their rights restricted only if their personal conduct represents a **threat**, i.e. indicates the likelihood of a serious prejudice to the requirements of public policy or public security.

A threat that is only presumed is not **genuine**. The threat must be **present**. Past conduct may be taken into account only where there is a likelihood of reoffending⁴⁴. The threat must exist at the moment when the restrictive measure is adopted by the national authorities or reviewed by the courts⁴⁵. Suspension of sentence constitutes an important factor in the assessment of the threat as it suggests that the individual concerned no longer represents a real danger.

Present **membership of an organisation** may be taken into account where the individual concerned participates in the activities of the organization and identifies with its aims or designs⁴⁶. Member States do not have to criminalize or to ban the activities of an organisation to be in a position to restrict the rights under the Directive, as long as some administrative measures to counteract the activities of that organisation are in place. Past associations⁴⁷ cannot, in general, constitute present threat.

A **previous criminal conviction** can be taken into account, but only in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy⁴⁸. The authorities must base their decision on an assessment of the future conduct of the individual concerned. The kind and number of previous convictions must form a significant element in this assessment and particular regard must be had to the seriousness and frequency of the crimes committed.

³⁸ All criteria are cumulative.

³⁹ Cases C-33/07 *Jipa* (para 25) and C-503/03 *Commission v Spain* (para 62)

⁴⁰ Case 67/74 *Bonsignore* (paras 5-7)

⁴¹ General prevention in specific circumstances, such as sport events, is covered in the 1999 Communication (cfr point 3.3).

⁴² Cases C-348/96 *Calfa* (paras 17-27) and 67/74 *Bonsignore* (paras 5-7)

⁴³ Case C-408/03 *Commission v Belgium* (paras 68-72)

⁴⁴ Case 30/77 *Bouchereau* (paras 25-30)

⁴⁵ Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* (para 82)

⁴⁶ Case 41/74 *van Duyn* (para 17 et seq.)

⁴⁷ *Ibid*

⁴⁸ Cases C-482/01 and 493/01 *Orfanopoulos and Oliveri* (paras 82 and 100) and C-50/06 *Commission v Netherlands* (paras 42-45)

While the danger of re-offending is of considerable importance, a remote possibility of new offences is not sufficient⁴⁹.

A. and I. have finished serving their two year sentence for robbery. The authorities assess if the personal conduct of the two sisters represents a threat, i.e. if it involves the likelihood of a new and serious prejudice to public policy.

This was A.'s first conviction. She behaved well in prison. Since she left prison, she has found a job. The authorities find nothing in her behaviour that represents a genuine, present and sufficiently serious threat.

As for I., this was already her fourth conviction. The seriousness of her crimes has grown over time. Her behaviour in prison was far from exemplary and her two requests to be released on parole were refused. In less than two weeks, she is caught planning another robbery. The authorities conclude that I.'s conduct is a threat to public policy.

In certain circumstances, **persistent petty criminality** may represent a threat to public policy, despite the fact that any single crime/offence, taken individually, would be insufficient to represent a sufficiently serious threat as defined above. National authorities must show that the personal conduct of the individual concerned represents a threat to the requirements of public policy⁵⁰. When assessing the existence of the threat to public policy in these cases, the authorities may in particular take into account the following **factors**:

- the nature of the offences;
- their frequency;
- damage or harm caused.

The existence of multiple convictions is not enough, in itself.

3.3. Proportionality assessment

Chapter VI of the Directive cannot be regarded as imposing a precondition to the acquisition and maintenance of a right of entry and residence, but as providing exclusively the possibility to restrict, where justified, the exercise of a right derived directly from the Treaty⁵¹.

Once the authorities have established that the personal conduct of the individual represents a threat that is serious enough to warrant a restrictive measure, they must carry out a **proportionality assessment** to decide whether the person concerned can be denied entry or removed on grounds of public policy or public security.

National authorities must identify protected interests. It is in the light of these interests that they must carry out an analysis of the characteristics of the threat. The following **factors** could be taken into account:

⁴⁹ For example, the danger of re-offending may be considered greater in the case of drug dependency if there is a risk of further criminal offences committed in order to fund the dependency: AG Stix-Hackl in Joined cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri*

⁵⁰ Case C-349/06 *Polat* (para 35)

⁵¹ Case 321/87 *Commission v Belgium* (para 10)

- degree of social danger resulting from the presence of the person concerned on the territory of that Member State;
- nature of the offending activities, their frequency, cumulative danger and damage caused;
- time elapsed since acts committed and behaviour of the person concerned (*NB: also good behaviour in prison and possible release on parole could be taken into account*).

The personal and family situation of the individual concerned must be assessed carefully with a view to establishing whether the envisaged measure is appropriate and does not go beyond what is strictly necessary to achieve the objective pursued, and whether there are less stringent measures to achieve that objective. The following **factors**, outlined in an indicative list in Article 28(1), should be taken into account⁵²:

- impact of expulsion on the economic, personal and family life of the individual (*including on other family members who would have the right to remain in the host Member State*);
- the seriousness of the difficulties which the spouse/partner and any of their children risk facing in the country of origin of the person concerned;
- strength of ties (*relatives, visits, language skills*) – or lack of ties – with the Member State of origin and with the host Member State (*for example, the person concerned was born in the host Member State or lived there from an early age*);
- length of residence in the host Member State (*the situation of a tourist is different from the situation of someone who has lived for many years in the host Member State*);
- age and state of health.

3.4. Increased protection against expulsion

EU citizens and their family members who are permanent residents (*after five years*) in the host Member State can be expelled only on serious grounds of public policy or public security. EU citizens residing for more than after ten years and children can be expelled only on imperative grounds of public security (*not public policy*). There must be a clear distinction between normal, ‘serious’ and ‘imperative’ grounds on which the expulsion can be taken.

As a rule, Member States are not obliged to take **time actually spent behind bars** into account when calculating the duration of residence under Article 28 where no links with the host Member State are built.

3.5. Urgency

Under Article 30(3), the time allowed to leave the territory must be at least one month, save in duly substantiated cases of **urgency**. The justification of an urgent removal must be genuine

⁵² In relation to the fundamental rights, see the case-law of the ECtHR in cases *Berrehab, Moustaquim, Beldjoudi, Boujlifa, El Boujaidi* and *Dalia*.

and proportionate⁵³. In assessing the need to reduce this time in cases of urgency, the authorities must take into account the impact of an immediate or urgent removal on the personal and family life of the person concerned (*e.g. need to give notice at work, terminate a lease, need to arrange for personal belongings to be sent to the place of new residence, the education of children, etc.*). Adopting an expulsion measure on imperative or serious grounds does not necessarily mean that there is urgency. The assessment of urgency must be clearly and separately substantiated.

3.6. Procedural safeguards

The person concerned must always be notified of any measure taken on grounds of public policy or public security, as required by Article 30.

Decisions must be fully reasoned and list all the specific factual and legal grounds on which they are taken so that the person concerned may take effective steps to ensure his or her defence⁵⁴ and national courts may review the case in accordance with the right to an effective remedy, which is a general principle of Community law reflected in Article 47 of the EU Charter. In this respect, forms may be used to notify the decisions but must always allow for a full justification of the grounds on which the decision was taken (*just indicating one or more of several options by ticking a box is not acceptable*).

4. ABUSE AND FRAUD

Community law cannot be relied in case of abuse⁵⁵. Article 35 allows Member States to take effective and necessary measures to fight against abuse and fraud in areas falling within the material scope of Community law on free movement of persons by refusing, terminating or withdrawing any right conferred by the Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure must be proportionate and subject to the procedural safeguards provided for in the Directive⁵⁶.

Community law promotes the mobility of EU citizens and protects those who have made use of it⁵⁷. There is no abuse where EU citizens and their family members obtain a right of residence under Community law in a Member State other than that of the EU citizen's nationality as they are benefiting from an advantage inherent in the exercise of the right of free movement protected by the Treaty⁵⁸, regardless of the purpose of their move to that State⁵⁹. By the same token, Community law protects EU citizens who return home after having exercised their free movement rights.

⁵³ AG Stix-Hackl in case C-441/02 *Commission v Germany*

⁵⁴ Case 36/75 *Rutili* (paras 37-39)

⁵⁵ Cases 33/74 *van Binsbergen* (para 13), C-370/90 *Singh* (para 24) and C-212/97 *Centros* (paras 24-25)

⁵⁶ Case C-127/08 *Metock* (paras 74-75)

⁵⁷ Cases C-370/90 *Singh*, C-291/05 *Eind* and C-60/00 *Carpenter*

⁵⁸ Cases C-212/97 *Centros* (para 27) and C-147/03 *Commission v Austria* (paras 67-68)

⁵⁹ Cases C-109/01 *Akrich* (para 55) and C-1/05 *Jia* (para 31)

4.1. Concepts of abuse and fraud

4.1.1. Fraud

For the purposes of the Directive, **fraud** may be defined as deliberate deception or contrivance made to obtain the right of free movement and residence under the Directive. In the context of the Directive, fraud is likely to be limited to forgery of documents or false representation of a material fact concerning the conditions attached to the right of residence. Persons who have been issued with a residence document only as a result of fraudulent conduct in respect of which they have been convicted, may have their rights under the Directive refused, terminated or withdrawn⁶⁰.

4.1.2. Abuse

For the purposes of the Directive, **abuse** may be defined as an artificial conduct entered into **solely** with the purpose of obtaining the right of free movement and residence under Community law which, albeit formally observing of the conditions laid down by Community rules, does not comply with the purpose of those rules⁶¹.

4.2. Marriages of convenience

Recital 28 defines **marriages of convenience** for the purposes of the Directive as marriages contracted for the **sole** purpose of enjoying the right of free movement and residence under the Directive that someone would not have otherwise. A marriage cannot be considered as a marriage of convenience simply because it brings an immigration advantage, or indeed any other advantage. The quality of the relationship is immaterial to the application of Article 35.

The definition of marriages of convenience can be extended by analogy to other forms of relationships contracted for the sole purpose of enjoying the right of free movement and residence, such as (registered) partnership of convenience, fake adoption or where an EU citizen declares to be a father of a third country child to convey nationality and a right of residence on the child and its mother, knowing that he is not its father and not willing to assume parental responsibilities.

Measures taken by Member States to fight against marriages of convenience may not be such as to deter EU citizens and their family members from making use of their right to free movement or unduly encroach on their legitimate rights. They must not undermine the effectiveness of Community law or discriminate on grounds of nationality.

When interpreting the notion of abuse in the context of the Directive, due attention must be given to the status of the EU citizen. In accordance with the principle of supremacy of Community law, the assessment of whether Community law was abused must be carried out in the framework of Community law, and not with regard to national migration laws. The Directive does not prevent Member States from **investigating individual cases** where there is a **well-founded suspicion of abuse**. However, Community law prohibits systematic checks⁶².

⁶⁰ Cases C-285/95 *Kol* (para 29) and C-63/99 *Gloszczuk* (para 75)

⁶¹ Cases C-110/99 *Emsland-Stärke* (para 52 et seq.) and C-212/97 *Centros* (para 25)

⁶² The prohibition includes not only checks on all migrants, but also checks on whole classes of migrants (e.g. those from a given ethnic origin).

Member States may rely on previous analyses and experience showing a clear correlation between proven cases of abuse and certain characteristics of such cases.

In order to avoid creating unnecessary burdens and obstacles, it is possible to identify **a set of indicative criteria** suggesting that there is unlikely to be an abuse of Community rights:

- the third country spouse would have no problem obtaining a right of residence in his/her own capacity or has already lawfully resided in the EU citizen's Member State beforehand;
- the couple was in a relationship for a long time;
- the couple had a common domicile/household for a long time⁶³;
- the couple have already entered a serious long-term legal/financial commitment with shared responsibilities (*mortgage to buy a home, etc*);
- the marriage has lasted for a long time.

Member States may define **a set of indicative criteria** suggesting the possible intention to abuse the rights conferred by the Directive for the sole purpose of contravening national immigration laws. National authorities may in particular take into account the following factors:

- the couple have never met before their marriage;
- the couple are inconsistent about their respective personal details, about the circumstances of their first meeting, or about other important personal information concerning them;
- the couple do not speak a language understood by both;
- evidence of a sum of money or gifts handed over in order for the marriage to be contracted (*with the exception of money or gifts given in the form of a dowry in cultures where this is common practice*);
- the past history of one or both of the spouses contains evidence of previous marriages of convenience or other forms of abuse and fraud to acquire a right of residence;
- development of family life only after the expulsion order was adopted;
- the couple divorces shortly after the third country national in question has acquired a right of residence.

The above criteria should be considered possible triggers for investigation, without any automatic inferences from results or subsequent investigations. Member States may not rely on one sole attribute; due attention has to be given to all the circumstances of the individual case. The investigation may involve a separate interview with each of the two spouses.

⁶³ Community law does not require third country family spouses to live with the EU citizen to qualify for a right of residence – case 267/83 *Diatta* (para 15 et seq.).

S., a third country national, was ordered to leave in one month as she had overstayed her tourist visa. After two weeks, she married O., an EU national who had just arrived to the host Member State. The authorities suspect that the marriage might have been concluded only to avoid expulsion. They contact the authorities in O.'s Member State and find out that after the wedding his family shop was finally able to pay a debt of 5000 EUR, which it had been unable to repay for two years.

They invite the newly-weds for an interview, during which they find out that O. has meanwhile already left the host Member State to return home to his job, that the couple is not able to communicate in a common language and that they met for the first time one week before the marriage. There are strong indications that the couple may have married with the sole purpose of contravening national immigration laws.

The **burden of proof** lies on the authorities of the Member States seeking to restrict rights under the Directive. The authorities must be able to build a convincing case while respecting all the material safeguards described in the previous section. On appeal, it is for the national courts to verify the existence of abuse in individual cases, evidence of which must be adduced in accordance with the rules of national law, provided that the effectiveness of Community law is not thereby undermined⁶⁴.

Investigations must be carried out in accordance with **fundamental rights**, in particular with Articles 8 (*right to respect for private and family life*) and 12 (*right to marry*) of the ECHR (*Articles 7 and 9 of the EU Charter*).

On going investigation of suspected cases of marriages of convenience cannot justify derogation from the rights of third country family members under the Directive, such as the prohibition of the right to work, seizure of passport or delay of the issue of a residence card within six months from the date of application. These rights can be withdrawn at any time as a result of subsequent investigations.

4.3. Other forms of abuse

Abuse could also occur when EU citizens, unable to be joined by their third country family members in their Member State of origin because of the application of national immigration rules preventing it, move to another Member State with the sole purpose to evade, upon returning to their home Member State, the national law that frustrated their family reunification efforts, invoking their rights under Community law.

The defining characteristics of the line between genuine and abusive use of Community law should be based on the assessment of whether the exercise of Community rights in a Member State from which the EU citizens and their family members return was **genuine and effective**. In such case, EU citizens and their families are protected by Community law on free movement of persons. This assessment can only be made on a case-by-case basis. If, in a concrete case of return, the use of Community rights was genuine and effective, the Member State of origin should not inquire into the personal motives that triggered the previous move.

When necessary, Member States may define **a set of indicative criteria** to assess whether **residence** in the host Member State was **genuine and effective**. National authorities may in particular take into account the following factors:

⁶⁴ Cases C-110/99 *Emsland-Stärke* (para 54) and C-215/03 *Oulane* (para 56)

- the circumstances under which the EU citizen concerned moved to the host Member State (*previous unsuccessful attempts to acquire residence for a third country spouse under national law, job offer in the host Member State, capacity in which the EU citizen resides in the host Member State*);
- degree of effectiveness and genuineness of residence in the host Member State (*envisaged and actual residence in the host Member State, efforts made to establish in the host Member State, including national registration formalities and securing accommodation, enrolling children at an educational establishment*);
- circumstances under which the EU citizen concerned moved back home (*return immediately after marrying a third country national in another Member State*).

The above criteria should be considered possible triggers for investigation, without any automatic inferences from results or subsequent investigations. In assessing whether the exercise of the right to move and reside freely in another Member State of the EU was genuine and effective, national authorities may not rely on a sole attribute but must pay due attention to all the circumstances of the individual case. They must assess the conduct of persons concerned in the light of the objectives pursued by Community law and act on the basis of objective evidence⁶⁵.

J. returns home from another Member State with S., his third country spouse. S. unsuccessfully attempted twice to acquire residence in J.'s Member State. J. continued to work home during his alleged residence in another Member State.

The authorities contact the authorities of the host Member State and find out that J. returned home only after three weeks. The couple stayed in a tourist hotel and paid for the three weeks of accommodation in advance. Taking all of this into account, J. and S. do not benefit from the provisions of the Directive.

It cannot be inferred that the residence in the host Member State is not genuine and effective only because an EU citizen maintains some ties to the home Member State, all the more if his status in the host country is unstable (*e.g. a work contract of limited duration*). The mere fact that a person consciously places himself in a situation conferring a right does not in itself constitute a sufficient basis for assuming that there is abuse⁶⁶.

All relevant considerations set out above on investigation, material and procedural safeguards, co-operation between Member States relating to marriages of convenience apply *mutatis mutandis*.

4.4. Measures and sanctions against abuse and fraud

Article 35 entitles Member States to adopt the **necessary measures** in cases of abuse of rights or fraud. These measures **can be taken at any point of time** and may entail:

- the refusal to confer rights under Community law on free movement (*e.g. to issue an entry visa or a residence card*);

⁶⁵ Case C-206/94 *Brennet v Paletta* (para 25)

⁶⁶ Case C-212/97 *Centros* (para 27)

- the termination or withdrawal of rights under Community law on free movement (*e.g. the decision to terminate validity of a residence card and to expel the person concerned who acquired rights by abuse or fraud*).

Community law does not at present provide for any specific sanctions Member States may take in the framework of fight against abuse or fraud. Member States may lay down sanctions under civil (*e.g. cancelling the effects of a proven marriage of convenience on the right of residence*), administrative or criminal law (*fine or imprisonment*), provided these sanctions are effective, non-discriminatory and proportionate.