



## **General topic 2:**

# **Union citizenship: development, impact and challenges**

## **National Report on the United Kingdom**

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## ***Part 1: Citizenship within Directive 2004/38 EC – Stability of Residence for Union Citizens and their Family Members***

### **Question 1**

- *With respect to a Union citizen's family members, how have Articles 2, 3 and 5 of the Directive been transposed into national law?*

1. Arts 2 and 3 of Directive 2004/38 EC (hereinafter: CRD) define the categories of individuals who enjoy derived rights under EU law as 'family members,'<sup>1</sup> 'other family members,'<sup>2</sup> or non-married partners of Union citizens.<sup>3</sup> The three distinct categories apply without reference to the nationality of the individuals concerned and confer distinct levels of protection. Most significantly, Art 5 CRD affords Union citizens and 'family members' a right to enter the territory of the host Member State on the production of certain valid documents. Arts 2, 3 and 5 of the CRD were transposed into UK law through Regs 7, 8 and 11 of the *Immigration (European Economic Area) Regulations 2006* (hereinafter: EEA Regulations).<sup>4</sup> The European Casework Instructions, issued by the UK Border Agency (UKBA), supplement the EEA Regulations by providing UK immigration caseworkers with guidance on CRD rights.<sup>5</sup> The UK has adopted special transitional provisions to govern the entry and residence rights of Bulgarian and Romanian nationals and their family members.<sup>6</sup> These arrangements apply until 1<sup>st</sup> January 2014.

2. The EEA Regulations categorise 'other family members' and non-married partners as 'extended family members.' Unless otherwise stated, we shall adopt this label throughout this report to refer collectively to these two specific categories of derived rights holders. The EEA Regulations apply to 'EEA nationals,' defined as nationals of an EEA State who are not also British citizens. Unless otherwise stated, reference to EEA nationals in this Report should be taken to include the situation of Member State nationals as Union citizens.

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<sup>1</sup> The Union citizen's spouse or registered partner (where the host State treats registered partnerships as equivalent to marriage) and the direct descendants (under the age of 21 or dependent) and direct dependent relatives in the ascending line of the Union citizen and/or his or her spouse/civil partner (Art 2 CRD).

<sup>2</sup> Persons who, in the country from which they have come, are dependants or members of the household of the Union citizen and persons requiring the personal care of the Union citizens on serious medical grounds (Art 3 CRD).

<sup>3</sup> 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 (2004) OJ L 158/1.

<sup>4</sup> Immigration (European Economic Area) Regulations SI 2006/1003. For detailed review of the EEA Regulations, see e.g. H. Toner, 'New Regulations implementing Directive 2004/38,' (2006) 25(4) *Journal of Immigration, Asylum and Nationality Law* 331. For discussion of the interface between the CRD/EU citizenship rights and UK immigration law, see J. Shaw, N. Miller, M. Fletcher, 'Getting to grips with EU citizenship: Understanding the friction between UK immigration law and EU free movement law,' (2013) *Edinburgh Law School Citizenship Studies* and J. Shaw and N. Miller, 'When legal worlds collide: an exploration of what happens when EU free movement meets UK immigration law,' (2013) 38(2) *EL Rev.* 137.

<sup>5</sup> See <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/ecis/> (all electronic links last accessed on 14/11/13).

<sup>6</sup> Accession (Immigration and Worker Authorisation) Regulations SI 2006/3317 (as amended).

- *How have national courts and/or tribunals dealt with the different types of family relationships outlined in Articles 2 and 3?*

3. Our findings indicate that UK courts and tribunals understand the key distinction established by the CRD between, on the one hand, the rights of family members of Union citizens and, on the other hand, the rights of their extended family members.<sup>7</sup> National courts and tribunals recognise that persons qualifying as family members (Art 2 CRD/Reg 7 EEA Regulations) enjoy automatically, by virtue of their status as a family member of a Union citizen and irrespective of their nationality, a right of entry into and residence within the UK as host Member State. UK courts understand that, by contrast, extended family members (Art 3 CRD/Reg 8 EEA Regulations) benefit only from a more limited procedural right; specifically: a right to have the UK authorities consider fully their personal circumstances with a view to “facilitating” their entry and residence.

4. The distinction between family members and extended family members proved decisive before the UK courts in *B v Home Office*.<sup>8</sup> In that decision, the High Court concluded that the EU law doctrine of Member State liability for breaches of Union law only protected the substantive rights of entry and residence afforded to family members under Art 2 CRD and not the procedural rights conferred on extended family members by Art 3 CRD.<sup>9</sup>

➤ *Family members*

5. With particular respect to family members, the case law of UK courts and tribunals to date has been concerned primarily with the interpretation of the two dependent variables in Art 2 CRD/Reg 7 of the EEA Regulations: (1) the existence of legal marriages between Union citizens and (usually) Third Country Nationals (hereinafter: TCN) spouses; and (2) the criterion of dependency.<sup>10</sup> The first criterion has given rise to most of the case law on family members. Legal disputes interpreting that first criterion tend to involve judicial review of determinations of ‘sham marriages’ made by UKBA officials.<sup>11</sup> In particular, UK courts have criticised the UKBA’s failure, in specific instances, to recognise fully the automatic rights of entry and residence enjoyed by TCN spouses of EU citizens under Union law.<sup>12</sup>

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<sup>7</sup> E.g. *AP (India) v Secretary of State for the Home Department* [2007] UKAIT 48 and *Aladeselu v Secretary of State for the Home Department* [2013] EWCA Civ 144 at paras 8-16, 52 and 54. See here also the recent decision of the CJEU in Case C-83/11 *Secretary of State v Rahman*, Judgment of the Court (Grand Chamber) of 5 September 2012 (nyr) at para. 21 – on preliminary reference from the Court of Appeal.

<sup>8</sup> *B v Home Office* [2012] EWHC 226 (QB).

<sup>9</sup> *Ibid.*, at paras 105-119

<sup>10</sup> On this point, see also Shaw et al, ‘Getting to grips with EU citizenship,’ cited *supra* note 4 at p. 21.

<sup>11</sup> E.g. *ZH (Afghanistan) v Secretary of State for the Home Department* [2009] EWCA Civ 1060 and *Adetola v First-Tier Tribunal (Immigration and Asylum Chamber)* [2010] EWHC 3197 (Admin).

<sup>12</sup> *ZH (Afghanistan) v Secretary of State*, cited *supra* note 11 and *Papajorgji* [2012] UKUT 38 (IAC).

6. The UK was one of several Member States that opted to impose an additional requirement of prior lawful residence (within the territory of the Union) for TCN family members when transposing the CRD into national law. The UK Government introduced this extra requirement in Reg 12(1)(b) of the EEA Regulations. In *Metock*, the Court of Justice held that EU law did not permit the application of such a test to determine the rights of entry and residence of TCN family members of Union citizens.<sup>13</sup> The UK Government was extremely slow to respond to the *Metock* ruling. Reg 12(1)(b) of the EEA Regulations was not amended to reflect the substance of that decision until 2011.<sup>14</sup> On the other hand, UK courts reacted more swiftly and favorably to the *Metock* ruling. That decision was followed by the English Court of Appeal in *ZH (Afghanistan)*, prior to the amendment of the EEA Regulations.<sup>15</sup> During the same period, the Court of Appeal also expressed its clear frustration with the UK Government's initial delayed response to *Metock*. In *Owusu* that Court strongly criticised the Secretary of State's attempt to rely, post-*Metock*, on Reg 12(1)(b) of the EEA Regulations in the knowledge that that provision was now 'flagrantly unlawful.'<sup>16</sup>

➤ *Extended family members*

7. UK courts and tribunals have addressed three specific points of interpretation as regards the rights of extended family members. First, national courts and tribunals have been requested to examine the requirement that extended family members previously resided with the Union citizens in an EEA State before entering the UK.<sup>17</sup> That requirement for prior EEA residence is not provided for in the CRD, but was (again) imposed by the UK Government through transposition, in parallel with its approach to family members – discussed above.<sup>18</sup> Secondly, national courts and tribunals have reviewed the requirement, included in both the CRD and EEA Regulations, that extended family members 'accompany or join' the Union citizen in the host Member State.<sup>19</sup> Finally, UK courts have again been required to interpret the dependency criterion, which also applies to govern the derived rights of certain extended family members under both the CRD and EEA Regulations.<sup>20</sup>

8. After some initial difficulty in places,<sup>21</sup> UK courts and tribunals now appear to be making good progress on all three of the aforementioned key issues. First, following the approach for family members discussed above, national courts have struck down as unlawful the prior EEA residence requirement for extended family

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<sup>13</sup> Case C-127/08 *Metock and Others v Minister for Justice, Equality and Law Reform* [2008] ECR I-6241.

<sup>14</sup> Immigration (European Economic Area) (Amendment) Regulations, SI 2011/1247.

<sup>15</sup> *ZH (Afghanistan) v Secretary of State*, cited *supra* note 11.

<sup>16</sup> *R. (on the application of Owusu) v Secretary of State* [2009] EWHC 593 (Admin).

<sup>17</sup> E.g. *KG (Sri Lanka) v Secretary of State* [2008] EWCA Civ 13 and *SM (Sri Lanka) v Secretary of State* [2008] UKAIT 75 (AIT).

<sup>18</sup> See Reg 8(2)(a) EEA Regulations.

<sup>19</sup> E.g. *Aladeselu v Secretary of State* [2011] UKUT 253 (IAT) and *Aladeselu v Secretary of State*, cited *supra* note 7.

<sup>20</sup> *Ibid.*

<sup>21</sup> See esp. *KG (Sri Lanka) v Secretary of State*, cited *supra* note 16 and *SM (Sri Lanka) v Secretary of State* [2008] UKAIT 75 (AIT). In both cases UK courts struggled to assess the derived rights of TCNs as extended family members.

members introduced by Reg 8 of the EEA Regulations.<sup>22</sup> Secondly, with respect to the requirement – permitted by the CRD – that extended family members ‘accompany or join’ the Union citizen in the United Kingdom, national courts have kept pace with developments in the case law of the CJEU. Recently, for instance, the Court of Appeal ruled that this specific requirement must be read in light of *Metock*.<sup>23</sup> In other words, it took the view that the requirement in both the CRD and EEA Regulations that extended family members accompany or join Union citizens in the host State must be taken to include the situation of relations who entered the host State – whether legally or illegally – *prior* to the Union citizen. Finally, on dependency, UK courts are working towards a generous construction of that criterion. In *Adaleslu* the Court of Appeal recently ruled that, for extended family members, that requirement must be assessed at the time of application.<sup>24</sup> Further, it also concluded that the situation of dependency need not have arisen in the recipient’s country of origin.<sup>25</sup> The Court of Appeal’s position would appear to extend beyond the requirements outlined by the CJEU in *Rahman*. The Court of Justice had strongly suggested that the situation of dependency on the Union citizen in Art 3(2)(a) CRD must have arisen in the extended family member’s country of origin.<sup>26</sup>

- *Are the procedural safeguards contained in Article 5 providing effective protection?*

9. The primary procedural safeguard as regards the right of entry into the host State is contained in Art 5(4) CRD. That provision obliges Member States to afford Union citizens and their family members ‘every reasonable opportunity’ to obtain – or have brought to them within a reasonable period – the necessary documentation required to support their right of entry into the host State. Alternatively, Member States must permit persons to corroborate or prove by other means that they are covered by the right of free movement and residence under Union law. The host Member State is expressly prohibited from refusing persons entry to the national territory before the aforementioned obligations have been discharged. The substance of Art 5(4) is transposed into UK law in Reg 11(4) of the EEA Regulations.

10. Reg 11(4) has been invoked to establish, for TCN family members of Union citizens, a right of entry into the UK. For instance, in *CO (Nigeria) v Entry Clearance Officer*, the Asylum and Immigration Tribunal held that the son of a Polish national resident in the UK could rely on Reg 11(4) in order to secure entry into the United Kingdom.<sup>27</sup> Equally, in *Owusu* the Court held that a Ghanaian minor was entitled to join his Dutch mother resident in the UK on the basis of that

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<sup>22</sup> *Bigia v Entry Clearance Officer* [2009] EWCA Civ 79. In that case, the Secretary of State conceded that Art 3(2) CRD had been incorrectly transposed. The EEA Regulations were subsequently amended in 2011 by the Immigration (European Economic Area) (Amendment) Regulations SI 2011/1247.

<sup>23</sup> *Aladeselu v Secretary of State*, cited *supra* note 7 at paras 39 and 44.

<sup>24</sup> *Ibid.*, at para. 48.

<sup>25</sup> *Ibid.*

<sup>26</sup> Case C-83/11 *Rahman*, cited *supra* note 7 at para. 33.

<sup>27</sup> *CO (Nigeria) v Entry Clearance Officer* [2007] UKAIT 74.

same provision.<sup>28</sup> The application of Reg 11(4) to establish rights of entry and residence for TCN family members is, however, severely limited in practice by the UK's rules on entry clearance.<sup>29</sup> The UK has introduced financial penalties for carriers bringing TCN family members to the United Kingdom who have not first obtained an 'EEA family permit' in accordance with Reg 12 of the EEA Regulations.<sup>30</sup> Thus, in effect, TCN family members without an EEA permit will in all likelihood be denied boarding by carriers even though they would be able to secure entry upon arrival pursuant to Reg 11(4).

11. The requirement under the EEA Regulations that TCN family members obtain a UK-issued 'EEA family permit' prior to entering the UK conflicts with Art 5(2) CRD. That provision clearly directs Member States to exempt non-EEA family members from visa requirements otherwise applicable under national law where such persons hold a valid EU residence card issued by the authorities of another Member State in accordance with Art 10 CRD. The UK Government's refusal to transpose this obligation is based on concerns about the abuse of rights, fraud and, moreover, the current absence of uniform, minimum standards governing the issue of CRD residence cards throughout the Union.<sup>31</sup> In 2011 the European Commission concluded that the UK had failed to transpose Art 5(2) CRD correctly.<sup>32</sup> In November 2012, the High Court ruled that the UK's refusal to recognise non-UK issued residence cards in accordance with Art 5(2) CRD was justified and proportionate.<sup>33</sup> Nevertheless, in the final analysis, the Court opted to refer the matter to the Court of Justice on a preliminary reference.<sup>34</sup> The CJEU is yet to adjudicate on the validity of the UK's legal position.<sup>35</sup>

## Question 2

- *Is there any evidence of the expulsion of EU citizens (and/or their family members) on purely economic grounds (i.e. failure to satisfy the conditions set out in Article 7 of the Directive) e.g. in the decisions of national courts and/or tribunals?*

12. There is clear evidence of targeted administrative efforts to deport EU citizens from the UK on grounds that are inherently linked to economic considerations. By way of illustration, in April 2010 the UKBA introduced a pilot scheme aimed at removing homeless EEA nationals from the United Kingdom.<sup>36</sup> The scheme ran in parts of London as well as in several other cities in the South of England. The Homelessness Pilot project involved UKBA officials issuing written notices to EU

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<sup>28</sup> *R. (on the application of Owusu) v Secretary of State*, cited *supra* note 15.

<sup>29</sup> See here also Shaw et al, 'Getting to grips with EU citizenship,' cited *supra* note 7 at p. 10.

<sup>30</sup> Art 1(2) of the Immigration and Asylum Act 1999 (Section 40) indicates that liability may be waived if the person concerned is able to satisfy the conditions in Reg 11(4) EEA Regulations upon arrival.

<sup>31</sup> See here esp. *R. (on the application of McCarthy) v SSHD* [2012] EWHC 3368 (Admin) at paras 41-57.

<sup>32</sup> [http://europa.eu/rapid/press-release\\_IP-12-417\\_en.htm](http://europa.eu/rapid/press-release_IP-12-417_en.htm).

<sup>33</sup> *R. (on the application of McCarthy) v SSHD*, cited *supra* note 30 at para 108.

<sup>34</sup> *Ibid.*, at para. 112.

<sup>35</sup> Case C-202/13.

<sup>36</sup> For discussion, see Shaw et al, 'Getting to grips with EU citizenship,' cited *supra* note 7 at pp 31-32.

citizens requiring them to attend a local police station for interview. The purpose of this hearing was to determine whether the EU citizen concerned had a right of residence in the UK under the CRD (e.g. by virtue of Arts 7 or 16 CRD). *The Guardian* reported in July 2010 that, one month into the Homelessness Pilot project, more than 200 people had been targeted under the pilot, with around 100 EU citizens served removal notices and 13 deported.<sup>37</sup>

13. A recent report in *Inside Housing* indicates that the UKBA has revived its removal scheme.<sup>38</sup> As of July 2013, it is reported that Metropolitan Police and UK Immigration officers have again targeted homeless EU citizens in London. *Inside Housing* reports that 63 Romanian nationals were questioned near Marble Arch, around 20 of who were subsequently deported by plane to Romania. An official statement by the Head of the Home Office Immigration Enforcement Team, confirmed that a number of ‘immigration offenders from Eastern Europe’ were targeted in the July action on the grounds that they did not enjoy a right of residence in the UK under Union law.<sup>39</sup>

14. UK courts and tribunals are only very exceptionally confronted with the issue of removing EU citizens from the UK on grounds that are purely economic.<sup>40</sup> Most of the national case law on deportation addresses the existence of CRD residence rights or the interpretation of the concepts of public policy, public security and public health protecting EU citizens from expulsion from the host State.<sup>41</sup> On the issue of residence rights (point one), national courts frequently conclude that EU citizens and/or their family members do not enjoy a right of residence under EU law for want of sufficient resources (Art 7 CRD).<sup>42</sup> However, that determination does not, of itself, lead in law or practice to the deportation of Member State nationals. The solution adopted by the UK courts is to treat EU citizens who do not enjoy a right of residence by virtue of e.g. Art 7 CRD as simply ‘present’ in the United Kingdom.<sup>43</sup> That status does not confer any right of residence in the UK under either EU or national law. Such persons are deemed subject to UK immigration control and, therefore, liable to removal by the Secretary of State.<sup>44</sup> The preceding discussion of the UKBA’s schemes to remove EU citizen confirms that such follow-on administrative action is now being taken – at least with respect to specific categories of non-economically active EU citizens.

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<sup>37</sup> <http://www.theguardian.com/society/2010/jul/20/eastern-european-rough-sleepers-deported>.

<sup>38</sup> <http://www.insidehousing.co.uk//6527844.article>.

<sup>39</sup> *Ibid.*

<sup>40</sup> See here *Chief Adjudication Officer v Wolke* (HL) [1997] 1 WLR 1640.

<sup>41</sup> See further Q6 below.

<sup>42</sup> E.g. *Lekpo-Bozua v Hackney LBC* [2010] EWCA Civ 909 and *Mirga v Secretary of State for Work and Pensions* [2012] EWCA Civ 1952. The sufficient resources test is transposed in Reg 4(4) EEA Regulations.

<sup>43</sup> *Kaczmarek v Secretary of State for Work and Pensions* [2008] EWCA Civ 1310. See here also *Abdirahman v Secretary of State* [2007] EWCA Civ 657.

<sup>44</sup> As per Maurice Kay LJ, *Kaczmarek v Secretary of State*, cited *supra* note 41 at para. 5. See here also Lord Hoffmann in *Chief Adjudication Officer v Wolke*, cited *supra* note 38 at p.1656.

### Question 3

- *How have Articles 12-15 of the Directive been transposed into national law?*

15. Art 12 and 13 CRD provide for the retention of residence rights, under certain conditions, by family members of a Union citizen following the death or departure from the host Member State of that citizen, or after the termination of a marriage or registered partnership. These provisions have been transposed into UK law by Reg 10(2), (3), and (5) of the EEA Regulations. Art 14 CRD places conditions on both the individual and the host State in relation to the retention of residence under Articles 6, 7, 12 and 13 CRD. These broadly relate to conditions of work or self-sufficiency.<sup>45</sup> Art 14 is transposed to a greater extent by Regs 14, 13(3), 19(4) and (6)(2)(b)(iii) of the EEA Regulations. Art 15 CRD affords Union citizens and their family members a range of procedural safeguards; e.g. protection from expulsion upon the expiry of identity documents and a right of appeal against expulsion decisions. These provisions are partly transposed by Regs 26, 27, 29 and 29A of the EEA Regulations. The Commission has identified specific problems with the UK's transposition of the rights of appeal related to Art 15 CRD – discussed below.<sup>46</sup>

- *Have any disputes on the interpretation or application been addressed within the national courts and tribunals?*

16. Much of the national case law in relation to Arts 12 and 13 CRD has concerned the economic status required of both the Union citizen and his/her (former) family members for residence rights to be retained, following death, departure or termination of marriage/registered partnership. In short, UK courts have largely held that, for family members to retain residence rights, the Union citizen, from whom rights are derived, must have been working, self-sufficient or self-employed up until the point of death, departure or divorce.<sup>47</sup> This requirement has been held to apply even in relation to Art 13(2)(c) CRD under which spouses can retain a right of residence, without meeting requirements as to length of residence attached to other parts of the provision, in particularly difficult circumstances such as domestic violence.

17. The economic status of the Union citizen, from whom rights were originally derived, is considered irrelevant *after* the date of death, departure or divorce.<sup>48</sup> At this point, the focus shifts to the economic status of the (former) family member. UK courts have held that, from the date of death, departure, or divorce, family members must themselves become employed, self-employed or self-sufficient in order to retain derived residence rights under Union law. This requirement is

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<sup>45</sup>The initial right of residence, residence for more than three months, and the retention of residence respectively.

<sup>46</sup>COM (2008) 840, p.9. These issues are yet to be addressed by the UK.

<sup>47</sup>*Amos v Secretary of State for the Home Department* [2011] EWCA Civ 552 and *Ahmed v Secretary of State for the Home Department* [2013] UKUT 00089 (IAC). C.f. *Samsam v The Secretary of State for the Home Department* [2011] UKUT 00165 (IAC).

<sup>48</sup>*Amos*, cited *supra* note 47. Reasoned by reference to the fact that such a requirement would be impossible under Art 12 CRD, which can relate to the death of the Union citizen, and the similarity of the wording of Art 13 CRD.

applied to both Union citizen family members<sup>49</sup> and TCN family members<sup>50</sup> who retain rights under Arts 12 and 13 CRD. However, in one Upper Tribunal decision, it was held that a TCN who had obtained a retained right of residence following divorce did not lose that right if he subsequently ceased to be employed or self-employed.<sup>51</sup> Finally, national courts have held that a condition of employment, self-employment or self-sufficiency on the part of the family member does not attach to Art 12(3) CRD, which concerns the retention of residence due to a child's enrolment at an educational establishment in the host State.<sup>52</sup>

18. In other developments, UK courts have confirmed that the rights conferred on TCNs under Art 13 CRD apply only to the dissolution of marriages/civil partnerships and not with respect to durable relationships.<sup>53</sup> On the termination of marriages/civil partnerships, national courts have followed established principles of EU law by confirming that legal, rather than factual termination is required for this provision to give rise to retained residence rights.<sup>54</sup>

19. With respect to Art 15 CRD, we identified a problem with access to appeal rights for family members in specific instances. The UK presently imposes a requirement that family members produce evidence that they are, inter alia, indeed family members of an EEA national *before* they are granted a right to appeal.<sup>55</sup> Ordinarily, this precondition is unproblematic, e.g. in cases where a family member is facing deportation on grounds of public policy, public security and public health. However, in certain instances, an individual may be subject to a deportation order following an administrative decision finding that they are not family members for the purposes of the CRD.<sup>56</sup> In such circumstances, the requirement to adduce proof of the appellant's status as a family member is the very basis of the substantive appeal. The European Commission has highlighted this approach to appeal rights under the EEA Regulations as a matter of concern.<sup>57</sup>

## Question 4

- *How have Articles 16-21 been transposed into national law?*

19. Arts 16-18 CRD outline the conditions for the acquisition of the right of permanent residence by Union citizens and their family members. The basic right is set out in Art 16 CRD and confers a right of permanent residence to Union citizens and their family members who have resided legally in the host State for a continuous period of five years. Arts 17 and 18 CRD address the acquisition of the right of permanent residence by Union citizens and/or their family members in specific circumstances, e.g. following the Union citizen's retirement, or on the

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<sup>49</sup> *Okafor v Secretary of State for the Home Department* [2011] EWCA Civ 499, para.8

<sup>50</sup> *Amos*, through a combined reading of both paragraphs of Art 13.2 CRD. cited *supra* note 47.

<sup>51</sup> *Samsam*, cited *supra* note 47.

<sup>52</sup> *Okafor*, cited *supra* note 49 at para.8.

<sup>53</sup> *CS (Brazil) v Secretary of State for the Home Department* [2009] EWCA Civ 480.

<sup>54</sup> *Ahmed*. *Supra* note 47, based on a combined reading of both paragraphs of Art 13.2 CRD.

<sup>55</sup> Reg 26(3) EEA Regulations.

<sup>56</sup> See e.g. *The Queen on the Application of AH (Iraq) v Secretary of State for the Home Department, Asylum and Immigration Tribunal* [2009] EWHC 1771 (Admin).

<sup>57</sup> COM(2008) 840, p.9. These issues are yet to be addressed by the UK.

basis of residence rights retained under Arts 12 and 13 CRD. The substance of Arts 16-18 CRD is transposed principally by Reg 15 of the EEA Regulations. Arts 19-21 CRD require Member States to issue Union citizens and their family members entitled to permanent residence with certifying documents and impose conditions on the issue and renewal of such documents. Arts 19-21 CRD are transposed into UK law by Reg 18 of the EEA Regulations.

- *Has data on the volume of applications to date for the status of permanent residence been published for your Member State?*

20. The UK Home Office has published data on the issue and refusal of residence documentation to EU citizens (as ‘EEA nationals’) and their family members.<sup>58</sup> See below table:

<b>Year</b>	<b>Recognition of permanent residence issued</b>	<b>Recognition of permanent residence refused</b>	<b>Recognition of permanent residence invalid application</b>
2006	8777	1775	16
2007	7623	1455	4
2008	4020	1038	8
2009	11379	1726	7
2010	20157	3748	0
2011	21159	1999	5222
2012	15197	2332	9568

21. According to the Home Office, the generally rising number of applications made between 2007 and 2011 might reflect an increase in the number of eligible EU citizens who had been living in the UK in accordance with the CRD for the 5-year period required under Art 16 CRD.<sup>59</sup> The statistics record a fall in decisions recognising permanent residence in 2012 – across most nationalities. However, there was a notable rise in relation to Bulgarian and Romanian nationals in 2012, although the Home Office indicates that the ‘numbers remain low’.<sup>60</sup> In the same year, there was also an increase in the numbers refused recognition of permanent residence (2,332, up 17%). Perhaps most notably, since 2011 there has been a large increase in the number of ‘invalid’ applications. This likely follows from a change in Government policy in 2011. Applications are now deemed invalid during a ‘pre-application’ sifting process in instances where key information and/or supporting documentation is missing/incomplete. Immediate re-application

<sup>58</sup> The Home Office considers the quality of these statistics to be ‘high’. For information on how those statistics are compiled and their quality controlled, see: <https://www.gov.uk/government/publications/immigration-statistics-january-to-march-2013/immigration-statistics-january-to-march-2013#european-economic-area-eea>, in particular, para.14.7 and [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/200531/user-guide-immig-statistics.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/200531/user-guide-immig-statistics.pdf).

<sup>59</sup> *Ibid.*

<sup>60</sup> Issues to Bulgarians: 13 in 2011, 1067 in 2012; Romanians: 24 in 2011; 1110 in 2012.

may follow rejected or invalid applications. Re-applications are included in the above statistics.

22. Following the most recent amendment to the EEA Regulations in 2013,<sup>61</sup> there is now a processing and consideration fee of £55 per person to apply for a document certifying permanent residence/a permanent residence card, payable regardless of the outcome.

- *Have any disputes on the interpretation or application of these provisions been addressed within national courts or tribunals?*

23. The two principal issues in the national case law on Arts 16-21 CRD have addressed: 1) the definition of “legal” residence for the purposes of acquiring a permanent right of residence; and 2) the impact of imprisonment on the accrual of the years of residence necessary to attain a permanent right of residence.

➤ *The definition of “legal” residence*

24. UK courts consistently interpret the requirement for ‘legal’ residence in Art 16 CRD to mean residence in accordance with the CRD.<sup>62</sup> Under the terms of the EEA Regulations, Union citizens must therefore be resident in the UK as ‘qualified persons’ i.e. as a worker, or self-employed/self-sufficient person in order for residence to be legal. TCN family members also have to reside in the UK with ‘qualified persons’. Residence that does not accord with the terms of the CRD, but which is lawful by virtue of UK nationality,<sup>63</sup> or because no steps have been taken by national authorities to remove an individual,<sup>64</sup> will not constitute ‘legal’ residence for the purposes of Art 16 CRD. Moreover, residence that is lawful under other provisions of Union law, rather than the CRD, whether secondary<sup>65</sup> or primary law,<sup>66</sup> will not meet the requirements of Art 16. The approach of national courts on this point is in line with the UK’s approach to the implementation of EU citizens’ rights beyond the scope of the CRD (see Part 2 of this Report). The EEA Regulations clearly stipulate that the rights of residence arising from the Court of Justice’s decisions in *Chen*, *Teixeira* and *Ibrahim*, and *Ruiz Zambrano*<sup>67</sup> do not qualify as ‘legal’ for the purposes of acquiring a right to permanent residence under Art 16 CRD.

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<sup>61</sup> The Immigration (European Economic Area) Regulations, SI 2013/1391, s.2.

<sup>62</sup> Reasoned by reading Art 16 CRD in combination with Recital 17, this interpretation reduces the potential for conflict between the CRD and Reg 15, which requires residence ‘in accordance with these regulations’.

<sup>63</sup> *McCarthy* [2008] EWCA Civ 641.

<sup>64</sup> *Lepko-Bozua v London Borough of Hackney* [2010] EWCA Civ 909; *Okafor*, cited *supra* note 49. The UK courts consider Union residents residing in the UK but not meeting the requirements of the CRD to be ‘lawfully present’ but without a ‘right to reside.’

<sup>65</sup> E.g. Art 12 of Regulation 1612/68. See *Okafor* [2011] EWCA Civ 499, citing *McCarthy*, cited *supra* note 63 and *Dias v Secretary of State for the Home Department* [2009] EWCA Civ 807; *MDB* [2010] UKUT 161 (IAC). The national courts often refer to the Court of Justice’s decision in Case C-325/09 *Dias* [2011] ECR I-06387 when using this approach.

<sup>66</sup> On Arts 20/21 TFEU: *Lepko-Bozua*, cited *supra* note 64 and *Abdirahman*, cited *supra* note 43. Incidentally, Art 12(3) CRD also does not confer a right to permanent residence.

<sup>67</sup> See Q7. Case C-200/02 *Zhu and Chen v Secretary of State for the Home Department* [2004] ECR I-9925; Case C-480/08 *Teixeira v London Borough of Lambeth and Secretary of State for the*

25. At times, national courts have taken a strict approach to whether residence purported to be in accordance with the CRD in fact meets its requirements. For instance, a permanent residence claim based on five years' self-sufficient residence in the UK was rejected on the basis that the applicant's sickness insurance *complemented* rather than *replaced* all services provided by the UK's publicly-funded National Health Service. The applicant had not been truly self-sufficient and so her residence had not been 'legal' under the CRD for the purposes of enjoying a permanent right of residence.<sup>68</sup> On the other hand, the national courts have recognised a number of situations as falling within Art 16 'legal' residence, in accordance with decisions of the Court of Justice. Thus, residence occurring before the coming into effect of the CRD<sup>69</sup> but which *would have been* in accordance with its terms constitutes 'legal' residence for the purposes of Art 16.<sup>70</sup> It is also recognised that spouses who derive residence rights from a working or self-sufficient Union citizen do not have to live in the matrimonial home with that Union citizen in order for the residence to be 'legal' under Art 16.<sup>71</sup>

➤ *Imprisonment and periods of "lawful" residence under the CRD*

26. Until recently, national courts had consistently held that time spent in prison does not constitute 'legal' residence for the purposes of attaining a right to permanent residence under Art 16 CRD. To support this conclusion, UK courts had referred to: 1) the integrative objectives of the CRD and the belief that these cannot be met whilst in prison;<sup>72</sup> 2) the fact that 'legal' residence requires an individual to be a worker, self-sufficient, or self-employed<sup>73</sup> and that Art 7 CRD does not include imprisonment when listing situations in which a person retains worker status;<sup>74</sup> and 3) a Commission Communication which stated that, as a rule, Member States are not obliged to take time spent in prison into account when calculating periods of legal residence in a host State.<sup>75</sup> Nevertheless, the Upper Tribunal in *Onuekwere*<sup>76</sup> recently referred the question of whether, and in what

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*Home Department* [2010] ECR I-01107; Case C-310/08 *London Borough of Harrow v Nimco Hassan Ibrahim and the Secretary of State for the Home Department* [2010] ECR I-01065; and Case C-34/09 *Ruiz Zambrano v ONEM* [2011] ECR I-01177. Reg 15A, EEA Regulations.

<sup>68</sup> *FK (Kenya) v Secretary of State for the Home Department* [2010] EWCA Civ 1302, see, in particular, para.15 per Sullivan LJ. The UK's refusal to view NHS provision as 'sufficient medical insurance' in relation to Union citizens is currently the subject of infringement proceedings brought by the European Commission before the Court of Justice: [http://europa.eu/rapid/press-release\\_IP-12-417\\_en.htm](http://europa.eu/rapid/press-release_IP-12-417_en.htm).

<sup>69</sup> In other words, before 30<sup>th</sup> April 2006.

<sup>70</sup> *LG and CC (Italy)* [2009] UKAIT] 00024, departing from *OP (Columbia) v Secretary of State for the Home Department* [2008] UKAIT 74, following Case C-162/09 *Secretary of State for Work and Pensions v Taous Lassal* [2010] ECR I-09217. See also *Secretary of State for the Home Department v FV (Italy)* [2012] EWCA Civ 1199. This approach also applies to Art 17 CRD, see *RM (Zimbabwe) v Secretary of State for the Home Department* [2013] EWCA Civ 775, particularly the judgment of Lady Justice Gloster at para.38, also following *Lassal*.

<sup>71</sup> *PM (Turkey) v Secretary of State for the Home Department* [2011] UKUT 89 (IAC).

<sup>72</sup> *HB* [2008] EWCA Civ 806, Consider the judgment of Buxton LJ at para.9.

<sup>73</sup> *Jarusevicius v Secretary of State for the Home Department* [2012] UKUT 120 (IAC).

<sup>74</sup> *C v Secretary of State for the Home Department* [2010] EWCA Civ 1406, para. 27, per Maurice Kay LJ.

<sup>75</sup> *Ibid.*, at para.25. COM (2009) 313 final, 2 July 2009.

<sup>76</sup> [2012] UKUT 269 (IAC).

circumstances, a period of imprisonment may constitute legal residence, for the purposes of the acquisition of an Art 16 CRD right to permanent residence, to the Court of Justice.<sup>77</sup> This preliminary reference is currently pending.

27. National courts have also had to consider whether periods of imprisonment break the *continuity* of legal residence required in order to enjoy a permanent right of residence under Art 16 CRD. In other words, does an individual have to begin accruing years of legal residence afresh, from zero, upon his/her release from prison? The national courts had previously answered this question in the affirmative: an individual cannot aggregate periods of legal residence before and after imprisonment to accumulate 5 years' legal residence under Art 16 CRD.<sup>78</sup> However, following the Court of Justice's *Tsakouridis*<sup>79</sup> judgment, the Upper Tribunal recently considered it necessary to refer the matter to the Court of Justice for a preliminary ruling.<sup>80</sup> What is already clear to national courts is that, once acquired, a right of permanent residence under the CRD cannot be lost even by significant periods of imprisonment.<sup>81</sup>

## Question 5

- *How has Article 24(2) of the Directive been transposed into national law?*

28. Art 24(2) CRD makes provision for Member States to restrict the entitlement of EU citizens to social assistance benefits. Under that provision, Member States are not obliged to provide social assistance to EU citizens residing in accordance with the right of residence for up to three months (Art 6 CRD). Member States are also not obliged to grant social assistance to EU citizens enjoying a right of residence in the host State as 'workseekers' for the longer period of residence pursuant to Art 14(4)(b) CRD. With respect to maintenance aid for studies, including vocational training, consisting in student grants or student loans, Art 24(2) CRD permits Member States to exclude the payment of such benefits to economically inactive EU citizens *prior* to their acquisition of the right of permanent residence.

29. Art 24(2) CRD – together with the positive statement on equal treatment contained in Art 24(1) CRD – is not transposed by the EEA Regulations. The substance of that provision is instead given effect in UK law through a series of statutory amendments to existing UK legislation on social security/student maintenance. The legal framework governing social security, in particular, has been accurately described as 'labyrinthine' and subject to repeated amendment.<sup>82</sup>

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<sup>77</sup> Case C-378/12.

<sup>78</sup> *LG and CC (Italy)*, cited *supra* note 70 and *C v Secretary of State for the Home Department*, cited *supra* note 74 at para. 36.

<sup>79</sup> Case C-145/09 *Tsakouridis*, 23<sup>rd</sup> November 2010.

<sup>80</sup> *Onuekwere*, cited *supra* note 76; see also *Jarusevicius*, cited *supra* note 73, although a preliminary reference was considered unnecessary in that case, on the facts.

<sup>81</sup> *FV (Italy)*, cited *supra* note 70. The Court of Appeal held that loss of a permanent right of residence for this reason would be inconsistent with *Tsakouridis*, cited *supra* note 79. Case C-348/09 *PI*, 22<sup>nd</sup> May 2012, and Art 16(4) CRD.

<sup>82</sup> Maurice Kay LJ, *Kaczmarek v Secretary of State*, cited *supra* note 41 at para. 5.

The following paragraphs offer a summary of key UK provisions and judicial decisions of relevance to this question.

➤ *Social Assistance*

30. In the social assistance context, the Social Security (Persons from Abroad) Amendment Regulations 2006 (hereinafter: Social Security Regulations) is the most comprehensive attempt to transpose the substance of Art 24(2) CRD.<sup>83</sup> That Regulation entered into force on the same date as the CRD (30th April 2006). As the Explanatory Note indicates, its amending provisions were made 'in consequence of' the enactment of the Citizens' Directive with the purpose of modifying the criterion for entitlement to specific social benefits 'to take account of Article 24(2) CRD'.<sup>84</sup>

31. Briefly summarised, the Social Security Regulations introduce a new eligibility test for EEA nationals seeking to claim Income Support; Jobseeker's Allowance; Housing Benefit; Council Tax Benefit; and State Pension Credit. That same test also now governs entitlement to other benefits, such as Employment and Support Allowance – regulated separately.<sup>85</sup> In short, EEA nationals are now required to establish a 'right to reside' under EU law in order to secure access to the aforementioned range of UK social assistance benefits. EU citizens must demonstrate that they enjoy a right of residence under Union law as a worker (or person retaining this status pursuant to Art 7(3) CRD); self-employed migrant; or EU citizen with permanent residence (Art 16 CRD). The introduction of the right to reside test introduces an important difference in treatment between EEA nationals and UK (and Irish) citizens with respect to social assistance entitlement. For the latter category of persons, eligibility continues to be determined exclusively by the 'habitual residence' test.<sup>86</sup> That test was introduced into the UK legal framework on social security benefits in 1994. Prior to the adoption of the EEA Regulations, the habitual residence test governed entitlement for *both* EEA nationals and UK citizens.

32. The UK's right to reside test has given rise to a considerable body of case law before national courts and tribunals. In summary, legal disputes address three distinct issues. First, EU citizens have sought to contest administrative decisions finding that they do not qualify as 'EU workers' or 'persons retaining EU worker status' pursuant to Art 7(3) CRD<sup>87</sup> and are, therefore, not entitled to social assistance. Secondly, national courts and tribunals have been requested to adjudicate on whether EU citizens failing the 'right to reside' test enjoy a right of residence in the UK under *primary* EU law (Art 21 TFEU). The existence of such a right is highly significant in the social assistance context. It would make it

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<sup>83</sup> SI 2006/1026.

<sup>84</sup> *Ibid.*, at p.15.

<sup>85</sup> The Employment and Support Allowance Regulations SI 2008/794, Reg 70.

<sup>86</sup> For an overview of the habitual residence test, see e.g. 'The Habitual Residence Test - Commons Library Standard Note,' 2011 SN/SP/416 available at: <http://www.parliament.uk/briefing-papers/SN00416>

<sup>87</sup> E.g. *Secretary of State for Work and Pensions v Elmi* [2008] EWCA Civ 1403; *R. (on the application of Tilianu) v Secretary of State for Work and Pensions* [2010] EWCA Civ 1397; and *Jessy ST Prix v Secretary of State for Work and Pensions* [2011] EWCA Civ 806.

possible for EU citizens who are unable to satisfy the right to reside test to assert a right to equal treatment with respect to social assistance benefits on the basis of Art 18 TFEU.<sup>88</sup> Thirdly, direct challenges have been made to the legality of the right to reside test itself. In several recent cases, EU claimants have argued unsuccessfully that the right to reside test is discriminatory, contrary to both EU and UK law.<sup>89</sup> As noted above, that test is applied only to EEA nationals whereas UK nationals are simply required to demonstrate that they are habitually resident in the United Kingdom.

33. In 2013 the European Commission commenced infringement proceedings against the United Kingdom with respect to its introduction of the right to reside test to govern entitlement to social benefits falling within the scope of Regulation 883/2004.<sup>90</sup> According to the Commission, the right to reside test is indirectly discriminatory and, further, cannot be justified under EU law. It maintains that entitlement to the applicable social security benefits should be determined, for both UK nationals and EU citizens, under the same habitual residence test (as was the case before 30<sup>th</sup> April 2006). The UK Government has made its position clear that it does not intend to alter the current legal framework, which it also considers lawful.<sup>91</sup>

➤ *Student Maintenance*

34. Separate instruments regulate entitlement to student maintenance within the United Kingdom.<sup>92</sup> This reflects that fact that competence to regulate student support is devolved to the Northern Irish, Scottish and Welsh administrations.

35. The provisions on student maintenance applicable within England, Scotland, Northern Ireland, and Wales adopt a broadly common approach with respect to EU citizens. In line with Art 24(2) CRD, all four sets of rules restrict entitlement to student maintenance for EU citizens who do not qualify as workers, self-employed persons or the family members of such persons. Non-economically active EU citizens must satisfy a minimum period of three years residence in order to access student maintenance and other grants.<sup>93</sup> An additional criterion also applies where

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<sup>88</sup> See e.g. *Abdirahman v Secretary of State*, cited *supra* note 41.

<sup>89</sup> E.g. *Kaczmarek v Secretary of State for Work and Pensions* [2008] EWCA Civ 1310; *Patmalniece (FC) v Secretary of State for Work and Pensions* [2011] UKSC 11.

<sup>90</sup> See [http://europa.eu/rapid/press-release\\_IP-13-475\\_en.htm](http://europa.eu/rapid/press-release_IP-13-475_en.htm). Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L 166/1.

<sup>91</sup> See e.g. <http://www.theguardian.com/uk/2013/may/30/uk-government-eu-migrant-benefits>.

<sup>92</sup> For England, see: The Education (Student Support) Regulations, SI 2011/1986; for Scotland, see: The Education (Student Loans) (Scotland) Regulations, SI 2007/154; for Northern Ireland, see: The Education (Student Support) (No.2) Regulations (Northern Ireland) SI 2009/373; and for Wales, see: The Education (Student Support) (Wales) Regulations, SI 2012/3097. For a summary of the categories and conditions of entitlement, see: <http://www.ukcisa.org.uk/International-Students/Fees--finance/Student-support/Applying-in-England/Who-is-eligible/#Category-2:-European-Union-nationals-and-family-living-in-the-European-Economic-Area-and-Switzerland>.

<sup>93</sup> The Education (Student Support) Regulations, cited *supra* at note 90, Schedule 1, Part 2, S.10; the Education (Student Loans) (Scotland) Regulations, cited *supra* at note 90, Schedule 1, S.8; The Education (Student Support) (No.2) Regulations (Northern Ireland), cited *supra* at note 90, Schedule 1, Part 2, S.10; and the Education (Student Support) (Wales) Regulations, cited *supra* at note 90, Schedule 1, Part 2, S.10.

the period of qualifying residence was completed primarily for the purposes of receiving full-time education. In such instances, the applicant must demonstrate that he/she was ordinarily resident within the EEA immediately prior to the period of residence in the UK completed for the purposes of receiving full-time education.

36. All four sets of rules on student maintenance expressly exclude British nationals who have not exercised their rights of intra-EU movement under the Treaty from relying on their status as Union citizens in order to establish entitlement to equal treatment.<sup>94</sup> This exclusion is particularly significant in light of the considerable differences in entitlements available across England, Scotland and Wales.

- *Does national law distinguish between the categories specified in Article 24(2) and job-seekers in terms of entitlement to social benefits?*

37. UK law recognises the specific position of EU citizens as job-seekers as regards entitlement to social benefits. On the one hand, job-seekers are expressly *excluded* from the categories of EEA nationals capable of establishing a right to reside under the Social Security Regulations. This exclusion applies to the following key social benefits: Council Tax Benefit; Housing Benefit; Income Support; and Pension Credit. On the other hand, job-seekers are entitled to claim Jobseeker's Allowance - provided that they are able to satisfy the 'habitual residence' test in Art 85A of the Jobseeker's Allowance Regulations 1996. The habitual residence test applies to both EEA nationals and UK citizens.

38. The inclusion of job-seekers as persons entitled to claim Jobseeker's Allowance (subject to the habitual residence test) follows the Court of Justice's decision in *Collins*.<sup>95</sup> In that case – on reference from the Court of Appeal – the CJEU concluded that Member State nationals are entitled, as workseekers, to equal treatment with UK nationals as regards financial benefits intended to facilitate access to employment in that State. However, the Court also accepted that it was legitimate for Member States to restrict the payment of such benefits to EU national job-seekers who are able to demonstrate a 'genuine link' to the employment market of that State.<sup>96</sup> In that connection, the CJEU concluded that a residence requirement, such as the UK's habitual residence test, could function as an appropriate tool to ensure that such a connection is established.<sup>97</sup> On the strength of the CJEU's decision, the Court of Appeal subsequently upheld the validity of the UK's habitual residence test as justified in EU law.<sup>98</sup>

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<sup>94</sup> The Education (Student Support) Regulations, cited *supra* at note 90, Schedule 1, Part 2, S. 10(1)(a); The Education (Student Loans) (Scotland) Regulations, cited *supra* at note 90, Schedule 1 S.8(a); The Education (Student Support) (No.2) Regulations (Northern Ireland), cited *supra* at note 90, Schedule 1, Part 2, S. 10(1)(a); and The Education (Student Support) (Wales) Regulations, cited *supra* at note 90, Schedule 1, Part 2, S.10(1)(a).

<sup>95</sup> Case C-138/02 *Collins v Secretary of State for Work and Pensions* [2004] ECR I-2703. See thereafter e.g. Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* [2009] ECR I-4585.

<sup>96</sup> Case C-138/02 *Collins*, cited *supra* note 94 at para. 67.

<sup>97</sup> *Ibid.*, at paras 69-72.

<sup>98</sup> *Collins v Secretary of State for Work and Pensions* [2006] EWCA Civ 376.

39. EU citizens who are able to satisfy the habitual residence test and, therefore, secure UK Jobseeker's Allowance may be passported subsequently to two additional categories of social assistance. Under the Social Security Regulations, recipients of Jobseeker's Allowance qualify as persons with a 'right to reside' for the purposes of entitlement to Housing and Council Tax Benefit.<sup>99</sup>

- *Has Article 24(2) displaced the Court of Justice's 'real link' case law before national courts or tribunals?*

40. Art 24(2) CRD has not displaced the Court of Justice's 'real link' test before UK courts and tribunals in the social assistance context.<sup>100</sup> National courts continue to fall back on the 'real link' criterion as the primary legal basis to support the exclusion of certain EU citizens from the categories of persons entitled to claim UK social assistance benefits. The recent Supreme Court decision in *Patmalniece* upholding the validity of the UK's right to reside test illustrates this point clearly.<sup>101</sup> In *Patmalniece*, the Supreme Court also made an important connection between the real link test and Member State concerns about the phenomenon of 'social tourism'.<sup>102</sup> The purpose of the real link test, it was argued, was to protect the UK's resources against social tourism on the basis of the principle that entitlement is based directly on the claimant's degree of economic and social integration in the UK.<sup>103</sup> We suggest that the fact Art 24(2) CRD is yet to take hold as a legislative alternative to the real link test may be linked to the UK Government's decision not to transpose that provision directly in the EEA Regulations.

## Question 6

- *How have Articles 27 and 28 of Directive 2004/38 been transposed into national law?*

41. Arts 27 and 28 CRD permit the Member States to restrict the freedom of movement and residence of Union citizens and their family members, regardless of their nationality, subject to various conditions. Relevant individuals can only be refused admittance, or deported, on grounds of public policy, public health and public security. 'Serious grounds of public policy or public security' are required for those enjoying a permanent right of residence, while those who have resided in the host State for ten years can only be expelled on 'imperative grounds of public security'. The national courts have consistently applied this increasingly stringent

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<sup>99</sup> See Reg 10(3)(b)(k) of The Housing Benefit Regulations, SI 2006/213 and Reg 7(4A)(k) of The Council Tax Benefit Regulations, SI 2006/215.

<sup>100</sup> On the real link test, see e.g. Case C-224/98 *D'Hoop* [2002] ECR I-6191 at para. 38 and Case C-138/02 *Collins*, cited *supra* note 94 at para. 67.

<sup>101</sup> *Patmalniece (FC) v Secretary of State*, cited *supra* at note 87. See also earlier e.g. *Kaczmarek v Secretary of State*, cited *supra* note 41.

<sup>102</sup> To support their conclusions, UK courts attach particular authority to the decision in Case C-456/02 *Trojani* [2004] ECR I-7573.

<sup>103</sup> As per Lord Hope, *Patmalniece (FC)*, cited *supra* at note 87 at para 52.

hierarchy of protection based on duration of residence<sup>104</sup> and refer to the different levels of protection described above using the shorthand of ‘level one’, ‘level two’ and ‘level three’ protection respectively.<sup>105</sup> This Report will adopt the shorthand distinction of level one to three protection developed by UK courts.

42. Whatever the level of protection, restrictions on free movement are subject to the condition that the individual represents a genuine, present and sufficiently serious threat to a fundamental interest of society, the principle of proportionality, and to factors such as, *inter alia*, the individual’s age, family and economic situation, social and cultural integration in the host State, and the extent of his/her links with the Member State of origin. Transposition into UK law is by way of Regs 19, 20(6) 21(2)-21(6) of the EEA Regulations.

- *Please describe how national courts and tribunals have understood, applied and differentiated between the concepts of “public policy, public security or public health” (Art 27 CRD), “serious grounds of public policy or public security” and “imperative grounds of public security” (Art 28 CRD)*

43. National case law relating to which level of protection applies has principally concerned how to calculate duration of residence. In differentiating between the levels of protection the national courts have frequently been tasked with determining the type of conduct that falls within each level.

➤ *Application: calculating the duration of residence*

44. Deportation decisions usually follow a period of imprisonment. Appellants against such decisions often argue that they enjoy a permanent right of residence and therefore level two protection. However, this will often depend on whether time spent in prison constitutes the ‘legal’ residence required for the attainment of a permanent right of residence and/or whether any legal residence accrued before a custodial sentence is lost upon entering prison. Discussed in Q4 above, this issue is currently the subject of a reference to the Court of Justice for a preliminary ruling<sup>106</sup> and will not be discussed further here. The national courts have held that residence must also be ‘legal’ for level three protection to apply although there is no reference to this in Art 28(3) CRD/Reg 21(4) EEA Regulations.<sup>107</sup>

45. Reg 21(4)(a) of the EEA Regulations bestows level three protection upon those who have resided in the UK for ten years *prior* to the deportation order. The national courts have interpreted this as requiring them to count *backwards* from the date of deportation order, as opposed to *forwards* from the commencement of legal residence as one would with level two protection.<sup>108</sup> This is significant

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<sup>104</sup> See e.g., *NYK* [2013] CSOH 84; *A, B, C v Secretary of State for the Home Department* [2013] EWHC 1272 (Admin); and *VP v Secretary of State for the Home Department* [2010] EWCA Civ 806.

<sup>105</sup> *LG (Italy) v The Secretary of State for the Home Department* [2008] EWCA Civ 190.

<sup>106</sup> *Onuekwere*, cited *supra* note 76.

<sup>107</sup> *HR (Portugal) v Secretary of State for the Home Department* [2009] EWCA Civ 371. Applied in *LG and CC*, cited *supra* note 70. See also *Chindamo* Appeal No. 1A/13107/2006. C.f. *MG and VC (EEA Regulations 2006 “conductive” deportation) Ireland* [2006] UKAIT 00053.

<sup>108</sup> *LG and CC*, cited *supra* note 7.

because, if level three protection requires ‘legal’ residence, and periods of imprisonment do not constitute such residence, a person who has lived in the UK for decades will never enjoy level three protection if a deportation order is made after a custodial sentence.<sup>109</sup> However, in *MG*,<sup>110</sup> the Upper Tribunal considered that both the methodology of counting *backwards* from the deportation order and the rule that Art 28(3) CRD required ten years *legal* residence to be open to question in light of the purposes of the Directive and the recent decisions of the Court of Justice in *Tsakouridis* and *PI*.<sup>111</sup> Consequently, a reference was made to the Court of Justice for a preliminary ruling for clarification.<sup>112</sup> Shortly after *MG*, however, the Court of Appeal decided *FV*,<sup>113</sup> in which it held that, following *Tsakouridis* and *PI*, the test in relation to the acquisition of level three protection should involve a qualitative assessment of the level of integration of the individual, under which time spent in prison was only a factor.<sup>114</sup> The key question, it concluded, was whether ‘integrating links’ forged with the UK had been broken. The Court of Appeal also considered that the loss of protection acquired after ten years’ legal residence caused by counting backwards from a deportation order would be inconsistent with the Court of justice’s approach to the facts of *PI*.<sup>115</sup>

46. At the administrative level, a lack of consistency as to whether a person will be considered to have resided in the UK for past ten years, despite a period of imprisonment prior to the deportation order, has led to a ‘luck of the draw’ application of level three protection.<sup>116</sup>

- *Application: the principle of proportionality; the consideration of factors such as how long the individual concerned has resided in the territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.*

47. In practice, the principle of proportionality contained in Art 27(2) CRD/Reg 21(5)(a) of the EEA Regulations overlaps with the condition that an individual represents a genuine, present, and sufficiently serious threat to a fundamental interest of society<sup>117</sup> and the requirement to consider factors such as, *inter alia*, the individual’s age, family and economic situation or links with his/her Member State

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<sup>109</sup> Although Art 28(3) CRD implies a similar approach by referring to the ‘previous’ ten years, the issue is all the more acute under the EEA Regulations, which requires ten years’ *continuous* residence prior to the deportation order.

<sup>110</sup> *Secretary of State for the Home Department v MG (Portugal)* [2012] UKUT 268 (IAC).

<sup>111</sup> Cited *supra* notes 79 and 81. Also by reference to Recitals 23 and 24 of the CRD and the Common Position (EC) No 6/2004, adopted by Council on 5 December 2003. See also *LG and CC*, cited, *supra* note 70.

<sup>112</sup> Case C-400/12. See also *Jarusevicius*, cited *supra* note 73, *Onuekwere*, cited *supra* note 76 and Q4 concerning the impact on this in relation to level two protection.

<sup>113</sup> *FV (Italy)*, cited *supra* note 70, decided 14<sup>th</sup> September 2012.

<sup>114</sup> *Ibid.*, at paras 82 and 85.

<sup>115</sup> *Ibid.*, at paras 81 and 84. In *PI*, cited *supra* note 81, there had been two years’ custody immediately before the deportation decision ‘and nothing was made of that.’

<sup>116</sup> *Bulale* [2008] EWCA Civ 806 and *VP (Italy)*, cited *supra* note 105.

<sup>117</sup> Reg 21(5)(c) EEA Regulations/Art 27(2) CRD.

of origin.<sup>118</sup> In numerous cases, national courts have emphasised the need for a *present* threat to a fundamental interest of society and warned against using previous convictions or offender assessment reports made at the time of the offence to inform a deportation decision.<sup>119</sup> However, in several cases, previous convictions have been combined with evidence of an individual's continued unwillingness to reform or to abide by the criminal law; a willingness to mislead judges;<sup>120</sup> escalating levels of violence;<sup>121</sup> and even financial circumstances, to determine a present threat on the facts.<sup>122</sup>

48. The risk of re-offending is often central to the question of whether the appellant poses a *present* threat and to whether deportation is proportionate. Following *Tsakouridis*, this risk is increasingly assessed by reference to the potential impact of deportation on the rehabilitation and social integration of the EU citizen/family member concerned. The 'European dimension' to this question is acknowledged. Thus, the Court of Appeal has stated that 'common sense would suggest a degree of shared interest between the EEA countries in helping progress towards a better form of life'.<sup>123</sup> This encompasses comparing the prospects for rehabilitation in the UK against those in the Member State of origin.<sup>124</sup> Such comparisons necessitate the consideration of the factors contained in Art 28 CRD. Accordingly, national courts consistently take into account factors such as the applicant's social, familial, and cultural links in the UK and compare them with, for instance, the individual's knowledge of the language of his/her Member State of origin, and the availability (or not) of familial and financial support in that State, when deciding whether deportation is permissible.<sup>125</sup> However, there are some examples of a potentially tokenistic consideration of these questions resulting from a possible tendency by the national courts to overlook personal circumstances or use a one size fits all approach in relation to personal wealth.<sup>126</sup>

➤ *Differentiation: Determining the type of conduct which falls within each level*

49. UK courts have recognised that, as derogations to the rights of free movement, grounds of public policy, public security, and public health must be interpreted strictly.<sup>127</sup> While national courts have seen merit in using administrative guidance

<sup>118</sup> Reg 21(6) EEA Regulations/Art 28(1) CRD. See, for instance, *BF (Portugal) v Secretary of State for the Home Department* [2009] EWCA Civ 923.

<sup>119</sup> *A, B, C*, cited *supra* note 105 and *BF (Portugal)*, cited *supra* note 119. Up-to-date offender assessment reports have conversely been used to find that a decision of the Secretary of State to deport has been disproportionate. See *Flaneur's Application for Judicial Review, Re* [2011] NICA 72.

<sup>120</sup> *Jarusevicius*, cited *supra* note 73.

<sup>121</sup> *Batista v Secretary of State for the Home Department* [2010] EWCA Civ 896.

<sup>122</sup> *Flaneur's*, cited *supra* note 120.

<sup>123</sup> *Ibid.* per Carnwath LJ. See also *NYK*, cited *supra* note 105.

<sup>124</sup> Accordingly, a proportionality assessment under the CRD should not be conflated with a proportionality assessment under Art 8 ECHR, which, only concerning private and family life, is narrower than under the CRD. See *R. (on the application of Essa) v Upper Tribunal (Immigration and Asylum Chamber)* [2012] EWCA Civ 1718.

<sup>125</sup> See for instance *A, B, C*, *NYK*, cited *supra* note 105 and *Essa*, cited *supra* note 125.

<sup>126</sup> *Essa* [2012] EWHC 1533 (Admin). In that case, the High Court considered the availability of 'quick and cheap travel to The Netherlands.' See also *NYK*, cited *supra* note 105.

<sup>127</sup> See *Essa*, cited *supra* note 127.

to categorise the type of conduct that would justify deportation under levels one, two and three,<sup>128</sup> they have explicitly stated that administrative operational manuals do not provide formal, legal categories.<sup>129</sup> They have also openly questioned whether administrative guidance adequately distinguishes between different levels of protection, especially in light of the case law of the Court of Justice. As a result, differentiation based on ‘severity’ of the conduct or custodial sentence length alone has been rejected.<sup>130</sup>

50. The courts have held that conduct falling within level one presupposes and encompasses the existence of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.<sup>131</sup> Examples of crimes justifying deportation at level one include culpable homicide,<sup>132</sup> the use of forged or stolen passports,<sup>133</sup> and conspiracy to handle stolen goods.<sup>134</sup> Although activity does not have to be criminal, it will rarely be permissible to refuse to admit, or deport, an individual in relation to activity that is not even unlawful under UK law.<sup>135</sup>

51. Concrete examples of offences that have been held to constitute ‘serious’ grounds of public policy and public security (level 2 protection) include serious domestic burglaries,<sup>136</sup> conspiracy to handle stolen goods,<sup>137</sup> and violent crime not only against society but also against the person. In the absence of Union-level guidance, the Court of Appeal considers that the Member States have a certain amount of discretion in deciding what level of violence its law-abiding citizens must put up with under level two, with due regard to the seriousness of the conduct under domestic law.<sup>138</sup> In *Batista*,<sup>139</sup> a ‘medium risk of serious harm to the public’, amongst other things, was sufficient to establish level two grounds.<sup>140</sup>

52. Administrative guidance provides the following examples of conduct falling within ‘imperative grounds’ (level 3 protection): murder, terrorism, drug

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<sup>128</sup> *LG (Italy)*, cited *supra* note 70. The AIT also considered a questionnaire, sent by the Secretary of State to other Member States, which asked how ‘imperative grounds’ were defined in those states.

<sup>129</sup> *LG (Italy)* cited *supra* note 106.

<sup>130</sup> *FV*, cited *supra* note 70, per Lord Carnwath in consideration of *Tsakouridis* and *PI*, cited *supra* notes 79 and 81. See also *LG (Italy)*, cited *supra* note 106.

<sup>131</sup> *LG (Italy)*, cited *supra* note 70 and *LG (Italy)*, cited *supra* note 106.

<sup>132</sup> *NYK*, cited *supra* note 105.

<sup>133</sup> *R v Clarke (Thomas)* [2008] EWCA Crim 3023.

<sup>134</sup> *Jarusevicius*, cited *supra* note 73.

<sup>135</sup> *GW (Netherlands)* [2009] UKAIT 50, concerning the expression of views that Islam should not be tolerated or followed.

<sup>136</sup> *R. v Laurusevicius (Vytautas)* [2008] EWCA Crim 3020.

<sup>137</sup> While not giving rise to ‘imperative grounds of public security’, conspiracy to handle stolen goods must constitute ‘serious grounds’ if committed on a particularly large scale. *Jarusevicius*, cited *supra* note 73.

<sup>138</sup> *B (Netherlands) v Secretary of State for the Home Department* [2008] EWCA Civ 806, reasoned by reference to an examination of the *travaux préparatoires* to the CRD and applying *Case 41/74 Van Duyn v Home Office* [1974] ECR 1337; See also *Batista*, cited *supra* note 122.

<sup>139</sup> Cited *supra* note 122.

<sup>140</sup> The conflated consideration of ‘serious grounds’ and a ‘sufficiently serious threat to a fundamental interest of society’ in this case risks blurring level one and two in light of the decision in *LG* that level one ‘presupposes a sufficiently serious risk to a fundamental interest of society’.

trafficking, serious immigration offences, or serious sexual or violent offences carrying a maximum penalty of ten years or more imprisonment.<sup>141</sup> The national courts have generally adopted a restrictive approach to the definition of imperative grounds, holding that, even if the threshold includes crimes other than terrorism, the threat must be ‘so compelling that it justifies the exceptional course of removing someone who...has become “integrated” by “many years residence in the host State”’.<sup>142</sup> The risk of the future commission of even serious offences will not be enough.<sup>143</sup> Accordingly, the difference between levels two and three cannot be merely a matter of degree but must entail a qualitative difference.<sup>144</sup> The Court of Appeal, in *FV*,<sup>145</sup> has recently interpreted the Court of Justice’s decisions in *Tsakouridis* and *PI* as meaning that any deportation decision must consider, *inter alia*, the exceptional seriousness of the threat; the serious negative consequences deportation might have on the rehabilitation of genuinely integrated Union citizens and therefore whether the measure is strictly necessary or the objective can be met through less strict means. ‘Imperative grounds’ presuppose not just a threat to public security, but also one of a particular high degree of seriousness to the calm and physical security of the population.<sup>146</sup> Accordingly, the appellant’s conviction for manslaughter did not constitute ‘imperative grounds of public security.’ A distinction was drawn here between the risk of homicide to the public at random and potential for violence towards a specific person.

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<sup>141</sup> <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/modernised/criminality-and-detention/34-eea-offender-cases?view=Binary>.

<sup>142</sup> *LG (Italy)*, cited *supra* note 106, quoting the Preamble to the CRD. See also, *VP (Italy)*, cited *supra* note 105.

<sup>143</sup> *MG and VC* [2006] UKAIT 53.

<sup>144</sup> *LG (Italy)*, cited *supra* note 106.

<sup>145</sup> *FV (Italy)*, cited *supra* note 70.

<sup>146</sup> *Ibid.*, at para. 132.

## ***Part 2: EU citizenship beyond Directive 2004/38 EC – exploring national application of primary EU law***

### **Question 7**

- *To what extent has the Court of Justice's case law grounded directly on the TFEU's citizenship provisions (e.g. Chen, Ruiz Zambrano and subsequent decisions) been effectively implemented and applied at the national level? Have legislative or specific administrative changes been put in place?*

53. The Court of Justice's case law grounded directly on the Treaty provisions on Union citizenship has bolstered further the rights of EU citizens, particularly as regards the right of residence for their dependent TCN family members. In *Chen*, on reference from the UK, the CJEU established a right of residence for primary carers of minor EU citizens resident in a Member State of which they are not a national – subject to self-sufficiency and a requirement for medical insurance.<sup>147</sup> In *Ruiz Zambrano* the Court of Justice developed its case law on Union citizenship rights further by concluding that Art 20 TFEU precluded national measures that had the effect of depriving Union citizens of the 'genuine enjoyment' of the rights conferred on them by the Treaty as citizens of the Union. On the facts of that case, this conferred a right to reside and work on the TCN parents of dependent minor EU citizens, residing in their home Member State, who would have to leave the territory of the Union if such rights were not bestowed upon their parents.<sup>148</sup>

54. The UK Government has implemented CJEU's jurisprudence on primary law citizenship rights through a series of statutory amendments. The Immigration (EEA) (Amendment) Regulations 2012 amends the EEA Regulations to give effect to the Court of Justice's decision in *Chen*.<sup>149</sup> That instrument amends Regs 11 and 15A of the EEA Regulations accordingly by providing rights of entry and residence for 'the primary carer of an EEA, who is (a) under the age of 18 and (b) residing in the United Kingdom as a self-sufficient person, where the denial of such a right would prevent the EEA national child from exercising his or her own right of residence'.<sup>150</sup> A second instrument, the Immigration (EEA) (Amendment) (No 2) Regulations 2012 gives effect to the *Ruiz Zambrano* judgment.<sup>151</sup> It amends the EEA Regulations by conferring rights of entry and residence on the 'primary carer of a British citizen who is residing in the United Kingdom and where the denial of such a right of residence would prevent the British citizen from being able to reside in the United Kingdom or in an EEA State'.<sup>152</sup> Significantly, where a Union citizen minor has two primary carers, the amended EEA Regulations state

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<sup>147</sup> Case C-200/02 *Zhu and Chen* [2004] ECR I-9925.

<sup>148</sup> Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177.

<sup>149</sup> SI 2012/1547.

<sup>150</sup> SI 2012/1547, explanatory notes. The UKBA Immigration Rules have also recently been amended in light of the *Chen* ruling. In July 2013, Paragraph 257 C, regulating 'requirements for leave to enter or remain as the primary carer or relative of an EEA national self-sufficient child', was deleted. See

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/statementsofchanges/2013/hc1039.pdf?view=Binary> at paras 86-88.

<sup>151</sup> SI 2012/2560.

<sup>152</sup> *Ibid.*, explanatory notes.

that *both* primary carers must be required to leave the UK before a derivative right can be enjoyed by P.<sup>153</sup> As the wording of the amended EEA Regulations makes clear, the UK has opted for a narrow transposition of the *Zambrano* decision, closely orientated around the particular facts at issue in that decision.<sup>154</sup> Broadly, this is in line with the terms of the CJEU's subsequent clarifications in e.g. *McCarthy*, *Dereci* and *Iida*.<sup>155</sup>

55. Significant consequential changes have also been made to UK legislation on social security entitlement in light of CJEU's case law on primary law citizenship rights. Perhaps most notably, the UK legal framework has been amended to *exclude* entitlement to a range of UK social assistance benefits for persons resident in the UK under the terms of the *Ruiz Zambrano* ruling.<sup>156</sup> Additionally, the amended EEA Regulations make it clear that individuals residing in the UK on the basis of derived residence rights conferred by primary EU law cannot acquire permanent residence under Art 16 CRD. This introduces an important additional restriction on EU citizenship rights in the UK context. Such individuals can also be deported more easily.<sup>157</sup>

- *How are these matters being dealt with by the national courts? Does national case law distinguish clearly between rights acquired under Directive 2004/38 and under Articles 20 and/or 21 TFEU when EU citizens are seeking family reunification rights from their home State?*

56. There is a growing body of case law addressing EU citizenship rights beyond the CRD framework. A review of the jurisprudence indicates that, overall, UK courts and tribunals are responding appropriately to the evolving case law of the Court of Justice in this area. For instance, the reasoning of national courts and tribunals indicates that they are capable of distinguishing clearly between the rights acquired under the CRD and those under Arts 20 and/or 21 TFEU. UK courts have demonstrated that they are able to progress logically through the co-authored framework of citizenship rights guaranteed in Union law – assessing, in sequence, the rights contained with the CRD; the subsequent case law of the ECJ

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<sup>153</sup> Reg 15A(7A) EEA Regulations. The amended Regulations apply only to children. This makes explicit what is implicit in the judgments of the Court of Justice, that Union citizen *adults*, not usually requiring care, will not be considered *compelled* to leave the Union territory if their spouse is deported to a third country and so will not trigger *Ruiz Zambrano* protection. See also *F & ANR* [2013] EWCA Civ 76 for national judicial consideration of this point.

<sup>154</sup> In stark contrast, commentators continue to reflect, more dynamically, on what other factual situations might deprive a Union citizen of the genuine enjoyment of the rights associated with his/her Union citizenship. See e.g. Substance?" (2012) 37 *EL Rev.* 369; N. Nic Shuibhne "(Some of) the Kids Are All Right: Comment on *McCarthy* and *Dereci*" (2012) 49 *CML Rev.* 349, 364–366; S. Reynolds, "Exploring the 'Intrinsic Connection' between Free Movement and the genuine Enjoyment Test: Reflections on EU Citizenship after *Iida*" (2013) 38 *EL Rev.* p.376.

<sup>155</sup> Case C-434/09 *McCarthy* [2011] ECR I-3375; Case C-256/11 *Dereci and Others v Bundesministerium für Inneres* [2011] ECR I-11315; and Case C-40/11 *Iida v Stadt Ulm*, Judgment of the Court (Third Chamber) of 8 November 2012 (nir).

<sup>156</sup> Social Security (Habitual Residence) (Amendment) Regulations 2012/2587, amending, *inter alia*, Income Support (General) Regulations 1987; Jobseeker's Allowance Regulations 1996; State Pension Credit Regulations 2002; and The Employment and Support Allowance Regulations 2008. See here also *R. (on the application of Sanneh) v Secretary of State for Work and Pensions* [2013] EWHC 793 (Admin).

<sup>157</sup> Reg 21A, EEA Regulations.

extending the scope of EU legislative provisions;<sup>158</sup> and the jurisprudence on Union citizenship rights under primary EU law.<sup>159</sup>

57. First, with respect to the *Chen* ruling, UK courts and tribunals were quick to recognise that that decision establishes, in primary EU law, a derived right of residence for TCN family members in their capacity as primary carers of dependent minor EU citizens.<sup>160</sup> Much of the subsequent UK case law on *Chen* addresses the interpretation of the conditions attached to the existence of the derived residence right under primary EU law established in that decision: self-sufficiency and the requirement for comprehensive medical insurance. On this matter, UK courts have upheld the requirement to satisfy both conditions in order to establish the derived right of residence under *Chen*.<sup>161</sup> Additionally, in *W (China)*, the Court also concluded that Art 20 TFEU did not establish a right to work in the host Member State for TCN family members; in other words, that provision did not enable such persons to *create* sufficient resources for the family unit as required in *Chen*.<sup>162</sup> The House of Lords rejected a request for permission to appeal this assessment, noting that there was ‘no scope of reasonable doubt’ on this issue.<sup>163</sup>

58. In relation to *Ruiz Zambrano*, it is worth noting in the first instance, that cases involving very similar facts have been resolved with no reference to *Ruiz Zambrano* or the genuine enjoyment test. For example, in *ZH*<sup>164</sup> Lady Hale found that the validity of a decision to deport the TCN parent of a British child, who may take that child with him/her, was to be determined by reference to the best interests of the child and in accordance with the UK’s obligations under the United Nation’s Convention on the rights of the child.

59. Nevertheless, UK courts have engaged with *Ruiz Zambrano* in several key cases.<sup>165</sup> In summary, national courts have adopted a restrictive approach to that judgment, relying frequently on the Court of Justice’s subsequent decision in *Dereci*.<sup>166</sup> The *Ruiz Zambrano* ruling is now understood as being ‘exceptional’ in character, and is not considered to cover anything short of the situation in which an EU citizen is forced to leave the territory of the Union.<sup>167</sup> Whilst strong emotional and psychological ties within the family would be significantly likely to rupture in instances of separation, diminishing the enjoyment of life in the UK, this would not, on its own, trigger the *Ruiz Zambrano* principle. Only when quality

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<sup>158</sup> Joined Cases C-310/08 and C-480/08 *Ibrahim and Teixeira* [2010] ECR I-1065.

<sup>159</sup> *Okafor*, cited *supra* note 49.

<sup>160</sup> E.g. *M-T v T* [2005] EWHC 79 (Fam); *W (China) v Secretary of State for the Home Department* [2006] EWCA Civ 1494; and *Bassey v Secretary of State for the Home Department* [2011] NICA 67.

<sup>161</sup> *W (China) v Secretary of State* cited *supra* note 161; *Liu v Secretary of State for the Home Department* [2007] EWCA Civ 1275, and *Z v Secretary of State for the Home Department* [2013] CSIH 16.

<sup>162</sup> *W (China)*, cited *supra* note 162 See also *Bassey*, cited *supra* note 161.

<sup>163</sup> *Ibid.*

<sup>164</sup> *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4.

<sup>165</sup> *Harrison v Secretary of State for the Home Department* [2012] EWCA Civ 1736; *Ahmed*, cited *supra* note 47; and *Sanneh*, cited *supra* note 157.

<sup>166</sup> Case C-256/11 *Dereci*, cited *supra* note 155.

<sup>167</sup> *Elias LJ in Harrison*, cited *supra* note 165. See also *Sanneh*, cited *supra* note 157.

of life is so diminished that an individual is effectively compelled to leave Union territory would *Ruiz Zambrano* apply. Consequently, the High Court has explicitly stated that ‘where a non-EU ascendant relative is compelled to leave EU territory, the Art 20 [TFEU] rights of an EU child will not be infringed if there is another ascendant relative who has the right of residence in the EU, and who can and will in practice care for the child.’<sup>168</sup> The courts have, however, taken a fact-sensitive approach to the application of this rule, noting, for instance, in *MDB* that Union citizen children could not be cared for by their abusive Italian national father if their Argentine mother were deported.<sup>169</sup>

60. New factual constellations that push the boundaries of *Ruiz Zambrano* have chiefly concerned what other rights – aside from the right of residence and the right to work – must be respected in order to ensure that a Union citizen is not compelled to leave the Union territory. In this connection, the intervention of the Home Secretary in *Pryce v Southwark LBC*<sup>170</sup> suggests that the question of a *Ruiz Zambrano*-based right to social welfare has arisen frequently at the administrative level. In that case, it was held that an individual would have a right to certain social benefits *once* a residence right has been established pursuant to *Ruiz Zambrano*. However, due to a significant concession made by the defendant local council in that case, *Pryce* does not establish whether recourse to and denial of social assistance will *itself* give rise to a *Ruiz Zambrano* right of residence. The Court of Appeal considered this to be fact-sensitive.

61. The argument that denial of social welfare to a TCN parent effectively compels Union citizen children to leave the Union territory is currently before the national courts in *Sanneh*.<sup>171</sup> Now on appeal to the Court of Appeal, the Upper Tribunal rejected *Sanneh*’s case because she had been ‘surviving’ in the UK since 2006 and was continuing to do so in 2011. As a result, she was not compelled to leave the Union territory. Similarly, *Sanneh*’s application to the High Court for the interim payment of social welfare while her substantive case proceeded through the court system was rejected on the basis that *Sanneh* had ‘survived’ in the UK to date and that *Sanneh* herself had accepted that she would never, in practice, leave the UK due to economic pressure as she was ‘absolutely determined’ to stay in the UK as her case progressed. The High Court in *Sanneh* rejected the argument that paragraph 44 of *Ruiz Zambrano*<sup>172</sup> means that it must be assumed, irrebuttably and as a matter of law, that a person such as *Sanneh* must be accorded both the right to

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<sup>168</sup> At para. 19. See also *Harrison*, cited *supra* note 165. There is a contrary approach, by the national courts, to the same issue in relation to *Chen*-based residence rights. See *Bassey*, cited *supra* note 161. The national courts have voiced some concern that the focus on the provision of primary care can result in the removal of children from homes, where they are happy and settled, in order to live with a TCN parent who seeks to establish a *Ruiz Zambrano* right to residence. See here *R (on the application of Bent) v Secretary of State for the Home Department* [2012] EWHC 4036 (Admin).

<sup>169</sup> *MDB (Italy) v Secretary of State for the Home Department* [2012] EWCA Civ 1015. See also *Ahmed*, cited *supra* note 47.

<sup>170</sup> [2012] EWCA Civ 1572.

<sup>171</sup> *Supra* cited note 157.

<sup>172</sup> ‘...if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would result in the children, citizens of the Union, having to leave the territory of the Union’.

residence and to access a particular level of funds by way of earnings or benefits.<sup>173</sup>

62. National courts have also been charged with determining whether *Ruiz Zambrano* applies to *non-British* Union citizens living in the UK. While this is clearly not anticipated in the 2012 amendments to the EEA Regulations, the Upper Tribunal held in *Ahmed* that ‘nothing said by the Court of Justice in any of the Art 20 TFEU cases excludes the potential application of *Ruiz Zambrano* principles to third country national parents if the practical effect of a refusal decision is that the children are obligated to leave the territory of the Union as a whole, notwithstanding that the children are not, as in *Ruiz Zambrano*, citizens of the host Member State’.<sup>174</sup> The application of *Ruiz Zambrano* to non-British Union citizen children arguably undercuts the conditions attached to the derived rights of residence for TCN primary carers established in *Chen*, rendering it unnecessary to meet the requirements for sufficient resources and conferring a right to work on relevant individuals. However, the emerging UK case law on this potential extension to the scope of the *Ruiz Zambrano* ruling is far from clear. For instance, in *JYZ*, the Court of Session held that Irish citizen children would not be compelled to leave the territory of the Union if their TCN parents were not afforded the right to work in the UK as the family could move to Ireland where *Ruiz Zambrano* would apply.<sup>175</sup>

- *To what extent do national courts and tribunals tend to reject arguments based on EU citizenship rights on grounds that the dispute involves a ‘purely internal situation’?*

63. Decisions of the UK courts and tribunals make occasional reference to the existence of a ‘purely internal situation’ or, to the same effect, the absence on the facts of a relevant ‘connecting factor’ to EU law.<sup>176</sup> UK courts and tribunals apply these linguistic markers simply to acknowledge that the legal dispute in issue does not fall within the scope of the Court’s existing case law on Union citizenship rights beyond the CRD. For example, in *Bent*, the Court concluded that there was ‘no EU law connection’ on the basis of the finding that the claimant could not be reasonably regarded as the primary carer of a minor EU citizen.<sup>177</sup>

64. There is particularly interesting discussion of the internal rule in *Harrison*. In that decision Elias LJ accepted that free movement can generally be breached by activity that impedes, rather than totally deprives an individual of that right. However, Elias LJ took the view that a stricter test was necessary in relation to the

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<sup>173</sup> At para.100.

<sup>174</sup> *Ahmed v Secretary of State for the Home Department* [2013] UKUT 00089 (IAC), at para.68. See also *MDB (Italy) v Secretary of State for the Home Department* [2012] EWCA Civ 1015.

<sup>175</sup> *JZY (China) v Secretary of State for the Home Department* [2013] CSIH 16. See also *Pryce v Southwark LBC*, cited *supra* note 170. On this point at Union-level, see Case C-86/12 *Alopa*, Judgment of the Court (Second Chamber) of 10 October 2013 (nir).

<sup>176</sup> E.g. *R. (on the application of H) v Secretary of State for the Home Department* [2008] EWCA Civ 245; *R. (on the application of Bent) v Secretary of State for the Home Department* [2012] EWHC 4036 (Admin); and *McCarthy*, cited *supra* note 63 at para. 21

<sup>177</sup> *R. (on the application of Bent)*, cited *supra* note 168. See also *R (on the application of H)* cited *supra* note 176.

genuine enjoyment test in *Ruiz Zambrano* ‘precisely because it does not require the exercise of free movement’.<sup>178</sup> Thus, whilst the Court of Justice still insists that there is an ‘intrinsic connection’ between free movement and the genuine enjoyment test,<sup>179</sup> the UK Court of Appeal, in this case at least, seems to have accepted that, in some instances, the purely internal rule, as a synonym for a cross-border requirement, no longer applies. Indeed, the Court of Appeal considered that *Ruiz Zambrano* had removed the condition of ‘even an exiguous cross-border link’, previously required by *Chen*.

## Question 8

- *In the context of the judgment in Rottmann, to what extent do rules on the acquisition and/or loss of national citizenship reflect the implications of the particular requirements of EU citizenship?*

65. The British Nationality Act 1981 (as amended) sets out the principal rules on the acquisition and loss of British citizenship.<sup>180</sup> That instrument defines various categories of British nationality in an effort to rationalise and narrow entitlement to key citizenship rights (chiefly: the right of abode in the UK).<sup>181</sup> At the same time, the 1981 Act also seeks to recognise both the historic and continuing links that many overseas nationals have with the United Kingdom. The declaration of the UK Government on the definition of ‘nationals,’ annexed to the EU Treaties, defines the categories of person considered to be nationals of the United Kingdom for the purposes of EU law.<sup>182</sup> The EUDO Citizenship Observatory provides a detailed overview of the rules governing the acquisition and loss of British citizenship.<sup>183</sup>

66. The 1981 Act makes no special provision for EEA nationals. It has also not been amended in light of Court of Justice’s decision in *Rottmann*.<sup>184</sup> However, the UK legal framework on nationality acquisition/loss is arguably relatively open to the unique features of Union citizens. First and foremost, UK law does not preclude British citizens from holding dual or multiple nationalities – in contrast to certain other Member States. EEA nationals who acquire British citizenship are, therefore, not, as matter of UK law, required to surrender the nationality of their home Member State, as was the case under both German and Austrian law in *Rottmann*. The decision to renounce British citizenship is, from a UK legal perspective, entirely at the discretion of the citizen concerned. S.12 of the 1981 Act provides that a British citizen may renounce their citizenship by declaration on

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<sup>178</sup> Cited *supra* note 165 at para.65.

<sup>179</sup> See Case C-40/11 *Yoshikazu Iida v Stadt Ulm*, Judgment of the Court (Third Chamber) of 8 November 2012 (nyr).

<sup>180</sup> British Nationality Act 1981.

<sup>181</sup> For analysis, see the EUDO Citizenship Country Report on the United Kingdom: <http://eudocitizenship.eu/admin/?p=file&appl=countryProfiles&f=United%20Kingdom.pdf>

<sup>182</sup> [1983] OJ C 23/1, as revised at Lisbon by Declaration No.63. On this point, see also Case C-192/99 *Queen v Secretary of State for the Home Department, ex parte: Kaur* [2001] ECR I-1237.

<sup>183</sup> See, respectively: <http://eudo-citizenship.eu/databases/modes-of-acquisition?p=&application=modesAcquisition&search=1&modeby=country&country=United+Kingdom> and <http://eudo-citizenship.eu/databases/modes-of-loss?p=&application=modesLoss&search=1&modeby=country&country=United+Kingdom>.

<sup>184</sup> Case C-135/08 *Rottmann v Freistaat Bayern* [2010] ECR I-1449.

the condition that they will become a citizen of another country within 6 months.<sup>185</sup> Further, it is also open to British citizens to reinstate British citizenship by registration if that status was renounced in order to acquire the citizenship of another (Member) State.<sup>186</sup> However, resumption under s.13 of the 1981 Act is permitted only once.<sup>187</sup> This limitation might potentially, over the course of a lifetime, impact on the migration choices of EU citizens (including British citizens) who hold, have held, or wish to acquire British citizenship.

67. Non-British EU citizens over the age of 18 and of full capacity may acquire the status of 'British citizen' through naturalization.<sup>188</sup> The general rules in the 1981 Act apply: requiring persons to satisfy a minimum residence period of 5 years (with requirements related to absences etc); to demonstrate good character; sufficient knowledge of English, Welsh or Scots Gaelic as well as of life in the United Kingdom.<sup>189</sup> Applicants must also declare an intention to reside in the UK as their principal home.

68. S.40 of the British Nationality Act 1981 permits the Secretary of State to deprive persons of their status as British citizens. First, the Secretary of State may issue an order to this effect where he/she is satisfied that to do so is 'conducive to the public good.' An order may not be issued in circumstance where the individual would be left stateless.<sup>190</sup> Secondly, s.40(4) of the 1981 Act permits the Secretary of State to deprive a person of British citizenship by order where that status was acquired – through registration or naturalization – by fraud; false representation; or concealment of material facts. In all cases under s.40, the Secretary of State is required to give reasons for the deprivation order. The individual concerned is also afforded certain rights of appeal. The *Rottmann* judgment suggests that, subject to the demands of the proportionality principle, s.40 of the 1981 Act may be compatible with the requirement of EU law. In that decision, the Grand Chamber noted expressly that EU law did not, in principle, preclude a Member State from depriving its nationals of its citizenship where this had been obtained by fraud or deception.<sup>191</sup> With respect to s. 40(2) – deprivation 'conducive to the public good' – the UK rules on the loss of citizenship may also be defensible. In *Rottmann*, the CJEU pointed clearly to the possibility of justifying revocation decisions for reasons 'relating to the public interest,' within which it is arguably possible to subsume the substance of s.40(2) of the UK Act.<sup>192</sup>

69. The *Rottmann* decision remains particularly relevant in the UK context in connection with decisions to revoke British citizenship from persons who hold/have held the nationality of a non-Member State. In such instances, the revocation of British citizenship under the 1981 Act necessarily deprives such

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<sup>185</sup> To protect against statelessness, that provision states that British citizenship will be reinstated automatically should the applicant fail to acquire citizenship of another country within the prescribed time period.

<sup>186</sup> S.13.

<sup>187</sup> S.13(2).

<sup>188</sup> S.6 of the 1981 Act.

<sup>189</sup> See Schedule 1.

<sup>190</sup> S.40(4).

<sup>191</sup> Case C-135/08 *Rottmann*, cited *supra* note 182 at para. 59.

<sup>192</sup> *Ibid.*, at para. 51.

individuals of the status of Union citizenship. Thus far, the UK courts appear reluctant to engage with *Rottmann* in that context. In *G1 v Secretary of State*, the appellant had argued that, following *Rottmann*, the decision to revoke his British citizenship under s.40(2) of the 1981 Act triggered the application of EU law.<sup>193</sup> Interpreting the Grand Chamber's decision in *Rottmann*, it was argued that loss of British citizenship necessarily entailed the loss of the appellant's status as a Union citizen.<sup>194</sup> For that reason, the decision to deprive him of his British citizenship fell within the scope of EU law, meaning that national law must 'have due regard to EU law.' The Court of Appeal rejected this argument outright. It took the view that there was 'no cross-border element whatsoever' to the case.<sup>195</sup> On the facts, the appellant was a British citizen who had not exercised his Treaty free movement rights. On one view, this was a key distinction with *Rottmann*. However, by adopting this position, the Court arguably failed to engage with another, broader reading of that decision; namely, that Member State authorities are obliged post-*Rottmann* to have regard to EU law in connection with the deprivation of national citizenship *per se* because this would also lead to the loss of *Union* citizenship. On that possible interpretation, the Court of Appeal was clear. If the CJEU had intended in *Rottmann* to establish such an approach, then this raised serious concerns about the jurisdiction of the Court of Justice in the area of Member State nationality law.<sup>196</sup>

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<sup>193</sup> *G1 v Secretary of State* [2012] EWCA Civ 867.

<sup>194</sup> *Ibid.*, at 30.

<sup>195</sup> As per Laws LJ, *G1 v Secretary of State*, cited *supra* note 182 at para. 41.

<sup>196</sup> *Ibid.*, at para. 43.

### ***Part 3: Political Rights of EU Citizens***

#### **Question 9**

- *Since when has Directive 93/109/EC on European Parliament elections been fully implemented? Have there been any derogations? Are there any additional conditions imposed on EU citizens compared to national citizens (special registration or residence requirements)?*

70. Directive 93/109 EC grants Union citizens the right to vote and stand as a candidate in elections to the European Parliament as residents of a Member State of which they are not nationals. The UK implemented that instrument in 1994 within 15 days of the transposition deadline through the European Parliamentary Elections (Changes to the Franchise and Qualification of Representatives) Regulations.<sup>197</sup> The 1994 Regulations amended para.5 of Schedule 1 of the European Parliament Elections Act 1978 to provide Union citizens who are not British citizens but resident in the UK with the right to stand as a candidate in elections to the European Parliament.<sup>198</sup> Reg 7 of the 1994 Regulations extended the franchise to vote in European Parliamentary elections to the same category of persons. The Commission's 1998 Report on the application of Directive 93/109 EC identified no specific concerns with the UK's implementation of that instrument.<sup>199</sup>

71. The legal framework governing EU citizens' right to vote and stand for election in European Parliamentary elections has been subject to several amendments. The 1978 Act has been replaced by the European Parliamentary Elections Act 2002 (hereinafter: the 2002 Act). Section 8(5) of the 2002 Act currently regulates the electoral franchise. The relevant rules to which that section refers are set out in revised Regulations.<sup>200</sup> The 2002 Act also repealed the provisions of the 1994 Regulations governing the right of resident non-national EU citizens to stand as candidates in European Parliamentary elections. The current rules are set out in the European Parliamentary Regulations 2004.<sup>201</sup> The UK legislative provisions fully implement Directive 93/109 EC.

72. With respect to the right to vote, the UK has not opted to implement Art 9(3)(a)-(c) of Directive 93/109 EC. Under that provision Member States may

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<sup>197</sup> SI 1994/342. For an overview of the political rights of EU citizens within the UK, see the EUDO Citizenship Report on Access to Electoral Rights available at: <http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=1310-UK-FRACIT.pdf>. See also e.g. J. Shaw, 'Citizenship and Electoral Rights in the Multi-Level "Euro Polity" – The Case of the United Kingdom,' in H. Lindahl (Ed.), *A Right to Inclusion and Exclusion: Normative Fault Lines of the EU's Area of Freedom, Security and Justice* (Oxford: Hart, 2009).

<sup>198</sup> The special position of Irish nationals is discussed further below.

<sup>199</sup> Report from the Commission to the European Parliament and the Council on the application of Directive 93/109/EC - Voting rights of EU citizens living in a Member State of which they are not nationals in European Parliament elections [1998] COM (97) 731 Final.

<sup>200</sup> The European Parliamentary Elections (Franchise of Relevant Citizens of the Union) Regulations, SI 2001/1184, as amended by The European Parliamentary Elections (Franchise of Relevant Citizens of the Union) (Amendment) Regulations, SI 2009/726.

<sup>201</sup> SI 2004/293.

require EU citizens to declare that they have not been deprived of the right to vote in their home Member State; to produce a valid ID document; and/or to indicate the date from which they have been resident in the host Member State. However, the UK has invoked the derogation in Art 14(2) of Directive 93/109 EC to exempt Irish nationals from the registration regime established in that instrument. Under Reg. 1(2) of the 2011 Regulations, Irish nationals, as well as Commonwealth citizens (here: citizens of the UK, Malta or Cyprus) are excluded from the definition of ‘relevant citizen of the Union’ to which the Regulations apply. This special provision for Irish and certain Commonwealth citizens reflects the particular constitutional relationship between the UK and citizens of these Member States.<sup>202</sup> Finally, as for voter registration, the UK has not opted to require Union citizens to provide a valid ID document to support their application to stand as candidates in elections to the European Parliament. Art 10(3) of the Directive permits this restriction.

- *What additional changes will be required by the December 2012 amendments to Directive 93/109/EC?*

73. The UK Government has already prepared a draft statutory instrument to implement the changes required by Directive 2013/1 EU.<sup>203</sup> The draft European Parliamentary Elections (Amendment) Regulations 2013 abolishes the requirement for Union citizens wishing to stand as election candidate to obtain an attestation from their home Member State certifying that they have not been deprived of their right to stand as a candidate in that Member State or that no disqualification is known to them. The 2013 draft Regulations replaces the attestation requirement, which was identified as a barrier to the exercise of Union citizens’ rights,<sup>204</sup> with an obligation on candidates to declare that they have not been deprived of their right to stand in their home Member State. The host Member State is then required to check the validity of this declaration in cooperation with the designated authority in candidate’s home Member State.

- *Has there been relevant case law in domestic courts?*

74. The issue of prisoners’ voting rights takes centre stage in the UK case law on European Parliamentary elections.<sup>205</sup> This important line of case law is considered in Q12 below. Aside from the issue of prisoners’ voting rights, there is relatively little judicial activity on the topic of EU citizens’ right of participation in elections to the European Parliament. The case law on European Parliamentary elections in the national context has focussed on extensions to the franchise. In *Matthews*, the European Court of Human Rights held that the UK had violated Article 3 of the Protocol 1 of the ECHR by excluding Gibraltarians from voting in European Parliamentary elections.<sup>206</sup> The UK Government amended its election rules to give effect to the Court’s judgment. The European Court of Justice subsequently confirmed the validity under EU law of the amended UK provisions in the context

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<sup>202</sup> See here e.g. Shaw, cited *supra* at note 195 at pp 246-247.

<sup>203</sup> The European Parliamentary Elections (Amendment) Regulations, SI 2013/2876.

<sup>204</sup> Directive 2013/1 EU, preamble 4.

<sup>205</sup> See *McGeoch v Lord President of the Council* [2011] CSIH 67 and *Chester v Secretary of State for Justice* [2010] EWCA Civ 1439.

<sup>206</sup> *Matthews v United Kingdom*, No 24833/94 (1999).

of an Art 258 TFEU infringement procedure initiated by the Spanish Government.<sup>207</sup>

## Question 10

- *Since when has Directive 94/80/EC on local elections been fully implemented?*

75. The UK was one of the first four Member States to transpose fully Directive 94/80 EC, which lays down arrangements for the exercise of the right to vote and stand as a candidate in municipal elections for citizens of the Union residing in a Member State of which they are not a national. Transposition was in the form of a statutory instrument, namely the Local Government Elections (Changes to the Franchise and Qualification of Members) Regulations 1995.<sup>208</sup> This amended, *inter alia*, the Representation of the People Act 1983, allowing a person to vote at local government elections if he is, on the day of the poll, a relevant citizen of the Union. S.1(c) of the Elected Authorities (Northern Ireland) Act 1989 introduces the changes for local elections in Northern Ireland. ‘Citizen of the Union’ is defined by reference to Art 20 TFEU, whilst ‘relevant Union citizen’ refers to Union citizens who are not citizens of the Commonwealth or the Republic of Ireland.<sup>209</sup> Various pieces of primary legislation divided according to region allow ‘relevant Union citizens’ to stand as candidates in local government elections: the Local Government Act 1972, s.79; The Local Government (Scotland) Act 1973 s.29; The Local Government Act (Northern Ireland) 1972 s.3; and the Greater London Authority Act 1999 s.20. The terms ‘citizen of the Union’ and ‘relevant Union citizen’ are defined as they are above.<sup>210</sup>

- *Have there been any derogations?*

76. Directive 94/80 EC permits derogations from the general rule that Union citizens should be able to vote in local elections in the host Member State where the proportion of non-national Union citizens of voting age in that Member State exceeds 20% of the total number of Union citizens residing there.<sup>211</sup> This does not apply to the UK and has not been used by the UK.<sup>212</sup> Under Art 12(3), a Member State may also derogate from Arts 6-11 of the Directive, which relate to the exercise of the right to vote and stand as a candidate in municipal elections, in respect of non-national Union citizens who have a right to vote in national parliamentary elections and are thus entered on the national roll under exactly the same conditions as national voters. Although Irish, Maltese and Cypriot citizens

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<sup>207</sup> Case C-14/05 *Spain v. United Kingdom (Gibraltar)* [2006] ECR I-7917.

<sup>208</sup> SI 1995/1948.

<sup>209</sup> S.202(1) Representation of the People Act 1983; s.10(1) Elected Authorities (Northern Ireland) Act 1989; and s.4(1) City of London (Various Powers) Act 1957. Commonwealth citizens and citizens of the Republic of Ireland have more extensive voting rights including the right to vote in national parliamentary elections. This is relevant for Maltese and Cypriot nationals.

<sup>210</sup> E.g. s.79(2)A Local Government Act 1972; s.29(2) Local Government (Scotland) Act 1973; and s.3(2) Local Government Act (Northern Ireland) 1972. Commonwealth and Republic of Ireland citizens can also stand under these provisions.

<sup>211</sup> Art 12(1) Directive 94/80 EC.

<sup>212</sup> For more detail on this derogation see COM (2012) 99 final, p.12.

can vote in UK parliamentary elections, the UK has not availed itself of this derogation. The UK has a separate register of ‘local government electors’.

- *Are there any additional conditions imposed on EU citizens compared to national citizens (special registration or residence requirements)?*

77. In order to be able to vote in elections in the UK, individuals must register to vote, whether they are British nationals or not. There are number of conditions for eligibility that apply equally to British citizens and eligible voters of other nationalities. Similarly, the UK imposes no additional requirements on EU citizens when compared with UK nationals in relation to standing as a candidate in local government elections. The Directive permits Member States to restrict some posts related to the executive of local government to its own nationals. However, the UK has not opted to impose any such restrictions. Accordingly, in the UK, a non-national EU citizen can be the head, deputy or member of the executive of basic government units.<sup>213</sup>

- *Has there been relevant case law in domestic courts?*

78. The only UK case law relevant to the discussion of the voting rights under Directive 94/80 EC is discussed in Q12 below. This concerns attempts to invoke EU law in order to contest the UK’s prohibition on prisoner voting.

- *Other issues relating to the voting rights of Union citizens*

79. According to the European Commission’s 2012 report on the application of Directive 94/80/EC, awareness of the right to vote for EU citizens living in the UK had risen from 32% in November 2007 to 72% in March 2010. Further, the UK has adopted target measures to inform EU citizens of their electoral rights in municipal elections by activating a dedicated helpline. Overall turnout in local elections is nevertheless low. In London’s most recent municipal elections, at the time of the report, turnout was just 45.30% while in Salford, it was 29.35%.<sup>214</sup> Turnout, nationally, in the May 2013 local elections was 31%. National research has found that registration rates are lower amongst eligible non-UK nationals: while 84% of UK nationals are registered to vote, only 56% of Union citizens resident in the UK have registered.<sup>215</sup> For the May 2013 elections, the Electoral Commission developed new media advertisements using the online platform [www.itsyourvote.org](http://www.itsyourvote.org) to encourage interaction and as an opportunity to target under-registered groups.<sup>216</sup> Used as a ‘test run’, the Electoral Commission is looking to use this campaign in relation to the European Parliamentary elections in 2014.

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<sup>213</sup> *Ibid.*, at p.11.

<sup>214</sup> COM (2012) 99 final.

<sup>215</sup> The Electoral Commission: Great Britain’s electoral registers 2011 (December 2011). Available at [http://www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0007/145366/Great-Britains-electoral-registers-2011.pdf](http://www.electoralcommission.org.uk/_data/assets/pdf_file/0007/145366/Great-Britains-electoral-registers-2011.pdf).

<sup>216</sup> <http://www.lgcplus.com/Journals/2013/07/15/f/b/1/Local-Elections-May-2013-report.pdf>.

## Question 11

- *Briefly report on regional and other elections in which EU citizens residing in the country are granted electoral rights under national law. Is there a franchise for EU citizens that goes beyond the local and EP electoral rights required under EU law? What have been the reasons for extending such rights specifically to EU citizens?*

80. The right to vote has been extended to (certain) Union citizens beyond the franchise for Union citizens in local and European Parliament elections required by Directives 94/109 EC and 94/80 EC in the following areas:

- National parliamentary elections
- Elections in relation to devolved bodies
- Police commissioner elections

➤ *National parliamentary elections*

81. Under S.1 of the Representation of the People Act 1983, citizens of the Commonwealth and of the Republic of Ireland can vote in national parliamentary elections. As a result citizens of Cyprus, Malta, and the Republic of Ireland are eligible to vote in all elections within the UK. This is because Commonwealth citizens and citizens of Ireland are not viewed as ‘foreign’ in UK law.<sup>217</sup>

➤ *Elections to devolved administrations*

82. Under s.11(1)(b) of the Scotland Act 1998, those who are registered to vote in the register of local government electors are entitled to vote in Scottish Parliamentary elections. As Union citizens are permitted to vote in local government elections, they appear on this register. Union citizens are therefore also able to vote in Scottish parliamentary elections. Under Article 16(2) of the same Act, a citizen of the European Union resident in the United Kingdom, is not disqualified from being a member of the Scottish Parliament because he was born outside the United Kingdom.<sup>218</sup> The same rules apply in relation to The Welsh Assembly, by virtue of s.12(1)(b) and 17(2) of the Government of Wales Act 2006.

83. The right of Union citizens to vote in elections to the Scottish and Welsh administrations is, therefore, based on their inclusion on local government registers, rather than as a result of an explicit provision that makes specific reference to a right of the European citizen to vote in elections to devolved bodies. Nevertheless, this ‘loophole’ is openly acknowledged. The general information website for voting in the UK ‘[www.aboutmyvote.co.uk](http://www.aboutmyvote.co.uk)’ states that Union citizens can vote in such elections.<sup>219</sup> Furthermore, Union citizens were able to vote in the referendums concerning the establishment of the Scottish Parliament and Welsh

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<sup>217</sup> E.g. s.2 Ireland Act 1949 states that the Republic of Ireland is not a ‘foreign country.’

<sup>218</sup> Certain people can be disqualified from standing as members of the devolved institutions because they were not born in the UK, under The Act of Settlement.

<sup>219</sup> [http://www.aboutmyvote.co.uk/who\\_can\\_register\\_to\\_vote.aspx](http://www.aboutmyvote.co.uk/who_can_register_to_vote.aspx).

Assembly in the first place. In relation to the forthcoming referendum on Scottish Independence, s.2 of the Scottish Independence Referendum (Franchise) Act 2013 states that, ‘a person is entitled to vote in an independence referendum if, on the date on which the poll at the referendum is held, the person is... a relevant citizen of the European Union.’

84. Union citizens in Northern Ireland were permitted to vote in the last election to the Northern Irish Assembly but were not permitted to vote in the referendum on the voting system.<sup>220</sup> S.36(7) of the Northern Ireland Act 1998 clearly states that: A person is not disqualified for membership of the Assembly...by reason only...that he is born out[side] of the Kingdom if he is a citizen of the European Union.

85. Although electors for elections for devolved bodies are drawn from local government elections, national courts do not appear to consider the devolved administrations in Scotland, Wales and Northern Ireland as ‘basic local government units’ under Directive 94/80 EC. As a result, the right to vote in such elections is interpreted as extending the franchise for Union citizens beyond the requirements of the Directive rather than as implementing it. This is clear from the approach of the Supreme Court in *McGeoch*.<sup>221</sup> In that case, the Court noted expressly that elections to the Scottish Parliament did not constitute ‘municipal elections’ within the meaning of Directive 94/80 EC. In its view, municipal elections referred specifically to ‘local government elections at a lower level of government, closer to people and with a more direct responsibility for service delivery’.<sup>222</sup>

86. In relation to the London Assembly, s.17 of the Greater London Authority Act 1999 makes reference to Schedule 3 of the same Act which amends the Representation of the People Act 1983, treating elections to the London Assembly as local government elections. Under s.20 of the 1999 Act, in order to be Mayor or a member of the London Assembly, one must be, *inter alia*, a ‘relevant citizen of the Union’.

➤ *Police commissioners*

87. In November 2012, local police authorities were replaced with democratically elected ‘Police and Crime Commissioners’ in an attempt to make the police more accountable. It is unclear whether this role falls under the description of a ‘basic local government unit’ defined in Art 2 of Directive/94/80 EC.<sup>223</sup> If it did, a Police and Crime Commissioner could reasonably be interpreted as the elected head of the basic local government unit. Member States are permitted to restrict such posts to their own nationals. Nevertheless, under s.52(1)(a) of the Police Reform and Social Responsibility Act 2011, a person is entitled to vote in the elections for the Police and Crime Commissioner for their area if they are registered to vote as an

<sup>220</sup> Electoral Commission information: <http://www.aboutmyvote.co.uk/PDF/NI-accessible.pdf>.

<sup>221</sup> Cited *supra* note 205.

<sup>222</sup> *Ibid.*, at para.45.

<sup>223</sup> Bodies elected and empowered to administer ‘certain local affairs on their own responsibility.’ The Annex to the Directive describes such units in the UK as covering counties, districts, regions, parishes and wards, which arguably covers Police and Crime Commissioners.

elector at a local or government election. Accordingly, this includes Union citizens. The right of Union citizens to stand for election results from a combined reading of s.66(1) and s.68 of the 2011 Act.

## Question 12

- *Are there any specific areas where tensions exist between EU law and national provisions limiting the scope of the franchise (e.g. in relation to the voting rights of persons convicted of criminal offences or persons with mental impairments)?*

88. Two specific areas of tension have recently come to light in the UK case law concerning the relationship between EU law and national provisions limiting the scope of the franchise. First, the Court of Appeal was requested to rule on whether the UK provision on ‘overseas electors’ constitutes an obstacle to intra-EU movement. Secondly, as referenced in Q9 and Q10, there is a recent line of national case law considering the compatibility with EU law of the current UK prohibition on prisoners’ voting.

- *The UK’s ‘15-year rule’ on overseas voting as an obstacle to intra-EU movement*

89. The validity of the UK rules on overseas voting arose in *Preston*.<sup>224</sup> In that case the applicant, a British citizen resident and engaged in economic activity in Spain since 1992, sought judicial review of the UK’s so-called ‘15-year rule’ on overseas voting. Under s.1 of the Representation of the People Act 1983, non-resident British citizens retain the right to vote in national elections as overseas electors for a period of 15 years.<sup>225</sup> The applicant maintained that this limitation constituted an obstacle to intra-EU movement in that it was liable to deter economic actors and EU citizens from exercising their free movement rights guaranteed in Union law.

90. The Court of Appeal accepted that, in principle, the loss of the right to vote under the 15-year rule could be qualified as a ‘disadvantage.’<sup>226</sup> However, it held that not every disadvantage constitutes an obstacle to the exercise of the rights of intra-EU movement.<sup>227</sup> On its view, it was necessary to adopt a ‘long term view’ when determining the potential deterrent effect of national measures on EU free movement rights.<sup>228</sup> Further, the Court asserted that electoral rights were ‘qualitatively and quantitatively different’ from social benefits.<sup>229</sup> National measures limiting the latter category of entitlements were considered capable of constituting direct and immediate barriers to the exercise of free movement rights.

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<sup>224</sup> *R. (on the application of Preston) v Wandsworth LBC* [2012] EWCA Civ 1378.

<sup>225</sup> The 15-year period is calculated from the date of an individual’s last entry on the electoral role of their previous UK constituency.

<sup>226</sup> As per Mummery LJ in *Preston*, cited *supra* note 223 at para. 79.

<sup>227</sup> *Ibid.* See here also earlier, Elias LJ in *R. (on the application of Preston) v Wandsworth LBC* [2011] EWHC 3174 (Admin) at para. 38.

<sup>228</sup> As per Mummery LJ in *Preston*, cited *supra* note 223 at para. 79.

<sup>229</sup> *Ibid.*, at para. 81.

By contrast, and with respect to the relationship between the 15-year rule and the exercise of the Treaty free movement rights, the Court concluded that:

*'No legal test, whether formulated in terms of "probability", or "likelihood", or "capability", or "liability", or "real possibility", addresses the basic difficulty that what is asserted in the claimant's case is too speculative, remote and indefinite to establish a case'.<sup>230</sup>*

91. The Court of Appeal also held that, even if evidence could be adduced to indicate a deterrent effect, the 15-year rule could be justified in EU law. According to the Court, that rule served a legitimate and proportionate objective of testing the strength of British citizens' link with the United Kingdom to ensure that only those maintaining close links remain eligible to vote.<sup>231</sup> In the Court of Appeal's view, the justification ground alone was sufficient to reject the appellant's request for a preliminary reference to the Court of Justice.

➤ *Prisoners' voting rights and EU law*

92. EU law has been recently invoked to challenge the legality of the UK's blanket ban on prisoners' voting rights.<sup>232</sup> Successful attempts have already been made to challenge the legality of that prohibition under Art 3 of the 1<sup>st</sup> Protocol of the ECHR.<sup>233</sup> The UK Government is yet to implement the Strasbourg jurisprudence on prisoners' voting rights.<sup>234</sup>

93. With respect to Union law, the Supreme Court ruled in October 2013 in *McGeoch* that British citizens detained in custody in the United Kingdom do not enjoy the right to vote in municipal elections as a consequence of their status as Union citizens.<sup>235</sup> The argument advanced in support of extending the franchise relied principally on the specific wording of Art 20(2)(b) TFEU. That provision, inserted by the Treaty of Lisbon, grants Union citizens 'the right to vote and stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State.' In *McGeoch*, it was argued that the omission of the phrase 'in a Member State of which he is *not* a national' as a qualifier in Art 20(2)(b) TFEU was decisive.<sup>236</sup> The absence in that provision of any reference to the right to vote in host Member States, it was submitted, granted Union citizens electoral rights in the Member State of which they are nationals under the terms required by EU law. That core argument was bolstered further with reference to the Court of Justice's evolving case law on the rights of static Union citizens – both in terms of political

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<sup>230</sup> *Ibid.*, at para. 80.

<sup>231</sup> *Ibid.*, at paras 88-95. The Court of Appeal made particular reference to the jurisprudence of the Strasbourg Court on the compatibility with the ECHR of the UK's 15-year rule. See e.g. *Doyle v. UK* (2007).

<sup>232</sup> See s.5(2) of the Representation of the People Act 1983.

<sup>233</sup> *Hirst v United Kingdom (No.2)*, No 74025/01 (2006).

<sup>234</sup> The UK Ministry of Justice has produced a draft bill on this issue. See <http://www.justice.gov.uk/downloads/legislation/bills-acts/voting-eligibility-prisoners/voting-eligibility-prisoners-command-paper.pdf>.

<sup>235</sup> *McGeoch v Lord President of the Council* [2013] UKSC 63.

<sup>236</sup> As per Lord Mance in *McGeoch*, cited *supra* note 233 at para. 17.

and non-political rights<sup>237</sup> – as well as to Arts 39 and 40 of the Charter on Fundamental Rights.

94. The UK Supreme Court unanimously rejected the argument advanced for the appellant to the effect that the insertion of Art 20(2)(b) TFEU had established a self-standing right for EU citizens to vote in municipal elections in the Member State of which they are nationals. The Supreme Court concluded that it would be ‘positively misleading’ to adopt such an interpretation of that provision in light of the Treaty’s structure.<sup>238</sup> The right to vote in municipal elections under EU law was considered limited implicitly to resident EU citizens who are not nationals of the host Member State.<sup>239</sup> Lord Mance noted further, that this interpretation of the franchise under EU law was also supported by the wording of Arts 39 and 40 of the EU Charter on Fundamental Rights.<sup>240</sup> The Supreme Court also rejected the appellant’s request for a preliminary reference to the Court of Justice.<sup>241</sup>

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<sup>237</sup> See esp. Case C-300/04 *Eman and Sevinger v. Netherlands* [2006] ECR I-8055, Case C-135/08 *Rottmann*, cited *supra* note 182 and Case C-34/09 *Ruiz Zambrano*, cited *supra* note X respectively.

<sup>238</sup> As per Lord Mance in *McGeoch*, cited *supra* note 233 at para. 59.

<sup>239</sup> *Ibid.*

<sup>240</sup> *Ibid.*

<sup>241</sup> *Ibid.*, at para. 84.

## Part 4: Culture(s) of citizenship

### Question 13

- *On the basis of your findings from the above questions, do you consider that the implementation of EU citizenship in your Member State is understood at the national level as part of a rights-based EU 'free movement' and 'constitutional' culture, or as an adjunct to national immigration systems based on 'permissions' to non-nationals to be present in the territory?*

95. Our findings lead us to conclude that, for the most part, Union citizenship is generally still understood in the UK context as an adjunct to national immigration law.<sup>242</sup> With respect to the legislative transposition, administrative application and judicial interpretation of the rights of EU citizenship, there is – to differing degrees – evidence of a permissions-based approach to the implementation of the rights conferred by EU law.<sup>243</sup> In certain instances, this permissions-based approach is inherent in the implementation process itself, e.g. through the transposition of EU Directives. In other instances, it follows as a result of administrative and judicial 'seepage' – a phenomenon whereby the approach of the UKBA and national courts and tribunals to EU citizenship rights is shaped by the administrative and legal framework governing non-EU immigration.<sup>244</sup> The impact of seepage on the culture of EU citizenship within the UK is particularly significant in light of the UK's strong permissions-based system governing non-EU migration.<sup>245</sup>

96. The transposition of the CRD through the EEA Regulations provides the clearest example of the predominantly permissions-based approach to EU citizenship rights within the UK. In line with its full title, that instrument effectively casts the free movement rights of EU citizens as an adjunct to UK immigration law.<sup>246</sup> That instrument integrates (many of) the rights contained within the CRD into a national immigration system that is based squarely on frontier controls and residence rights that are directly linked to a non-national's 'leave to enter' the United Kingdom.<sup>247</sup> Specific provisions of the EEA Regulations also permit the immigration detention of EU citizens even *prior* to the adoption of a decision by the Secretary of State to remove that person on grounds of public policy, public security and public health grounds.<sup>248</sup>

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<sup>242</sup> For recent analysis on the interface between EU citizenship rights and UK immigration law, see Shaw et al, 'Getting to grips with EU citizenship,' cited *supra* note 7.

<sup>243</sup> Shaw and Miller characterise the interface between EU citizenship and UK immigration law as 'legal worlds in collision.' See Shaw and Miller, cited *supra* note 4 at p. 140.

<sup>244</sup> This phrase is borrowed from Shaw et al, cited *supra* note 7 at p. 43. See also Shaw and Miller, cited *supra* note 4 at p. 156.

<sup>245</sup> See here esp. the conclusions of Lord Hoffmann in *Chief Adjudication Officer v Wolke*, cited *supra* note 38: '[UK immigration law] contemplates that persons who are not British citizens will be entitled to be present here only if they have been given leave to enter and that their right to reside in the United Kingdom will be a consequence of the terms of that leave. The whole scheme relies upon the exercise of control at the frontier.'

<sup>246</sup> On the embedded nature of EU citizenship within UK immigration law and policy, see Shaw and Miller, cited *supra* at note 4 at pp 142-143.

<sup>247</sup> *Ibid.*

<sup>248</sup> Reg 24(1) EEA Regulations. See also *R. (on the application of Nouazli) v Secretary of State* 2013 EWHC 567 (Admin).

97. Structured as an adjunct to UK immigration law, the EEA Regulations deal only with the CRD rights of entry, residence and expulsion for EU citizens and their family members. Other core rights of EU citizenship contained within the CRD are not transposed. Most notably, the EEA Regulations do not transpose Art 24(1) of the CRD – the right to equal treatment.<sup>249</sup> That provision is not directly transposed in UK law. The UK Government has again taken a permission-based approach to the transposition of the rights of equal treatment in Art 21 CRD. As discussed in Q5, EU citizens must establish a ‘right to reside’ in the UK under the CRD in order to secure access to a range of social assistance benefits. That test applies only to non-British citizens. Moreover, it positions EU citizens and their family members directly alongside non-EU migrants, who are also required to establish a right to reside to secure entitlement to the principal UK social assistance benefits. As such, its application further embeds the rights of EU citizenship within the general framework of UK immigration law.

98. Our review of the administrative practices of the UKBA provides additional evidence to support the view that EU citizenship rights within the UK are predominantly construed as permission- rather than rights-based. We have identified numerous instances of ‘seepage’ in the approach of UKBA officials towards EU nationals and their family members – exposed through litigation. The decision of the Court of Appeal in *Bassey* provides a particularly striking instance of seepage in the administrative context.<sup>250</sup> In that case, UKBA officials failed outright to identify and uphold the appellant’s derived rights of entry and residence under EU law. UKBA officials simply applied ordinary UK immigration rules and, ultimately, detained the appellant pending deportation. Whilst accepting that the appellant had falsely declared his intentions, the Court of Appeal strongly criticised the approach of the UKBA. In its view, the UKBA had wrongly treated the appellant’s situation as a ‘straightforward case of illegal entry by deception by an individual with no arguable right to be in the country’.<sup>251</sup> The case law on ‘sham marriages’ exposes further examples of seepage in the administrative practices of the UKBA. In several cases, the UKBA has been criticised by the UK courts for failing to recognise that the TCN spouse of a EU citizen enjoyed an automatic derived right to enter and reside in the United Kingdom under EU law.<sup>252</sup>

99. National courts also fall victim to the phenomenon of seepage. By way of illustration, we detected some discussion of the ‘credibility’ of individual litigants – a benchmark of UK immigration law – in individual EU citizenship cases.<sup>253</sup> This is clearly at odds with the approach to citizenship rights and their abuse in EU

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<sup>249</sup> See here also Shaw et al, ‘Getting to grips with EU citizenship,’ cited *supra* note 7 at p. 39.

<sup>250</sup> *Bassey v Secretary of State for the Home Department* [2011] NICA 67. See also *McCarthy*, cited *supra* note 30.

<sup>251</sup> *Bassey*, cited *supra* note 245 at para. 38.

<sup>252</sup> See esp. *ZH (Afghanistan) v Secretary of State for the Home Department* [2009] EWCA Civ 1060.

<sup>253</sup> E.g. *The Queen on the application of Adetola v First-Tier Tribunal (Immigration and Asylum Chamber) Secretary of State for the Home Department* [2010] EWHC 3197 (Admin) and *The Queen on the application of Essa v Upper Tribunal (Immigration & Asylum Chamber), Secretary of State for the Home Department* [2012] EWHC 1533 (Admin). On this point, see also Shaw and Miller, cited *supra* note 4 at p. 156.

law. Additionally, our findings also identified isolated problems with judicial implementation of EU citizenship rights. In *McCarthy* (Q5), for example, the High Court upheld the validity of the UK's refusal to recognise, pursuant to Art 5(2) CRD, residence cards issued to TCN nationals by other Member States in accordance with the CRD.<sup>254</sup> In *B v Home Office* (Q1) that same court adopted a particularly restrictive reading of the doctrine of State liability under EU law, in respect of a serious administrative delay in issuing a residence permit to an extended family member of a Union citizen.<sup>255</sup> In places, we also detected some resistance on the part of national courts to engage fully with particular landmark rulings of the CJEU on EU citizenship rights. The Court of Appeal decision in *G1 v Secretary of State* (Q8) on the scope of application of the *Rottmann* judgment illustrates this point most forcefully.<sup>256</sup>

100. On the other hand, our review of the UK legal framework also revealed a degree of understanding of EU citizenship as a more vibrant, rights-centered legal status, distinct from ordinary UK immigration law. National courts and tribunals drive this more positive vision of EU citizenship – subject to the preceding remarks. Additionally, there is also evidence of a stronger constitutional culture in connection with the transposition of the political rights of EU citizenship. In this area, EU citizens are closely assimilated with British nationals as rights holders – at least insofar as the former enjoy limited electoral participation rights under Union law. The political rights of EU citizens have also been extended beyond the requirements of Union law.

101. UK courts and tribunals play an absolutely critical role in entrenching the constitutional rights-orientated character of EU citizenship within the UK legal order. This is clear already from the preceding decisions scrutinising UKBA practices (e.g. *Bassey*). National courts also have corrected errors in the UK Government's transposition of the CRD. As discussed in Q1, the Court of Appeal struck down as 'flagrantly unlawful' Reg 12(1)(b) of the 2006 Regulations – introducing an additional requirement of prior lawful residence within the EEA for TCN family members of EU citizens.<sup>257</sup> However, it is through their approach to judicial interpretation that UK courts and tribunals have arguably impacted most significantly on the culture of EU citizenship within the UK. Our review of the case law demonstrates, to a greater extent, that national courts and tribunals broadly understand and, further, are able properly to apply the rights of EU citizenship within the national judicial context. This is apparent, in particular, from the consistent application of the CRD hierarchy of protection from deportation on public policy, public security and public health afforded to Union citizens and their family members.<sup>258</sup> Moreover, in numerous cases, UK courts have demonstrated their ability to step outside of the UK legal framework and resolve EU citizenship cases in accordance with interpretative principles developed and

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<sup>254</sup> *McCarthy*, cited *supra* note 30.

<sup>255</sup> *B v Home Office*, cited *supra* note 8.

<sup>256</sup> *G1 v Secretary of State*, cited *supra* note 182.

<sup>257</sup> *R.(on the application of Owusu) v Secretary of State*, cited *supra* at note 15.

<sup>258</sup> See here e.g. *BF (Portugal) v Secretary of State for the Home Department* [2009] EWCA Civ 923, *LG, CC v The Secretary of State for the Home Department* [2009] UKAIT 00024 and *B (Netherlands) v Secretary of State for the Home Department* [2008] EWCA Civ 806.

applied by the Court of Justice.<sup>259</sup> Finally, there has been express judicial recognition of the ‘fundamental’ character of EU citizens’ rights of movement and residence.<sup>260</sup>

102. To a greater extent, UK courts have also responded well to the challenges presented by the evolutionary nature of EU citizenship. As demonstrated in Q7 above, national courts have managed to implement specific CJEU decisions enhancing the rights of EU citizens and their family members beyond the terms of the CRD – ahead of the legislative transposition of these judgments.<sup>261</sup> We also identified evidence of the ability of UK courts to transpose the substance of particular CJEU decisions to parallel factual constellations. The Court of Appeal’s decision in *Adaleslu* (Q1), in which that Court applied *Metock* by extension to the situation of extended family members, offers a clear illustration of this openness to crosspollination.<sup>262</sup> Equally, when faced with specific questions of interpretation, the Court of Appeal and Supreme Court have made appropriate preliminary references to the Court of Justice.<sup>263</sup> Moreover, we would highlight that UK courts have also made references to the CJEU in instances where the scope of EU citizenship rights was arguably rather clear, but where there was a sense, on the part of the referring national court, that greater rights protection is desirable. For example, in *Jessy ST Prix* the Supreme Court requested the CJEU to determine whether ‘retained worker’ status in Art 7(3) CRD extends to cover the situation of an EU citizen who gives up work, or seeking work, because of the physical constraints of the late stages of pregnancy/child birth.<sup>264</sup> As the Supreme Court noted, the CRD is actually rather clear on this point: it does not.<sup>265</sup> The Supreme Court is inviting the Court of Justice to develop further the rights of EU citizens beyond the terms of the CRD on fundamental rights grounds.<sup>266</sup>

103. Finally, there is also a somewhat stronger constitutional character to the political rights of EU citizenship in the UK. Overall, our findings indicate that EU citizens are more closely integrated with British citizens as rights holders in the political context. The legislative framework governing the electoral rights of EU citizens does not employ the permission-based entitlement tests such as the right to reside introduced to govern the exercise of the substantive rights of intra-EU movement. Equally, as discussed in Qs 9, 10 and 11 above, the UK Government has not opted to introduce special restrictions on the voting rights of EU citizens, even where permitted under EU law – contrary to the position of certain other Member States. It has also already drafted legislation to implement the changes required by Directive 2013/1 EU. The more favorable treatment of EU citizens as

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<sup>259</sup> See e.g. *Aladeselu v Secretary of State*, cited *supra* note 18 at para. 19 and *PM (Turkey) v Secretary of State* [2011] UKUT 89 (IAC) at para. 32.

<sup>260</sup> E.g. *The Queen on the application of Daha Essa v Upper Tribunal (Immigration & Asylum Chamber), Secretary of State for the Home Department* [2012] EWHC 1533 (Admin). See also *Moses LJ in ZZ v Secretary of state for the Home Department* [2011] EWCA Civ 440, para.54.

<sup>261</sup> E.g. *M-T v T*, cited *supra* note 157 and *W (China) v Secretary of State*, cited *supra* note 157.

<sup>262</sup> *Aladeselu v Secretary of State*, cited *supra* note 11.

<sup>263</sup> E.g. *R (on the application of McCarthy) v SSH*, cited *supra* note 30; *Ogunyemi (Imprisonment Breaks Continuity of Residence: Nigeria)*, cited *supra* note 30; and *MG (Portugal)* cited *supra* note 111.

<sup>264</sup> *Jessy Saint Prix v Secretary of State for Work and Pensions* [2012] UKSC 49.

<sup>265</sup> *Ibid.*, As per Lady Hale at para. 21.

<sup>266</sup> *Ibid.*

compared with the position on entry, residence, and entitlement to social advantages may simply be linked to the low cost implications associated with the right to vote in municipal and European Parliamentary elections. In any case, the strength of rights in this context is an important component of the qualified constitutional character of EU citizenship within the UK legal order. A review of the legislative framework on municipal elections (Q11), also demonstrates that the electoral rights of EU citizens has been extended beyond the terms of Directives 94/109 EC and 94/80 EC.

### Question 14

- *Has the binding effect of the Charter of Fundamental Rights of the European Union, following entry into force of the Lisbon Treaty in 2009, played any role in how the rights of EU citizens are being interpreted by the national courts?*

104. Legal practitioners increasingly make reference to the Charter to support arguments concerning the interpretation of the rights of Union citizens before national courts. In *ZZ*, Maurice Kay LJ neatly summarised the impact of the Charter in its national context:

*'...the Charter is not a free-standing rights-creating legislative instrument. It is akin to a restatement of rights, freedoms and principles already established in law as a result of, inter alia, the judgments of the Luxembourg Court...what the Charter does not and cannot do is to give birth to rights, freedoms and principles in areas in which the Treaties claim no rule-making competence but acknowledge the exclusive competence of Member States. This is spelt out by Article 51.2 of the Charter.'*<sup>267</sup>

105. Based on our findings in this report, we highlight three specific examples of the Charter's emerging impact on the interpretation of the rights of EU citizens within the UK:

- 1) The application of the UK's contested 'right to reside' test
- 2) The application of the 'genuine enjoyment test' following *Ruiz Zambrano*
- 3) The use of the Charter to create new substantive rights for Union citizens

➤ *The application of the UK's contested 'right to reside' test*

106. Attempts have been made in some cases to address the perceived harshness of the UK's current 'right to reside' test by using rights that EU citizens derive from the Charter. In *Mirga*,<sup>268</sup> a Polish national was found not have satisfied the 'right to reside' test, as she was not a 'qualified person', i.e. working, self-employed, or self-sufficient, and so did not qualify for income support. M argued that denial of a right to reside would violate her right to family life under Article 7 of the Charter, as she had given birth to a child in the UK. In considering this argument, the Court of Appeal acknowledged, first, that while legal effect was only given to the

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<sup>267</sup> At paras 16 and 17.

<sup>268</sup> [2012] EWCA Civ 1952.

Charter by the Lisbon Treaty, which post-dated the appellant's application, the fundamental right to family life was a fundamental principle of Union law.<sup>269</sup> Nevertheless, the Court of Appeal held that 'the protection of her fundamental rights did not require that she be accorded such a "right of residence".'<sup>270</sup> The Court of Appeal cited a previous judgment in which it was stated that to allow a right of residence where a category of person had clearly been excluded from Directive 2004/38 would be an attack on the Directive itself and in which the Court did not accept fundamental rights arguments.<sup>271</sup>

➤ *The application of the 'genuine enjoyment test' following Ruiz Zambrano*

107. The Charter of Fundamental Rights has been raised in the arguments of appellants in a number of cases relating to whether or not an individual has been deprived of the genuine enjoyment of the rights arising from their Union citizenship. Applying *Dereci*, the national courts have repeatedly stated that the Charter only applies if the 'genuine enjoyment' test is satisfied; in other words, that the Charter only applies if the matter falls within the scope of EU law.<sup>272</sup> Moreover, relevant national case law consistently features the statement in *Dereci* that a desire to keep one's family together will not be sufficient, alone, to trigger protection under the genuine enjoyment test.<sup>273</sup> However, the national courts have also remarked that *Dereci* is not entirely clear on whether the separation family members can ever trigger the test. In *Harrison*, Elias LJ suggested that the Court of Justice 'might have been envisaging that Article 7 [EU Charter] could be relevant to the question whether the EU citizen was in fact compelled to follow the non-EU citizen out of the territory of the EU' but that the case law had not developed to that stage yet.<sup>274</sup> Indeed, in *Harrison* itself, the Court of Appeal focussed on the factual possibility for the British citizen children concerned to remain in the Union despite the deportation of their fathers in order to hold that the genuine enjoyment test had not been triggered.<sup>275</sup>

➤ *The use of the Charter to create new substantive rights for Union citizens*

108. Finally, we highlight that the entry into force of the Charter is also opening up new lines of argument for litigants. The example of prisoners' voting rights was discussed above in Q12. Here EU law – and the Charter – is being invoked in order to inject a new supranational EU dimension into existing domestic legal challenges. In other instances, the Charter is invoked to establish rights in new legal contexts. For example, in *Sandiford* the Charter was invoked unsuccessfully in an effort to establish an obligation on the United Kingdom Government to

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<sup>269</sup> *Ibid.*, at para.20.

<sup>270</sup> *Ibid.*, at para.26.

<sup>271</sup> *Ibid.*, at para.29, citing Lord Justice Maurice Kay in *Kaczmarek*, *supra* note 43 at para. 15.

<sup>272</sup> *Sanneh*, cited *supra* note 157 at para.19. See also *Harrison*, cited *supra* note 165.

<sup>273</sup> See Q7.

<sup>274</sup> *Harrison*, cited *supra* note 165 at para. 69.

<sup>275</sup> See Q7.

provide legal aid to one of its own nationals who had been convicted and sentenced to death in a Third Country for drug trafficking offences.<sup>276</sup>

## Question 15

- *Please describe the extent to which issues connected to EU citizenship have been a salient issue in the national media and how this issue has been dealt with in the national media.*

109. EU citizenship and related issues feature frequently in the mainstream UK media. National media coverage is often rather negative in character, reflecting perhaps the influence of a powerful centre-right British press. In the first instance, we identified only very infrequent discussion of substantive citizenship ‘rights’ – even in strands of the media that are not openly critical of the UK’s continued membership of the EU (e.g. *BBC*; *Guardian*; *Independent*). Mirroring the legislative framework implementing EU citizenship rights (Q13 above), the UK media tends to identify EU nationals as ‘migrants’ or ‘foreign nationals’ rather than EU citizens. Notably, there is also only infrequent reporting on the rights enjoyed by *British nationals* as EU citizens in host Member States. The focus is squarely centered on incoming ‘migrants,’ which again reinforces the view that EU citizenship is simply an adjunct to UK immigration law and not part of a framework of reciprocal rights. We would also observe that, where they exist, reports on the exercise of Treaty rights by British nationals are often framed negatively. This includes, for example, emphasizing the costs to the UK taxpayer of the exercise of their rights of intra-EU movement as EU citizens (e.g. ‘European Court Ruling will increase the number of Brits abroad who can claim winter fuel allowance,’ *Daily Mail* Jan 2013).<sup>277</sup>

- *Are there any particularly dominant themes within media reporting (e.g. expulsion; access to state benefits; derived rights for third country nationals)?*

110. The dominant and recurring themes in the UK media related to EU citizenship include entitlement to social welfare benefits; access to public services (particularly the NHS and State education sector); the rights of entry and residence enjoyed by EU citizens and their family members (particularly TCN family members); and the EU rules governing the expulsion of Union citizens. These key themes feature particularly predominantly in the centre-right UK press (chiefly: *Telegraph*; *Daily Mail*; *Daily Express*). Reporting on these key issues by this strand of the UK press is highly critical of EU citizenship, typically presenting headline-grabbing projections of both the number of incoming ‘EU migrants’ and their direct costs to the UK taxpayer.<sup>278</sup> As Shaw et al observe, there is a certain preoccupation within large sections of the UK media that EU migrants opt to exercise their Treaty rights in order chiefly to exploit the United Kingdom’s

<sup>276</sup> *The Queen on the application of Lindsay Sandiford v The Secretary of State for Foreign and Commonwealth Affairs* [2013] EWCA Civ 581.

<sup>277</sup> <http://www.dailymail.co.uk/news/article-2259585/Sunshine-test-stop-expats-claiming-16million-year-taxpayers-money-help-winter-fuel-bills.html#ixzz2h8qirzOM>.

<sup>278</sup> See e.g. <http://www.telegraph.co.uk/news/worldnews/europe/10375358/True-scale-of-European-immigration.html> and <http://www.dailymail.co.uk/news/article-2460704/One-10-dole-claimants-outside-UK-Cameron-moves-limit-access-benefits-foreigners.html>.

welfare system.<sup>279</sup> However, we did detect evidence of clear efforts to counter the validity of such perceptions within strands of the UK media.<sup>280</sup> Notably, the situation of EU citizens resident in the UK as economically active/self-sufficient Member State nationals does not feature prominently in national media, except to the extent that such persons and their family members contribute to an overall increase in demand for the UK public services (e.g. ‘Urgent need for 250,000 school places, spending watchdog warns,’ *BBC News Online*, 15<sup>th</sup> March 2013 and ‘EU influx leaves 3,000 children without primary places for the new term,’ *Daily Mail*, 1<sup>st</sup> Sept 2013).<sup>281</sup>

111. The centre-right UK press also tends periodically to isolate individual categories of EU citizens as ‘bad’ or ‘undesirable’ migrants.<sup>282</sup> These labels were often applied with reference *en masse* to nationals of the 10 Central and Eastern European States that acceded to the European Union in 2004. Interestingly, the situation of EU citizens from Western EU Member States is rarely discussed. This is despite the fact that nationals from these Member States (and their family members) have triggered the most significant extensions in the scope of rights/entitlement to social welfare benefits for EU citizens within the United Kingdom (e.g. *Baumbast*; *Chen*; *Bidar*; *Teixera*).<sup>283</sup> Most recently, Romanian nationals – and more specifically: members of the Roma community – have been singled out as ‘bad migrants’ by strands of the centre-right press as a target for particularly unfavorable treatment. The *Daily Express*, *Daily Mail* and *Daily Telegraph* have all run a series of articles on the prospect of an ‘invasion’ by Romanian nationals following the lifting of the UK’s transitional arrangements for Romanian (and Bulgarian) nationals in January 2014.<sup>284</sup> Reports in all three papers frequently present a distorted image of Romanian nationals. (e.g. ‘The Roma invasion of Paris... next stop Britain,’ *The Daily Telegraph*, 6<sup>th</sup> Oct. 2013).

- *How accurate is national reporting of EU citizenship issues? Can you detect evidence of the influence of the media on national public discourse?*

112. As the preceding comments indicate, the quality of reporting on EU citizenship issues in the UK is generally rather selective and non rights-centered. In addition, we suggest that, in places, UK reporting is often misleading. For

<sup>279</sup> Shaw et al, cited *supra* note 7 at p. 27.

<sup>280</sup> See e.g. <http://www.theguardian.com/commentisfree/2013/mar/06/uk-benefits-eu-migrants-what-crisis> (countering claims regarding the costs of EU migration to UK taxpayers) and <http://news.bbc.co.uk/1/hi/7525472.stm> (emphasising the rights-enhancing character of the CJEU’s decision in *Metock*).

<sup>281</sup> <http://www.bbc.co.uk/news/education-21785796> and <http://www.dailymail.co.uk/news/article-2408231/EU-influx-leaves-3-000-children-primary-places-new-term.html>.

<sup>282</sup> On this point, see also Shaw et al, ‘Getting to grips with EU citizenship,’ cited *supra* note 7 at p. 29.

<sup>283</sup> Case C-413/99 *Baumbast and R v Secretary of State* [2002] ECR I-7091, Case C-202/02 *Chen*, cited *supra* note X, Case C-209/03 *Bidar* [2005] ECR I-219 and Case C-480/08 *Teixeira v London Borough of Lambeth and Secretary of State* [2010] ECR I-1107.

<sup>284</sup> E.g. <http://www.express.co.uk/news/uk/440206/Join-our-Crusade-today-stop-new-EU-migrants-flooding-in-to-Britain>, <http://www.dailymail.co.uk/news/article-2263661/Up-70-000-Romanian-Bulgarian-migrants-year-come-Britain-controls-EU-migrants-expire.html> and <http://www.telegraph.co.uk/news/uknews/immigration/10013810/Diplomats-admit-35000-Romanian-and-Bulgarian-migrants-may-come-to-Britain.html> respectively. Cf. <http://www.theguardian.com/world/2013/feb/02/romania-uk-immigrants-diplomatic-row>.

instance, there is still a tendency to conflate EU citizenship rights with the legal framework of rights protection under the ECHR/Human Rights Act.<sup>285</sup> The UK Office of the European Commission publishes official clarifying responses to such instances of misreporting on EU issues on a near daily basis.<sup>286</sup> Its efforts appear to have little impact on the quality press reporting by the centre-right British press.

113. It is difficult in a study of this scope and nature to draw robust conclusions on the impact of the reporting on EU citizenship issues by the UK media on national public discourse. However, on the strength of our limited and illustrative sample, we would argue that the mainstream UK media contributes little to the sense of EU citizenship as rights-based legal status that is destined to become the fundamental status of all Member State nationals. As is perhaps inevitable in the national context, issues affecting or related to EU citizens are subsumed within broader political debates on e.g. immigration; public service reform; and criminal justice. In each context, EU citizens remain easily cast as ‘others’ – as EU migrants; welfare tourists; foreign criminals – at least within an influential strand of the UK media. There is, of course, a wealth of alternative media sources, including internet blogs that offer a more balanced and overtly rights-centered analysis of EU citizenship.<sup>287</sup> However, these attract the attention of more limited, specialist audiences. In more general terms, the frequency and intensity of negative reporting on EU citizenship issues, particularly as regards social welfare entitlements, may also be linked to a rise in support for the United Kingdom Independence Party, which campaigns for the UK to exit the European Union.

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**November 2013**

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<sup>285</sup> See here also Shaw et al, ‘Getting to grips with EU citizenship,’ cited *supra* note 7 at pp 29-30.

<sup>286</sup> <http://ec.europa.eu/unitedkingdom/blog/>.

<sup>287</sup> E.g. <http://eutopialaw.com/>.