



JÖNKÖPING INTERNATIONAL  
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# **Free movement of a Union citizen within the European Union**

What criteria must a family member of a Union Citizen fulfil in order to move  
to a Member State?

Bachelor thesis within

Commercial and Tax Law

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## Bachelor Thesis in Commercial and Tax Law

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### **Abstract**

The treaty on the functioning of the European Union provides certain rights to the Union Citizens. One of the fundamental rights is that of free movement of Union citizens. A citizen within the European Union has the right to freely move and reside within the territory of the Member States. Family members of a Union citizen also obtains right to move to a Member State. However, the family members have to fulfil certain conditions in the Residence Directive in order to move to a Member State. The question of what criteria a family member must fulfil has been controversial because the Member States have interpreted the EU-law in different ways. Consequently, through preliminary rulings ECJ has come to different conclusions hence the controversy.

The interpretation of the EU-law concerned whether a Member State can impose an additional requirement on a family member of a Union citizen or not. This is what the Member States have different views on. The implication of the requirement was that a family member must have had a prior lawful residence in a Member State in order to move to another Member State. This is the outcome in one of the cases where an additional requirement set by a Member State was to be considered as compatible with the EU-law. However, this view was to be reviewed in another case, as imposing a requirement was in contrary to the EU-law and to the internal market within the European Union.

It is clear that including an additional requirement is not in compliance within the EU-law. Mainly because the applying an additional requirement is not provided for in the Residence Directive. Additionally, it would restrict family members to move as well as it would hinder Union citizens to lead a normal family life.

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## **Abbreviations**

EU-Law      European Union law

TFEU      Treaty on the functioning of the European Union

ECJ      European Court of Justice

# I Introduction

## I.1 Background

The treaty on the functioning of the European Union (TFEU) establishes that every citizen of the Union shall have the right to move freely within the territory of the Member States.<sup>1</sup> Thus, a citizen of the European Union acquires certain rights and duties for being a Union citizen.<sup>2</sup> These rights and duties derive from the TFEU.

The TFEU holds different types of freedoms; free movement of goods, capital, services, and people.<sup>3</sup> In addition, the treaty also provides the freedom of establishment.<sup>4</sup> One of the fundamental rights for a citizen in the European Union is that of free movement and residence. The free movement and residence entails that a Union citizen's family member can move to the Member State.<sup>5</sup>

The Commission found it necessary to codify and review the existing Community instruments with the aim to simplify and strengthen the right of free movement and residence of the citizens in the Union.<sup>6</sup> In order for the conditions to give an effect, a directive was adopted. The Commission proposed the new Directive 2004/38/EC on the right of the citizens of the Union and their family members to move and reside freely within the territory of the Member (Residence Directive).<sup>7</sup>

The right of a family member to move and reside within the Member States is highlighted in several cases. Three cases in particular from the ECJ were involved in this matter. Two of the cases are based on the older Regulation 1612/68 on the freedom of movement for workers within the Community and Directives that are now repealed, and these are the Ak-

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<sup>1</sup> Article 21 TFEU.

<sup>2</sup> Asmus, K, *Boundaries to open borders*, Europarättslig tidsskrift, 2009, nr 2, p. 264.

<sup>3</sup> Article 26.2 TFEU.

<sup>4</sup> Article 49 TFEU.

<sup>5</sup> Article 20.2 TFEU.

<sup>6</sup> Directive 2004/38/EC, recital 3 of the Preamble.

<sup>7</sup> COM (2001)257 final.

rich case<sup>8</sup> and the MRAX case<sup>9</sup>. The third case is however based on the new Residence Directive and that is the Metock case<sup>10</sup>.

The outcome of these cases differs from each other. Hence, it becomes interesting as the interpretation of the Residence Directive and the older Regulation by the ECJ varies from case to case. Although it shall be noted that the Metock case and the Akrich case were before the Residence Directive was adopted it still have relevance. This is because the older Regulation<sup>11</sup> had a similar content as the current Residence Directive, which also gave the family members right to move and reside.<sup>12</sup> From these cases, it seems that the definition of a family member and the rights a family member acquires is not clear. For that reason, it is of interest to investigate what is required for a family member of a Union citizen who is planning to move to a Member State. Also, if the requirements that are set constitute an obstacle for the free movement of residence for a family member.

## **1.2 Objective and delimitation**

What criteria must a family member of a Union Citizen fulfil in order to move to a Member State? The purpose is also to assess whether the requirements are in accordance with rights of movement for a Union citizen's family member.

The focus of this essay will be on the free movement for a family member of a citizen of the European Union within the meaning of the Residence Directive. Therefore, the emphasis is on cases involving how the ECJ interprets the Directive in different approaches. The free movement of a citizen in general is thereby only treated to get a basic understanding.

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<sup>8</sup> Secretary of State for the Home Department v Hacene Akrich, 109/01, [2003], ECR I-9607.

<sup>9</sup> Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v Belgian State, 459/99, [2002], ECR I-6591.

<sup>10</sup> Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform, 127/08, [2008], ECR I-6241.

<sup>11</sup> Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

<sup>12</sup> Asmus, K, *Boundaries to open borders*, Europarättslig tidsskrift, 2009, nr 2, p. 270.

### **I.3 Methodology and material**

The material used in this essay will be treated after its value according to the division of primary law and secondary law. Since this essay concentrates on EU-law, the emphasis is on material from the EU legal framework. Treaty and case law from the ECJ related to the primary law, directives related to the secondary law, and at last literature a category of its own.

Case law in the area of free movement of a family member is limited. There are a few cases from ECJ, however as the outcome for these cases differ, it results in that the legal position remains unclear. Consequently, the different outcomes will be compared. The Residence Directive will therefore be analysed in order to get an understanding of what rights a family member actually obtains. Moreover, Reports from the Commission have been used in order to see the effect of the Residence Directive.

## 2 EU-Law

### 2.1 Regulation 1612/68

Before the Residence Directive was adopted, Regulation 1612/68 was *inter alia* treating the matter of free movement of Union citizens who are working in a Member State and their family members. The provisions in the Regulation that treats this matter are article 10, 11, and 12. The content of these articles will be described.

The articles mentioned above mainly define who is considered as a family member to a Union citizen. Moreover, these articles are only applicable to family members who are related to a worker who is a national of one Member State. This is something that differs comparing to the Residence Directive and the difference will be explained further down in the essay.<sup>13</sup>

A family member of a worker who is a Union citizen falls into article 10 depending on what kind of relation he or she has to the Union citizen. Family member irrespective of their nationality have the right to install themselves in the territory of the Member State which the Union citizen has an employment.<sup>14</sup>

Point (a) in article 10 includes spouse, descendants to the Union citizen who are under the age of 21 years and dependants. “*Dependent relatives in the ascending line of the worker and his spouse*”<sup>15</sup> are also regarded as family members according to point (b) of the article. However, if a family member does not meet the conditions set in point (a) and (b), then article 10(2) is applicable. The purpose of article 10(2) is to facilitate admission of a family member who is dependent on the worker. When a family member has decided to install himself with the worker, article 10(3) sets up a requirement such as that the worker must have “*housing considered as normal for national workers*”<sup>16</sup> available for his family. Although this requirement is most probably only relevant at the early stage, such as the entry of the family.<sup>17</sup>

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<sup>13</sup> See below, section 3.3.

<sup>14</sup> Article 10(1), Regulation 1612/68.

<sup>15</sup> Article 10(1)(b), Regulation 1612/68.

<sup>16</sup> Article 10(3) Regulation 1612/68.

<sup>17</sup> Friedl, W & Frank W, *Free movement of persons within the European community*, 1 ed, Kluwer Law International, The Hague, 2002, p. 51.



Article 11 provides rights to the spouse, children under the age of 21 years and to dependants to the worker who is a national of a Member State. The rights that the family member gains entail that family member can pursue an activity as an employed person in the territory of the same Member State, even though not being a national of that Member State.<sup>18</sup>

The third and last provision, article 12, is treating children of a worker who is a national of a Member State. The function of this provision is to make it possible for the children to attain education in the same way as nationals of that Member State which the parent has its employment.<sup>19</sup>

## **2.2 Principle of non-discrimination**

Furthermore, another important legal doctrine within the EU-law is the principle of non-discrimination. The meaning of this principle is that persons regardless of if they are citizens of the concerned Member State or another Member State, they shall be treated in the same way. Discrimination that depends on the nationality of Union citizen is prohibited.<sup>20</sup>

This principle is one, which the Residence Directive is based on. Hence, it is of importance since it constantly comes back when interpreting the Directive. As it will be discussed further down in the essay, the principle of discrimination is indirectly established in the Directive through equal treatment.<sup>21</sup>

## **2.3 Choosing an alternative**

A question that arises is why a new Directive was adopted. Compared to a Directive, a Regulation is binding in its entirety and is directly applicable in the Member States.<sup>22</sup> In that sense, amending the Regulation only or adopting a completely new regulation would have resulted in that the provisions of the Regulation would have been directly enforceable in the Member State. However, as the Regulation is now only amended and the previous Directives are repealed the situation is different.

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<sup>18</sup> Friedl, W & Frank W, p. 51.

<sup>19</sup> Article 12, Regulation 1612/68.

<sup>20</sup> Article 18 TFEU.

<sup>21</sup> Article 24 Directive 2004/38.

<sup>22</sup> Article 288 TFEU.

The reason why the previous Directives dealing with free movement of persons were repealed is because to make it easier for the Union citizens to exercise their right of free movement.<sup>23</sup> Consequently, the management of the free movement had to be facilitated in the matter of discharging the different Directives in order to replace it with “*a single legislative act.*”<sup>24</sup>

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<sup>23</sup> Directive 2004/38, recital 4 of the Preamble.

<sup>24</sup> Directive 2004/38, recital 4 of the Preamble.

## **3 Residence Directive<sup>25</sup>**

### **3.1 Background to the Residence Directive**

The Directive is mainly based on articles 18, 21, 46, 50, and 59 in the treaty on the functioning of the European Union.<sup>26</sup> What these articles have in common is that they deal with free movement of Union citizens and their family members too.

Article 18 TFEU regulates the essential principle of non-discrimination. This article has the purpose to prohibit any kind of discrimination that has to do with nationality. Thus, this underlying article has a great function in the new Directive since it is applicable on third country nationals too. Of a natural reason, the potential presence of discrimination is more likely to occur in a situation between nationals of Member States and third country nationals. As a result of this, the Directive is based on article 18 TFEU, where a situation like this would be prevented.

Further on, article 21 TFEU states the right to freely move and reside within the Member States for a Union citizen. In this article, family members are not mentioned and for this reason, the Residence Directive functions as a complement to the TFEU.

Article 46 and 50 TFEU define the function that some of the EU-institutions have, such as to act in accordance with the ordinary legislative procedure. The last article that the Directive is based on is article 59 TFEU. Here it is stated that certain directives shall be issued if concerning a specific service.<sup>27</sup>

### **3.2 The adoption and aim**

The Residence Directive defines the right of free movement for citizens within the European Union. The provisions of this directive set out the rules, which are applicable to Union citizens. The Residence Directive, however, also covers family members to the Union citizens but only as a dependant to the Union Citizen. This Directive is merged into a sin-

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<sup>25</sup> Directive 2004/38.

<sup>26</sup> The numbering of these articles in the old Treaty and in the Directive are: 12, 18, 40, 44, and 52.

<sup>27</sup> Article 59 TFEU.

gle instrument from different directives and regulations in order to simplify for the general public as well as public authorities to exercise their rights.<sup>28</sup>

In addition, this new Directive was adopted to reduce the administrative formalities to the essential parts<sup>29</sup> and to strengthen as well as to clarify<sup>30</sup> the EU-legislation in the field of the free movement of Union citizens. The reason for the modification to a single directive was also to give an improved definition of the status of family members as well as to encourage the Union citizens to exercise their rights to move and reside within the European Union.<sup>31</sup> This in turn confines the extent to which a Member State can refuse entry for a national.<sup>32</sup>

### **3.3 Definition of family member**

The definition of a family member can be found in article 2(2) of the Residence Directive. The article gives four different meanings of what can constitute a family member. A family member falls into article 2(a) if he is spouse of the Union citizen, or if the family member has contracted a registered partnership with the Union citizen according to article 2(b). In addition, direct descendants under the age of 21 are to be considered as family member. Lastly, the relative who are direct dependent on the Union citizen in the ascending line and the ones of the spouse or the partner as defined in 2(b).<sup>33</sup>

It is apparent that the definition of a family member in the Residence Directive is very similar to article 10 in Regulation 1612/68. However, there is a difference as the Regulation only addresses family members to a worker in a Member State, whereas the Residence Directive refers to Union citizens in general.<sup>34</sup> Thus, the rights provided in the Regulation are restricted to workers comparing to the broad definition of Union citizens in the Directive.

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<sup>28</sup> [http://europa.eu/legislation\\_summaries/education\\_training\\_youth/lifelong\\_learning/133152\\_en.htm](http://europa.eu/legislation_summaries/education_training_youth/lifelong_learning/133152_en.htm) (2011-04-25).

<sup>29</sup> Directive 2004/38, recital 7 of the preamble.

<sup>30</sup> Directive 2004/38, recital 3 of the preamble.

<sup>31</sup> [http://europa.eu/legislation\\_summaries/education\\_training\\_youth/lifelong\\_learning/133152\\_en.htm](http://europa.eu/legislation_summaries/education_training_youth/lifelong_learning/133152_en.htm) (2011-04-25).

<sup>32</sup> Article 3(2) Directive 2004/38.

<sup>33</sup> Article 3(2)(d) Directive 2004/38.

<sup>34</sup> Article 1 Directive 2004/38.

### **3.4 Rights which Union citizens and their family members acquire**

A family member gains certain rights from the Residence Directive. In general, he or she has a right of exit<sup>35</sup>, of entry<sup>36</sup> and of residence<sup>37</sup>. Mainly these rights include that the family member can move to the Member State, which the Union citizen is planning to move to or reside in within the European Union. The provisions that are dealing with this matter are the basic rights in the Residence Directive.

A Union citizen and his family member who are not nationals of a Member State acquire the right to leave a Member State in order to travel to another Member State, which is the right of exit. The requirement set in this provision, article 4(1), is that the Union citizen and his family members have a valid passport or identity card. This in turn shall not be prejudice to the provision treating the travel document or national border controls.<sup>38</sup> In addition, article 4(2) also states that formalities such as an exit visa or similar formalities may not be imposed to the persons in article 4(1).<sup>39</sup>

The right of entry is in the same way treated as the right of exit. The Member States shall permit the Union citizens to enter the territory of another Member State. This with the condition set that they have a valid identity card or a passport. Family members of Union citizens who are not nationals of a Member State also gain the right to enter a Member State with a valid passport.<sup>40</sup> In addition, formalities involving entry visa or any similar kind of formality may not be imposed on Union citizens.<sup>41</sup> This is similar to the provision treating the right of exit. However, there is a slight difference since article 5(2) actually states that family members who are not nationals of a Member State could be required to have an entry visa.<sup>42</sup> This is the only requirement that can be imposed on third country family

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<sup>35</sup> Article 4 Directive 2004/38.

<sup>36</sup> Article 5 Directive 2004/38.

<sup>37</sup> Articles 6-7 Directive 2004/38.

<sup>38</sup> Article 4(1) Directive 2004/38.

<sup>39</sup> Article 4(2) Directive 2004/38.

<sup>40</sup> Article 5(1) Directive 2004/38.

<sup>41</sup> Article 5(1) Directive 2004/38.

<sup>42</sup> Regulation 539/2001 and Article 5(2) Directive 2004/38.

members and that requires that they shall then have an entry visa according to a Regulation<sup>43</sup> or national legislation. In order to facilitate the procedure for third country family members, the Member State concerned shall give the persons the opportunity to attain the documents needed.<sup>44</sup>

The right of residence is treated in two articles; this is due to the Directive making a difference on the right of residence depending on the time of residing in a Member State. The right to reside in a Member State up to three months is treated in article 6. On the other hand, article 7 states the criteria for the right of residence for more than three months.

Article 6(1) confers the right to Union citizens to reside in another Member State for up to three months. The right that the Union citizens acquire shall not be imposed with any condition or formalities. The only requirement that is set is that the Union citizen is in possession of a valid passport or identity card.<sup>45</sup> Further on, family members to a Union citizen who are not nationals of a Member State must also hold a valid passport. The provisions of paragraph 1 are also applicable to family members.<sup>46</sup>

The right of residence for more than three months is stated in article 7. This article however also sets certain conditions that the Union citizens must meet. The Union citizens must for instance work or be a self-employed person in the Member State he is moving to.<sup>47</sup> In addition, he must have sufficient resources since he shall not become a burden to the social assistance of the Member State he has moved to.<sup>48</sup> Moreover, persons who are enrolled in a private or public establishment where the host Member State is financing also have the right to reside in the host Member State for more than three months.<sup>49</sup> The per-

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<sup>43</sup> Article 5(2) Directive 2004/38.

<sup>44</sup> Article 5(4) Directive 2004/38.

<sup>45</sup> Article 6(1) Directive 2004/38.

<sup>46</sup> Article 6(2) Directive 2004/38.

<sup>47</sup> Article 7(1)(a) Directive 2004/38.

<sup>48</sup> Article 7(1)(b) Directive 2004/38.

<sup>49</sup> Article 7(1)(c) Directive 2004/38.

son must also have a comprehensive sickness insurance, which is covered in the host Member State.<sup>50</sup>

Point (a)-(c) in article 7 covers only Union Citizen. However, family members who intend to reside in a Member State for more than three months are covered by point (d) in the same article. A Union citizen must satisfy the conditions set out in either point (a), (b), or (c) in order for a family member who intend to accompany the Union citizen to reside more than 3 months.

Furthermore, the right of residence according to paragraph 1 is extended to third country family members who are to join a Union citizen. The Union citizen must however fulfil the conditions set out in paragraph 1 (a), (b), or (c).

### **3.5 Equal treatment – article 24**

This article states that Union citizens who are residing within the territory of the host Member State on the basis of the Residence Directive shall get to be equally treated.<sup>51</sup> The meaning of equal treatment in this sense implies that the Union Citizen who resides in a host Member State shall be treated in the same way as the nationals of that Member States.

The article is not only applicable on Union citizens; the right of being equally treated is extended. Family members who are not nationals of a Member State can benefit from this right of equal treatment. However, they need to have the right of residence or permanent residence in order to enjoy this right.<sup>52</sup>

### **3.6 Abuse of rights – article 35**

In order for the Residence Directive to serve its purpose of providing the right to move and reside, article 35 defines that these rights should not be abused. This article has the function to prevent the Union citizens as well as the family members to abuse the right they obtain from the Directive. Therefore, Member States have the right to adopt measures

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<sup>50</sup> Article 7(1)(c) Directive 2004/38.

<sup>51</sup> Article 24 Directive 2004/38.

<sup>52</sup> Article 24 Directive 2004/38.

such as, to refuse, withdraw, or terminate a right, which a Union Citizen normally can get. A measure like this can only be taken if it is proportionate.<sup>53</sup>

The article lists different kind of abuses such as, “abuse of rights or fraud, such as marriages of convenience”<sup>54</sup> The latter abuse, will be apparent in one of the cases in this essay.<sup>55</sup>

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<sup>53</sup> Article 35 Directive 2004/38.

<sup>54</sup> Article 35 Directive 2004/38.

<sup>55</sup> C- 109/01 (Akrich).



## **4 Case law from ECJ**

### **4.1 Generally about the cases**

A few cases address the matter of free movement of a family member. Cases discussed in this essay have the common ground in that the Member States do not know how to interpret the Residence Directive correctly. More specifically these cases see if it is possible for the Member States to impose additional requirements than what is set out in the Directive. Thus to answer the question if a requirement which constitutes of being prior lawfully resident within the European Union for third country nationals was lawful or not is in accordance with the EU-law.

Some of the cases that will be discussed took place before the Residence Directive was adopted. Therefore, the preliminary ruling from the Member States embodies the older EU-law, such as the amended Regulation 1612/68 and other Directives. However, even though the ECJ applies older EU-law, it does not affect the outlook the Court has on the free movement of Union citizens' family members. The reason for this is that even before the new Residence Directive was adopted, the family members of a Union citizen acquired similar rights such as to move and reside freely within the European Union. Hence, these cases are of relevance when examining the different interpretations of former EU-law as well as the current law. The cases that will be examined have different outcomes and this will further down be analysed in the essay.<sup>56</sup>

### **4.2 MRAX case<sup>57</sup>**

The MRAX case is from 2002 and therefore the new Residence Directive was not yet adopted. Hence, the former regulation and directives are applicable in this case. In this case, there were several questions asked of the ECJ for a preliminary ruling and these questions have a common ground. The questions referred concern if the national legislation of a Member State is compatible with the EU-law concerning the issue of demanding certain documents from a third country national such as a valid passport or similar documents in order for him to enter the Member State, where he has his family member. Additionally if

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<sup>56</sup> See below, section 6.2.

<sup>57</sup> C-459/99 (MRAX).

the Member State had the right to refuse a spouse for entering a Member State unlawfully and deport the spouse.<sup>58</sup>

The Court encountered these questions by first upholding the importance of securing the family life of nationals of the Member States that the European Union law provides.<sup>59</sup> The meaning of the different Directives and Regulation were discussed and interpreted by the Court. Accordingly, the legislature of the European Union law has attached great weight to securing family life, therefore it is not proportionate to send back a third country national. The Court takes the principle of proportionality into account and gives the interpretation that a third country national who is married to a citizen of a Member State and is attempting to enter its territory without possessing a valid identity and where he can prove his identity and the marital ties may not be sent back.<sup>60</sup>

The other question the Court answered dealt with the issue regarding when a third country national unlawfully enters a Member State. The answer to this question is based upon the articles in the different Directives that were valid during that time. It shall therefore be interpreted that a citizen cannot be refused a residence permit if he can prove his identity and his marriage to a national of a Member State merely on the ground that he or she has unlawfully entered the territory of a Member State.<sup>61</sup>

### **4.3 Akrich case<sup>62</sup>**

The grounds for this case are intricate. The question referred to the Court concerned a Union citizen who is married to a third country national that do not meet the criteria to enter or reside in that Member State because of the national legislation. The issue is also that the couple were aiming to exert rights from the EU-law by working in another Member State for a certain time in order to benefit from the EU-law when returning with her spouse to

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<sup>58</sup> C-459/99 (MRAX), para 37.

<sup>59</sup> Can be seen for example in Regulation 1612/68 and *Mary Carpenter v Secretary of State for the Home Department*, 60/00, [2002], ECR I-6279, para 38.

<sup>60</sup> C-459/99 (MRAX), para 62.

<sup>61</sup> C-459/99 (MRAX), para 80.

<sup>62</sup> C- 109/01(Akrich).

the the Member State she is a national of.<sup>63</sup> The question is therefore if the married couple is permitted to reside in the home Member State as a family accordingly to the EU-law.

The ECJ countered this issue by saying that in order for a third country national who is married to a Union citizen to benefit from the rights provided by Regulation 1612/68, he must have been a lawful resident in a Member State before he moves to another Member State, which the Union citizen is migrating to or has migrated to.<sup>64</sup> The reason behind this outcome is that the provision<sup>65</sup> does not include when a couple enters a marriage of convenience with the purpose of eluding the provisions concerning entry and residence of third country nationals.<sup>66</sup> In addition, the spouse from a third country does not gain any rights from the Regulation<sup>67</sup> since he has not resided lawfully in a Member State, and marriages where the person enter as a result of convenience are not covered by the Regulation.<sup>68</sup>

#### **4.4 Metock case<sup>69</sup>**

This is a recent based upon a preliminary ruling on the Residence Directive. Several articles from the Directive are brought up in the case. One of the articles, article 5, treats the right of entry for a Union citizen as well as a family member. This preliminary ruling for this case includes four different cases, the Metock case, the Ikogho case, the Chinedu case, and the Igboanusi case. All four cases involve the same situation, a third country national who is refused to move to the Member State because of national legislation. These cases were heard together. The applicants of these cases had all in essence submitted that the national legislation of the Member State is not compatible with the Residence Directive.

There were several questions raised to the ECJ, however, only one question is of relevance for this essay. The question referred to the Court is if the Residence Directive permits a

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<sup>63</sup> C-109/01 (Akrich), para 45.

<sup>64</sup> C-109/01 (Akrich), para 61.

<sup>65</sup> Article 10 Regulation 1612/68.

<sup>66</sup> C-109/01 (Akrich), para 61.

<sup>67</sup> Article 10 Regulation 1612/68.

<sup>68</sup> Article 10 Regulation 1612/68.

<sup>69</sup> C-127/08 (Metock).

Member State to impose a requirement such that a national of a third country who is a spouse to a Union citizen must have been previously a lawful resident in another Member in order to benefit from the provision of the Residence Directive.<sup>70</sup>

The ECJ discusses that there is no such provision in the Residence Directive that states that the Directive can only apply on family members of a Union citizen if he has previously resided in a Member State.<sup>71</sup> As it is stated in article 3(1) of Residence Directive it is applicable on all Union Citizens who move to and reside in a Member State other than that of which they are a national and to their family members, which is defined in article 2(2). The definition of article 2(2) does not differentiate family members who have or not have previously resided lawfully in another Member State.<sup>72</sup>

Furthermore, the ECJ also mentions other formalities, which are applicable on non-Member State nationals. Formalities such as what documents are necessary to move to another Member State are stated in the Residence Directive. This is stated in article 10(2), where an exhaustive list of documents is set which third country nationals must present to the host Member State. However, this list does not give the possibility to a host Member State to ask for a document showing that a national has had a prior lawful residence in another Member State.<sup>73</sup> Moreover, the ECJ discusses that even before the Residence Directive was adopted the European Union law emphasized the importance of guaranteeing the family members of nationals of the Members States in order to comply with the fundamental freedom stated in the Treaty.<sup>74</sup> For that reason article, 2(2) in the Residence Directive shall apply to a third country family member to a Union citizen. The Directive confers right to a third country family member to move and reside in the member state without making any difference whether or not the third country national has previously lawfully resided in another Member State.<sup>75</sup>

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<sup>70</sup> C-127/08 (Metock), para 47.

<sup>71</sup> C-127/08 (Metock), para 49.

<sup>72</sup> C-127/08 (Metock), para 50.

<sup>73</sup> C-127/08 (Metock), para 53.

<sup>74</sup> C- 459/99 (MRAX), para 53.

<sup>75</sup> C-127/08 (Metock), para 54.

As the ECJ treats the question of the application of an additional requirement, it also mentions previous cases concerning the same issue as in the Metock-case. One of the cases that the ECJ refers to is the Akrich case. As written above, the Court in the case of Akrich concludes that in order for a third country national to benefit from the rights stated in Regulation 1612/68 he had to be a prior lawful resident in a Member State before he moves to another Member State. In the Metock case, the ECJ considers that the result of the Akrich case must be reviewed. Consequently, a condition such as prior lawful residence cannot be a factor that is decisive for the spouse of a Union citizen to benefit rights from the directive.<sup>76</sup> The reasoning behind this argument by the ECJ, lies in the fact that that if the Union citizens would be prohibited to lead a normal family life in the host Member State it would avert the exercise of the freedoms, which the Treaty is guaranteeing.<sup>77</sup> In addition, setting a requirement as prior lawful residence would discourage the family members of the Union citizens to move and reside to that Member State.<sup>78</sup>

#### **4.5 Concluding comments on the cases above**

The outcomes of these cases differ which shows there is discretion in interpreting the older Regulation and the new Residence Directive concerning the criteria a family member has to fulfil in order to move to a Member State. As stated above in the essay two of the cases<sup>79</sup> involve the repealed Directives and the Regulation, which had not been amended at that time. However, that does not affect the rights, which a family member can acquire as it is more or less the same.

First of all, in the MRAX case the ECJ enlightens the principle of proportionality. It is not considered proportionate to send back a third country national who is married to a Union citizen in a situation where the third country spouse is attempting to reside in its territory. The grounds for this judgement lie in the fact a Member State cannot send back a third country national only for the reason that he is not holding a valid identity card when he on the other hand can prove his identity and the marital ties to the Union citizen. Additionally

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<sup>76</sup> C-127/08 (Metock), para 58.

<sup>77</sup> C-127/08 (Metock), para 62.

<sup>78</sup> C-127/08 (Metock), para 64.

<sup>79</sup> C- 459/99 (MRAX) and C-109/01, (Akrich).

the ECJ concludes that a third country national who is married to a Union citizen cannot be sent back merely on the ground that he has unlawfully entered a Member State.

The Akrich case illustrates the requirements that the EU-law may impose. In this case, the ECJ narrowed its interpretation of the Directives and Regulation. Here the Court held in order for a third country family member to move to another Member State certain requirements must be fulfilled. In other words, the Member State could individually assess a third country family member, even though he is a family member of a Union citizen. Thereby this case implies that when deciding of a third country family member's right to move to a Member State, a Member State must make it conditional concerning that the family member must previously had a lawful residence in another Member State.<sup>80</sup>

The Metock case explains the power a Member State has. Here the ECJ clearly settled that a Member State is not entitled to impose requirements on a third country family member. Requirement such as that the third country family member must have had a prior lawful residence in another Member State is not compatible the EU-law.<sup>81</sup> Otherwise, the Union citizens would not be able to lead a normal family life and this would have the consequence that the freedom of movement that the TFEU guarantees would be obstructed.<sup>82</sup>

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<sup>80</sup> Broberg, M and Holst-Christensen, N, *Free movement in the European Union*, 3<sup>rd</sup> edition, DJØF Publishing Copenhagen Jurist-og Økonomforbundets Forlag, Copenhagen, 2010, p. 481.

<sup>81</sup> Broberg, M and Holst-Christensen, N, p. 515.

<sup>82</sup> Broberg, M and Holst-Christensen, N, p. 515, and C-127/08 (Metock), para 62.

## 5 Difficulties with implementing the Directive

### 5.1 Problems

When reading cases about how the Residence Directive and the older Regulation 1612/68 are interpreted and treated in the Member State the picture that one gets is that Member States as well as the ECJ do not know how to interpret some of the provisions of the Directive. The reason for this could vary, from the fact that the Directive might not be clear enough, hence the discretion it leaves to Member States' individual interpretation on the Directive and the Regulation. As a result of this, the Commission has reported to the European Parliament and the Council about the application of Directive 2004/38.<sup>83</sup> Since this essay focuses on certain articles of the Directive, other articles from the Residence Directive will not be commented on.

### 5.2 Report from the Commission<sup>84</sup>

This report concerns how the Residence Directive was transposed to the different Member States' national legislation. The purpose of the report is to give an overview of how the Directive is applied in everyday life and the result of it. The Commission starts in the report by stating that the free movement of persons is one of the fundamental freedoms.<sup>85</sup> Furthermore, the Directive is important not only for the Union citizens and for their family members who reside in another Member State but also to other Union citizens who travel within the territory of the European Union.<sup>86</sup>

The Commission took its position and commented on to what extent the transposition measure of the Residence Directive complied with the actual aim of the Directive. The view that was shared by the Commission was that generally the transposition of the Residence Directive was “*rather disappointing*.”<sup>87</sup> The reasoning behind this statement is because there was not a single Member State that had implemented the Directive in an effective and

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<sup>83</sup> COM (2008)840 final.

<sup>84</sup> COM (2008)840 final.

<sup>85</sup> COM (2008)840 final, p. 2, and article 45 TFEU.

<sup>86</sup> COM (2008)840 final, p. 2.

<sup>87</sup> COM (2008)840 final, p. 3.

correct way in its entirety.<sup>88</sup> The articles in the Directive were in the same way not transposed effectively by the Member States. With a situation like this, the Member States in some other areas transposed the Directive, which was more favourable to the Union citizens and their family members than what actually was required by the Directive itself.<sup>89</sup> For some countries, there were only certain provisions of the Directive that was not in compliance. However, most Member States had transposed considerable parts and vital provisions of the Directive incorrectly.<sup>90</sup>

Moreover, the transposition of the definition of family member according to article 2(2) in the Residence Directive was satisfactory. On the other hand, the rights that other family members acquire under article 3(2) was less satisfactory. Numerous of Member States failed to transpose this provision accurately, whereas other Member States had extended this right more favourably than needed.<sup>91</sup>

In addition, the Commission also comments on Member State who imposed the requirement concerning the right of residence, which was conditional to family members' prior lawful residence in another Member State.<sup>92</sup> The additional requirement that was applied by some Member States is not provided by the Directive. Thus, it resulted in a great number of complaints.<sup>93</sup> As mentioned in this essay, the *Metock* case<sup>94</sup> was the case where the ECJ gave a clear statement on the use of additional requirement by Member States. Here the Commission underlined that a requirement such as prior lawful residence is contrary to the Residence Directive. Nonetheless, the Commission as well as the ECJ<sup>95</sup> emphasise that

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<sup>88</sup> COM (2008)840 final, p. 3.

<sup>89</sup> COM (2008)840 final, p. 4.

<sup>90</sup> COM (2008)840 final, p. 4.

<sup>91</sup> COM (2008)840 final, p. 4.

<sup>92</sup> See above, section 4.3.

<sup>93</sup> COM (2008)840 final, p. 4.

<sup>94</sup> C-127/08, (*Metock*).

<sup>95</sup> C-127/08, (*Metock*), para 75.



measure against such as abuse of Community rights and marriages of convenience can be prevented by the Member States.<sup>96</sup>

### 5.3 Guidance on how to interpret the Directive

After the Report from the Commission about the application of the Residence Directive<sup>97</sup>, the Commission came with guidance on how to better transpose and apply the Residence Directive. The reason for this guidance has to do with that the “*overall transposition of Directive 2004/38/EC is rather disappointing.*”<sup>98</sup> Therefore, the Commission intended to help the Member States as well as the Union citizens by giving guidelines. The guidance that the Commission gives is mainly on the parts identified as “*problematic in transposition or application.*”<sup>99</sup> The purpose of the Communication from the Commission is to give guidance to Member States in order for them to know how to apply the Residence Directive correctly. Foremost the objective is to bring an improvement for all the Union citizens.<sup>100</sup>

Moreover, the Commission recalls that EU-law has the aim to encourage Union citizens to move as well as protect the people who make a use of their right.<sup>101</sup> Consequently, it is not to classify as abuse when Union citizens and their family members make a use of their right of residence, which they govern under the EU-law in a host Member State. The reason for this is that the Union citizens are benefiting from an advantage that is a part of exercising the right of free movement, which is in turn is protected by the TFEU.<sup>102</sup>

In addition, if any kinds of rights that are provided in the Directive are abused, the Member States should take necessary measurements to fight against these.<sup>103</sup> However, when the

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<sup>96</sup> COM (2008)840 final, p 4.

<sup>97</sup> COM (2008)840 final.

<sup>98</sup> COM( 2009)313 final, p. 2.

<sup>99</sup> COM (2009)313 final, p. 2.

<sup>100</sup> COM (2009)313 final, p. 2.

<sup>101</sup> COM (2009)313 final, p. 15.

<sup>102</sup> *Centres Ltd v Erhvervs- og Selskabsstyrelse*, 212/97, [1999], ECR I-1459, para 27 and COM (2009)313 final, p 15.

<sup>103</sup> Article 35 Directive 2004/38.

Member States take any measures of that kind, it must be proportionate.<sup>104</sup> For instance, a marriage of convenience constitutes an abuse of a right, which is conferred by the Residence Directive. The Commission in its guidelines highlights that in order for a marriage to be considered as a marriage of convenience, it must have been contracted for the sole purpose to enjoy the right of free movement under the Directive, which otherwise the person in question would not have benefitted.<sup>105</sup> For that reason, a marriage cannot be considered as a marriage of convenience only because it brings an advantage concerning the immigration or any other advantages it may bring.<sup>106</sup>

## **5.4 Applying the Directive practically**

It can be seen in some of the cases that some Member States did not agree to accept that the Residence Directive would be applicable on third country nationals who enter the territory of the Member States.<sup>107</sup> Before the Directive was adopted, there were already some problems with interpreting and applying the European Union Law. This could be a reason why the Residence Directive did not strengthen the rights, which the Union citizens and their family members governed.<sup>108</sup>

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<sup>104</sup> C-127/08, (Metock), para 74-75.

<sup>105</sup> Directive 2004/38, recital 28 of the preamble and COM (2009)313 final, p 15.

<sup>106</sup> COM (2009)313 final, p 15.

<sup>107</sup> For example, C-109/01, (Akrich).

<sup>108</sup> Europarättslig tidskrift, nummer 2, 2009, årgång 12, p. 277.

## **6 Analysis of the free movement of citizen's family members**

### **6.1 Dilemmas**

The question of whether a Member State can impose an additional requirement is much disputed. The additional requirement that constitutes a third country family member's right to move to a Member State were in some cases conditional to the prior lawful residence. Mostly this is a controversial question because the ECJ has come to different judgements in different cases, and that the Residence Directive is interpreted differently by the Member States. Consequently, the different outcomes have resulted in various interpretations of the Directive. Hence, the decision of which interpretation is the correct one and applicable is of interest.

Therefore, additional requirement will be discussed and analysed in the sections below. This in order will help answer the question of what kind of criteria a family member has to fulfil in order to move to a Member State within the European Union. Questions such as if the additional requirement is a proportionate measure taken by the host Member State, and the implications the different outcomes will be discussed.

### **6.2 Is it proportionate to include an additional requirement?**

When taking into consideration the different cases and the provisions of the Residence Directive, a question that arises is, whether it is proportionate for a Member State to add requirement such as prior lawful residence in a Member State. The Akrich case is one case where this situation appeared, and where the ECJ considered that in order for a third country spouse to obtain the benefits of the rights, in the Regulation, the person in question had to be a lawful resident in one Member State before moving to another. In addition, where a situation like a marriage of convenience appears, the Regulation did not cover it. In other words, the outcome of the Akrich case implies that a third country family member must first fulfil the condition in article 2(2) of the Residence Directive<sup>109</sup> for being considered as a family member and then also fulfil the additional requirement of prior lawful residence. Consequently, this leads to that the family members are not equally treated according to article 24 of the Residence Directive. Imposing an additional requirement as such in the Akrich case is not proportionate as well as it treats the family member unequally compared to

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<sup>109</sup> Before it was article 10 in Regulation 1612/68.

the nationals of that Member State. Also as the Commission mentioned in its report, a marriage of convenience cannot be the sole reason of sending back a third country family member.

After the judgement of the *Akrich* case, there were loads complaints from different Member States. However, just considering this case and the circumstances of this case, it can be argued that setting an additional requirement to third country spouses might be motivated in some situations. For example, it is mentioned in the case, that marriages of convenience should be prevented, if the benefits that derive from the Directive/Regulation are abused. By this time, when the preliminary ruling was asked, the Regulation did not have any provision that mentioned that marriages of convenience are to be abused. This is however something that has been improved, since this is established in article 35 in the new Residence Directive. Moreover, the Report from the Commission clarifies the meaning of marriage of convenience, which makes it easier to understand what is meant by this definition.

Regarding the additional requirement, the ECJ also stated in the *Metock* case stated that if family members could not accompany the Union citizens, whether they are nationals of a Member States or not, the right to exercise the freedom that the TFEU guarantees would be obstructed.

Firstly, it was established in the *MRAX* case that it only had to be proven that there was a family link between the Union citizen and the third country family member in order for the latter to benefit from the rights in the older Regulation. The ECJ here concludes that as long as a family link is provided, the EU-law will apply on family members.<sup>110</sup> This view seems be a consistent way of interpreting the law, however the ECJ took another standpoint in a later case. The *Akrich* case where the ECJ established that a third country family member must have had a prior lawful residence in a Member State in order to benefit from the rights set in article 10 Regulation 1612/68. With other words, a Member State could make an individual assessment. This was the opposite view from the previous *MRAX* case. Both these cases fell under the older Directives and the Regulation, which had not yet been amended. Even though it was under the same law, there were two different points of view. As a result of this, it could be questioned, which one of the judgements is the most convenient one? After the *Akrich* case, the ECJ changed its standpoint back again to what was

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<sup>110</sup>Asmus, K *Boundaries to open borders*, Europarättslig tidsskrift, 2009, nr 2, s 271.

established in the *Metock* case. Here the ECJ held that the Residence Directive does not allow a Member State to include a requirement as such. That the right on entry for a third country family member derives from the existence of the family relationship alone. From a generous approach in the *MRAX* case, to a narrowed interpretation in the *Akrich* case to the generous approach again lead to a confusion of the application of EU-law. However, as the Residence Directive does not explicit set out any requirements as mentioned above, it is to be argued that the outcome from case *Akrich* actually is contradictory to what the EU-law actually provides.

When a Member State adds individual requirements, it must be seen from a greater perspective, as this will have an impact on other Member States. This is because it would not be consistent if one Member State's national legislation would include an additional requirement, and Member States would not have a similar requirement. This would lead to that all the Member States would implement the Directive in different ways and hence the purpose of adopting a new Directive would not fulfil its purpose, which is that Member States shall implement a Directive to achieve the result of it. As well as it would create an unequal situation around the European Union with different conditions from one Member State to the other. Thus the Union citizens and their family members would be permitted the right to reside and move in some Member States but not in others.<sup>111</sup>

Considering the outcomes of these three cases, it appears not to be compatible with the EU-law to include an additional requirement. As in the Residence Directive, there is no such condition phrased, and therefore it is not appropriate that some Member States include a requirement of prior lawful residence and others do not. However, as it is apparent from the report from the Commission, the implementation of the Residence Directive was not satisfying overall and hence the underlying factor of this could be the different interpretations of the Residence Directive that the Member States had. On the other hand, it can also be argued that the provisions in the Directive were not clear enough and hence the diversity of interpretations.

At last, including a requirement such as prior lawful residence would have further negative implications. It would restrict the right of moving and residing, since it would discourage

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<sup>111</sup> Asmus, K. *Boundaries to open borders*, Europarättslig tidsskrift, 2009, nr 2, p 276.

family members of Union citizens to move to that Member State, which in turn would be a negative effect on the internal market within the European Union.

### **6.3 Why adopting a Directive, and not a new Regulation?**

A question that is of interest is to know why Regulation 1612/68 was not just amended in its whole and why a completely new Directive was adopted. The answer of why a new Directive was adopted is because there were numerous of Directives treating the matter of free movement of Union citizens, however, leading to a spread of different Directives there was no uniform Directive treating everything. As it is mentioned in the preamble of the Residence Directive, the purpose of the Directive was to strengthen the existing EU-law. However, as seen from the cases the interpretation of the Residence Directive varied from Member State to Member State. In order to avoid such a problem, one could think that amending Regulation 1612/68 or proposing a fully new Regulation treating the free movement of Union citizens and their family members would have been a better option. A Regulation compared to a Directive is binding in its entirety.<sup>112</sup>

Additionally, a Regulation might have had a better effect in the sense of that it would prevent Member States to impose additional requirements. Thereby, it would not have been a question for the Member States to implement the Directive in the way they considered to be correct.

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<sup>112</sup> Article 288 TFEU.

## **7 Conclusion**

After analysing cases, Directives, and Regulation in the area of free movement of Union citizens, it is now clearer in terms what conditions a third country family member must meet. The cases discussed have different outcomes and hence the confusion of really is applicable for family members who want to move to a Member State.

The objective of this essay was to answer what kind of criteria a family member had to fulfil in order to move within the territory of the Member States. As discussed above in the essay, there were different views on this matter. There was therefore not a consistent view of whether or not an additional requirement is in accordance with the purpose of the Directive. However, it was established in the *Metock* case that a Member is not entitled to add an additional requirement, since the Directive does not provide this. Consequently, the requirement of prior lawful residence is not supported by the Directive or the EU-law.

In order for a family member to move to a Member State, it must fulfil the criteria of being a family member within the meaning of article 2(2) in the Residence Directive. This means that a family link between the Union citizen and the third country family member is enough. A family member with other words does not have to previously been a lawful resident in a Member State before he or she moves to another Member State.

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