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Obstacles to the right of free movement and residence for EU citizens and their families: Country report for the United Kingdom

Study for the LIBE and PETI Committees

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CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS
PETITIONS

Obstacles to the right of free movement and residence for EU citizens and their families:
Country report for the United Kingdom

STUDY

Abstract

This study, commissioned by the European Parliament's Policy Department for Citizen's Rights and Constitutional Affairs at the request of the LIBE and PETI Committees, analyses the current status of transposition of selected provisions of Directive 2004/38/EC in the UK and identifies the main persisting barriers to free movement for EU citizens and their family members in UK law and practice. The study also examines discriminatory restrictions to free movement, measures to counter abuse of rights and refusals of entry and residence rights, in addition to expulsions.

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LIST OF ABBREVIATIONS

CEE	Central and Eastern European
CJEU	Court of Justice of the European Union
CRD	Directive 2004/38/EC - 'Citizens' Rights Directive'
EEA	European Economic Area. The term 'EEA national' is, however, often treated as synonymous with 'EU citizen' in the UK implementing legislation
EU	European Union
EU2/A2	Those Member States acceding to the EU in 2007, namely Bulgaria and Romania
EU8/A8	Central and Eastern European Countries joining the EU as part of the 2004 accession, including the Czech Republic, Estonia, Hungary, Latvia, Lithunia, Poland, Slovakia and Slovenia.
EU10/A10	Those Member States joining the EU in 2004 covering Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia
TCN	Third Country National
TFEU	Treaty on the Functioning of the European Union

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EXECUTIVE SUMMARY

POST-DRAFTING NOTE: This Report was drafted prior to the UK referendum on European Union membership, in which the electorate voted to leave the EU. At the point of publication, the United Kingdom has yet to trigger Article 50 TEU, which formally starts the process of withdrawal over a maximum period of two years. Until the UK formally leaves the European Union, EU law continues to be applicable in the UK. Accordingly, the content of this Report continues to be of relevance over that timeframe. The applicability of the Report upon the UK's departure from the Union will depend on the outcome of withdrawal negotiations relating to the status of Union citizens resident in the UK post-exit and also future negotiations regarding the UK's relationship with the EU, particularly in the context of free movement of labour.

According to the European Commission report and the European Parliament study, the majority of **Directive 2004/38/EC** (the Directive/CRD as 'Citizens' Rights Directive') has been correctly and fully transposed into UK law. Moreover, some of the issues identified as problematic by previous studies have now been resolved, such as the UK's implementation of the *Metock* and *Rahman* rulings. However, other previously noted concerns are yet to be addressed, such as the only partial transposition of Article 7(3) – on the retention of the status of a worker or a self-employed person – of Directive 2004/38/EC (i.e. the Citizens' Rights Directive (CRD)). In particular, the UK still offers more limited opportunity for self-employed migrants to retain their rights as economically-active individuals than does Directive 2004/38/EC. Article 24(1) CRD – on equal treatment – is yet to be fully transposed into UK law. Though initially only partially addressed, issues surrounding the UK's recognition of residence cards issued by other Member States, for the purposes of visa exemption under Article 5(2) CRD, have now been overcome. Following the Court of Justice's *McCarthy* judgment, the UK now recognises as a 'qualifying EEA State residence card' those issued by any EEA State except for Switzerland.

Crucially, new and **persisting barriers** to the entry and residence of Union citizens into the UK have arisen, including the introduction of a 'minimum earning threshold' to define a 'worker'. This risks denying Article 7 CRD residence rights to low-wage or zero hours workers, who may not meet this standard and would also be unlikely to be considered as 'self-sufficient' since the UK continues to refuse to recognise the National Health Service as comprehensive sickness insurance for the purposes of Article 7(1)(b) and (c) CRD. Moreover, it introduces the consequent concern that such workers will not qualify under the UK's 'right to reside' test for equal access to social welfare. This test, which requires EU citizens to be 'qualified persons' - i.e. workers or self-employed migrants – under the Directive to access social support is arguably discriminatory. It also suggests the existence of an automatic bar to social welfare for self-sufficient EU citizens who are temporarily in need, contrary to the *Grzelczyk* decision. Nevertheless, this test has been found to be lawful by national courts, despite numerous and varied legal challenges. Similarly, following infringement proceedings brought by the Commission, the use of the 'right to reside' test for access to child benefit and child tax credit has been found to be lawful by the Court of Justice. Recent amendments also limit the residence and equal treatment rights of job-seekers. In particular, access to housing benefit, child benefit and child tax credit is denied or restricted, depending on the circumstances, while residence as a jobseeker is limited to 91 days unless citizens can show *compelling* evidence of future employment.

Alongside the *McCarthy* ruling, on visa exemptions, the most common trend in respect of the entry and residence rights of Union citizens is the UK's restrictive interpretation of the *Singh* ruling. In particular, British citizens must transfer the 'centre of their life' to another Member State, and be working or self-employed, to trigger residence rights for their family members under Directive 2004/38/EC when they return to the UK. *Ruiz Zambrano* and *Chen* carers are not able to obtain permanent residence, access equal treatment rights, and can be deported more easily than individuals residing in the UK pursuant to the Citizens' Rights Directive. At the administrative level, excessive delays and evidentiary burdens, as well as the processing of third country national family members under ordinary national immigration rules, appear commonplace.

In respect of **discrimination on the basis of nationality**, research consistently identifies problems with the presentation of non-national EU citizens, particularly nationals of EU10 and EU2 Member States (i.e. those Member States joining as part of the large-scale accession of 2004, including Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia, along with Bulgaria and Romania in 2007), by some sections of the British press. Indeed, there appears to be a tendency from some quarters of the UK media to apply negative labels *en masse* to EU10 and EU2 nationals. More generally, it is felt that EU10 and EU2 nationals might be disproportionately affected by administrative efforts to remove homeless EU citizens from the UK. They are also more likely to be the victims of indirect discrimination in the workplace.

There is little evidence of **discrimination based on sexual orientation** in relation to the free movement rights of homosexual Union citizens and their civil partners/spouses in the UK. Indeed, the United Kingdom recognises same-sex civil partnership and marriage and this carries over into the treatment of spouses/civil partners as 'family members' under the Directive. However, a related issue is the UK's non-recognition of opposite-sex civil partnerships, with the consequence that heterosexual civil partners of Union citizens fall under Article 3(2) 'other family members' rather than the more favourable Article 3(1) 'Union citizens'.

Reports of **discrimination against the Roma community** are mixed but there is some evidence that they are at risk of exploitative labour practices. For example, the situation of the Roma community has been worsened by the cuts in employment-related benefits introduced by the previous coalition government and they are also frequently denied welfare benefits through misapplication of the habitual residence test by staff at the Department of Work and Pensions. Furthermore, previous reports indicate a lack of national strategy or plan to promote the social inclusion of the Roma population in the UK.

There is evidence that the United Kingdom has been increasing its monitoring in relation to **sham marriages** between non-national Union citizens and third country nationals, possibly in response to greater restrictions on marriages between British nationals and third country nationals. Crucially, there appears to be a general over-reliance on the right, provided by the Directive, for Member States to refuse residence rights in instances of sham marriage, to deny entry and residence rights for third country national spouses more generally. Certainly, in practice, automatic rights of residence seem to be frequently ignored and additional documentary requirements are imposed. However, national courts are consistently and openly critical of this approach.

The UK has recently amended measures transposing Directive 2004/38/EC in order explicitly to define **'abuse of residence rights'**. Beyond tackling marriages of convenience, these measures also prevent the re-entry, under Article 6 CRD (right of

residence for up to three months), of EU citizens who have been removed from the UK within the last 12 months, for failing to meet the conditions for residence contained in Article 7 CRD (right of residence for more than three months). There is also evidence of systematic checks, via HM Revenue and Customs, that residence conditions are being met.

Rules relating to the **expulsion** of Union citizens on grounds of public policy, public security, and public health are generally accurately transposed in the UK. Moreover, national interpretation of rules under the Directive, relating to the effect of imprisonment on periods of residence in the UK, for instance for the purposes of accruing permanent residence rights, have been confirmed as correct by the Court of Justice. However, at the administrative level, public policy, public security, and public health grounds must be considered, as a matter of course, by immigration officials, before the issuing of residence documents. Further, all EU offenders receiving one or more custodial sentences, of any length, are referred for consideration for deportation. Nevertheless, national courts consistently recognise the need for a *present* threat to a fundamental interest of society and acknowledge the 'European dimension' to such deportation cases. They have explicitly stated that administrative guidance on public policy and public security does not constitute formal legal categories and have also insisted that 'imperative grounds of public security' be *qualitatively* distinguished from even serious grounds of public policy, such that decisions cannot be made on sentence length alone.

Recent amendments to UK transposing measures provide a legislative footing to administrative programmes, which seek to remove individuals for not meeting the conditions attached to residence rights contained in Article 7 CRD. Such reasons are inevitably linked to economic grounds.

Overall, while Directive 2004/38/EC remains largely and correctly transposed into UK law, important gaps remain. Crucially, the UK government has taken steps to limit further the entry and residence rights of Union citizens to reside in the United Kingdom, on an equal basis with its nationals. Significant recent changes include the introduction of a 'minimum earnings threshold' to be categorised as a worker, with potential ripple effects on access to social security and assistance as well as health care. Restrictions have also been imposed on the residence and equal treatment rights of job-seekers. It seems evident that these changes are part of wider political issues surrounding the UK's obligation under the Treaties, its relationship with the EU, and the question of its membership. This is evidenced by the focus on free movement of persons, along with three other 'headline' issues, during the UK's renegotiation of its relationship with the EU, prior to the UK referendum on membership. While the outcome of those renegotiations are now void, from a UK perspective, these issues are likely to be at the forefront of discussions relating to withdrawal and the future relationship between the EU and the UK as a third country.

1. OVERVIEW OF THE TRANSPOSITION OF DIRECTIVE 2004/38/EC AND RECENT DEVELOPMENTS

KEY FINDINGS

- The majority of Directive 2004/38/EC has been correctly and fully transposed into UK law. Some issues identified in previous reports have since been resolved, including implementation of the *Metock* ruling. However, other concerns are still to be addressed.
- Crucially, more recent developments introduce new and potentially significant barriers to the exercise of free movement rights.

1.1. Transposition context

1.1.1. Transposition overview as assessed by the European Parliament and the Commission in 2008

The Commission's 2008 Report indicated that the UK had **correctly** and **completely** transposed a **majority** of the provisions contained within **Directive 2004/38/EC** (the Directive/the CRD)[1]. However, there was **also evidence of incomplete transposition**, **ambiguous national legislation** and **non-transposition**. The graph data in the 2008 Report suggests that the principal area of concern related to incorrect or incomplete transposition, though the UK's performance appeared comparable to other Member States in this regard[2]. The United Kingdom was average amongst the Member States in its relatively small offering of treatment more favourable than that provided by the CRD. The smallest areas of concern related to ambiguous or wholly absent transposition of parts of the Directive[3]. The Commission initiated infringement proceedings under Article 226 of the EC Treaty against the UK for its failure to communicate the text of the provisions of national law adopted to transpose the Directive[4].

A number of substantive areas of concern were identified across both the Commission's Report and the European Parliament's Comparative Study in 2009[5]. **Transposition issues** related to the derived entry and residence **rights of family members** of Union citizens, **residence rights**, and related conditions, for **Union citizens themselves**, **equal treatment rights**, and the **provision of procedural safeguards**.

[1] Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, 10th December 2008, COM(2008) 840 final, Annex, 'Situation by Member State', 12.
[2] Ibid, 12..
[3] N.1.
[4] Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, 10th December 2008, COM(2008) 840 final, Annex, ' – Situation by Member State', 3.
[5] Comparative Study on the application of Directive 2004/38/EC of 29 April 2004 on the Rights of Citizens and their family members to move and reside freely within the territory of the Member States, European Parliament (2009).

Both the Commission Report and the Parliament study highlighted the United Kingdom's failure to transpose correctly Article 3(2) CRD, concerning the residence rights of 'other family members' and partners with whom EU citizens are in a durable relationship[6]. Of particular concern were UK measures that made the right of residence of third country national family members/other family members conditional upon their **prior lawful residence** in another Member State. This approach was found to be **contrary to** the CRD in Case C-127/08 ***Metock***[7]. The European Parliament's study also flagged an issue relating to the UK's **non-recognition** of **opposite-sex civil partnerships**[8]. In addition, it was found that the UK did **not exempt family members** holding **residence cards issued** by **other Member States from visa requirements**, in conflict with Article 5(2) CRD[9].

In respect of Union citizens' residence rights, the UK was not considered to have correctly provided for the more favourable treatment of jobseekers under Article 6 CRD (right of residence for up to three months), read in light of Recital 9 of the Directive[10]. Both the Commission Report and the Parliament study also concluded that the UK had **not correctly transposed** Article 7(3) on **retention of worker status**, particularly in relation to **self-employed Union citizens**.[11]. In addition, the Commission noted that the UK had not explicitly transposed the second paragraph of Article 14(2) CRD, under which **systematic verification** of the conditions attached to the **right of residence** is prohibited[12], while the Parliament's study highlighted legal certainty issues regarding the UK approach to defining 'sufficient resources'[13]. Article 24 CRD on **equal treatment** had **not** been **directly transposed** into UK law[14].

In relation to calculating periods of lawful residence for the purposes of **permanent residence** rights under Article 16 CRD, the Commission report also highlighted concerns about the UK's **failure** to **include periods of residence by Union citizens, prior** to **their country's accession to** the **EU**, which would have been lawful residence under Directive 2004/38[15].

Questions were raised regarding UK transposition of the procedural safeguards contained in the CRD under Articles 30 and 31 by both the Commission's report and the Parliament's study. In particular, the Commission was critical of the UK's **restrictive approach** to the **right of appeal**, which it granted only to those EU citizens and their family members who could demonstrate that they had a right of free movement, while it did not inform those who it did not consider had provided such evidence of the right of redress[16]. The European Parliament's study expressed concern that individuals who had been denied entry to the United Kingdom could not appeal that decision from within the UK[17]. In addition, the Commission Report did not include the UK amongst those Member States it considered to have correctly transposed the material safeguards contained in Articles 27 and 28 CRD.

[6] N.1, 4; *ibid,* 162.
[7] Case C-127/08 *Metock and others* [2008] ECLI:EU:C:2008:449. See Commission Report, n.1, 4 and Parliament Study, n.5, 162-163.
[8] *Ibid.*
[9] N.1, 5; n.8 165.
[10] N.1, 5.
[11] N.1, 6; N.8, 160.
[12] N.1, 7.
[13] N.5, 161.
[14] N.5, 167.
[15] N.1 7
[16] N.1, 9.
[17] N.5, 169-170.

1.1.2. What has changed since

Since the European Commission's Report in 2008 and the European Parliament's Comparative Study in 2009, the United Kingdom has made a **number of amendments** to its transposing legislation. Whilst many of these **tackle some of the issues** raised by those reports, **other concerns** have **not been addressed**. Further, **more recent amendments** have arguably **exacerbated** some of the **gaps in protection** identified by the Commission's report and the Parliament's study.

To a greater extent, the UK has transposed Article 3(2) (concerning the residence rights of 'other family members' and partners with whom EU citizens are in a durable relationship) CRD into its law, via The Immigration (European Economic Area) Regulations 2006 (the EEA Regulations)[18], which have also been **amended** to **give effect** to the ***Metock* and *Rahman* rulings**[19]. However, some relevant provisions of the Directive remain to be explicitly transposed, in particular the obligation to *facilitate* entry and residence for 'other family members'. The UK **continues not** to **recognise opposite-sex civil partnerships**[20], even after the introduction of marriage for same-sex couples into UK law[21]. In response to the decision of the CJEU in *McCarthy*[22], the UK has the question of **visa exemptions** under Article 5(2) CRD, by providing a right of entry for third country family members on the presentation of a valid passport and 'qualifying EEA State residence card'[23]. Though initially only covering Germany and Estonia, this now covers 'all EEA States except Switzerland'.

One of the most significant developments since the Commission's 2008 Report are the steps taken by the United Kingdom to **restrict** the **residence rights** and **equal treatment** of **jobseekers further** than the limitations previously flagged as problematic by the Report. This issue is discussed fully in ch.2, which outlines the main barriers to movement for Union citizens in terms of residence and equal treatment rights.

The UK does **not** appear to have **addressed** the concerns raised in the Commission's report and the European Parliament's study in relation to Article 7(3) CRD and **retention of 'self-employed' status**. Specifically, Reg 6(3) of the EEA Regulations limits retention of this status to situations in which an individual is temporarily unable to pursue his activity as a self-employed person as a result of an illness or accident. The more extensive range of circumstances contained in Article 7(3) CRD - including, for example, unemployment linked to the pursuit of vocational training - is limited to workers under Reg 6(3). Moreover, since the 2009 Study, the United Kingdom has in fact taken steps to limit the retention of worker status more generally, as discussed further in ch.2.

The UK has **amended** its transposing legislation to stipulate that **verification** of the **right** of **residence cannot be carried out systematically**[24]. This arguably ensures better compliance with Article 14(2) CRD. However, as discussed in s.1.2.5, the position of this

[18] SI 2006/1003. In relation to Article 3(2) CRD, see in particular Regs 8 (defining 'extended family' members) and Regs 7(3), 11, 12, 14, 16 and 17 concerning consequent rights of entry and residence.
[19] The Immigration (European Economic Area) (Amendment) Regulations 2011, SI 2011/1247, Reg 2(3) amending Reg 8(2) of the EEA Regulations 2006.
[20] S.216(1) Civil Partnership Act 2004.
[21] Via The Marriage (Same Sex Couples) Act 2013.
[22] Case C-202/13 *McCarthy and others* [2014] ECLI:EU:C:2014:2450.
[23] Amended by the Immigration (European Economic Area) (Amendment) (No.2) Regulations 2013, SI 2013/3032, Sch.1 para.6(a).
[24] Reg 20B(7) EEA Regs, amended by virtue of the Immigration (European Economic Area) (Amendment) (No.2) Regulations, SI 2013/3032, Sch.1 para.16.

rule relative to the rest of the provision concerning the verification of residence arguably limits its protective scope.

In relation to Article 8 CRD (administrative formalities for Union citizens in gaining residence rights for more than three months), the UK has **amended** Reg 4(4) EEA Regulations to **clarify** that a person will be **considered to have sufficient resources** for the purposes of Article 7 CRD **even where** those **resources do not exceed** the **maximum level of resources** that a **British citizen may possess if** he is to **remain eligible** for **social assistance** under the benefit system. A decision-maker may consider that an EU citizen's resources are, nevertheless, sufficient having taken account of the **personal situation of the individual concerned**[25]. However, this amendment **does not particularly address** the **concerns** highlighted in the **European Parliament**'s 2009 Study that, since the UK has a number of different social security and assistance mechanisms with varying thresholds, it is not **legally certain** when an individual will be considered to have **sufficient resources**. Home Office Guidance defines 'sufficient resources' as 'enough money to cover an EU citizen's living expenses without becoming a burden on the social assistance system in the UK'.

Article 24(1) CRD - on **equal treatment -** is **yet to be directly transposed**. Moreover, the **focus of statutory provisions** that grant access to social welfare or student maintenance to Union citizens under certain conditions is **firmly on the derogation** from equal treatment in Article 24(2) CRD[26].

The UK continues only to consider residence 'in accordance with Directive 2004/38' to be legal residence for the purposes of acquiring a permanent right of residence pursuant to Art 16 CRD. However, since the Commission's 2008 Report, the Court of Justice has handed down its decision in *Ziolkowski*[27]*.* The Court held, in that case, that residence in a host State prior to accession of a now-Union citizen's Member State of origin can be included in the calculation of residence for the purposes of Article 16 CRD permanent residence. However, this is only a requirement where residence would have met the residence conditions contained in the CRD itself. **Courts** within the UK have **held** that **residence** which ***would have been*** **legal under** the **CRD** does **constitute legal residence for** the **purposes** of **attaining permanent residence rights**[28].

The **concerns** raised in both the Commission's report and the Parliament's study in relation to the transposition of the **procedural safeguards** contained in Articles 30 and 31 CRD **do not appear to have been addressed**. Indeed, **subsequent amendments** to the EEA Regulations appear to **widen the gap** between the **protection** offered by the Directive and the Regulations. In particular, as discussed further in s.1.2.3, **new restrictions** have been imposed in relation to the **appeal rights of partners in durable relationships** with Union citizens. More broadly, the UK imposes a requirement that family members produce evidence that they are, *inter alia*, indeed the family member of an EEA national *before* they are granted appeal rights[29]. Where an individual is refused entry or residence on the basis that they are not family members under the CRD, the requirement to provide proof of the applicant's status as a family member is the very basis of the substantive appeal. Reg

[25] Amended by the Immigration (European Economic Area) (Amendment) Regulations, SI 2011/1247, reg.2(2).
[26] For further discussion, see ch.2, s.2.1.3.
[27] Joined Cases C-424/10 and C-425/10 *Ziolkowski* [2011] ECLI:EU:C:2011:866
[28] Though in the context of the question of the relevance of the date of the entry into force of the CRD. See e.g. *LG and CC (Italy)* [2009] UKAIT 00024
[29] Reg 26(3) EEA Regulations.

27(1) EEA Regulations continues to stipulate that **certain appeals cannot be made** from **within** the **United Kingdom**.

In relation to material safeguards, it can still be considered that **Article 28 CRD** has been **effectively transposed** into UK law. Many of the **fundamental guarantees contained in Article 27 CRD** are **also included** in the EEA Regulations. For instance, Regs 19 and 21 of the EEA Regulations make clear that deportation measures taken on grounds of public policy or public security must comply with the principle of proportionality and be based exclusively on the personal conduct of the individual concerned. They stipulate that previous criminal convictions shall not be the sole justification for expelling a Union citizen from the UK. The Regulations require a genuine, present and sufficiently serious threat to a fundamental interest of society and preclude the use of general preventative measures. However, Article 27(3) CRD – concerning requests for criminal records from the Member State of origin – has not been transposed, though this is not a requirement. More importantly, the EEA Regulations do not make it explicit, unlike Article 27(4) CRD, that where the UK has issued a passport to an individual, it must allow re-entry onto its territory without any formality, even if the document is no longer valid. Beyond the issues raised in the Commission Report, the UK has also **recently amended** Regs 19 and 21 of the EEA Regulations **to permit** the **exclusion** or removal of a Union citizen where there are **reasonable grounds** to **suspect** an **abuse of rights**. As detailed in ch.4, this can **include attempts** to **re-activate initial residence rights under Article 6 CRD**, where Union citizens do not meet the formalities attached to Article 7 CRD residence rights.

1.2. Current transposition status

1.2.1. Overall assessment of the current transposition status in the UK

Transposition of Directive 2004/38/EC is largely by way of the Immigration (European Economic Area) Regulations 2006 (as amended), except for Article 24 CRD, on the right to equal treatment and related derogations, which is transposed through a series of amendments to existing social security legislation. **While** it can still be said that the **UK** has **transposed** the **majority** of the **Directive,** there are **still parts** of it that are **not fully transposed** or **rules** that are **at risk** of **non-compliance**. This section will assess the current transposition of Directive 2004/38 in relation to key issues covering: whether additional conditions are imposed on the exercise of free movement rights by family members; the UK's treatment of partners of Union citizens; the implementation of the *Metock* ruling; whether the United Kingdom imposes conditions on the extended residence rights of Union citizens beyond those contained in Article 7 CRD; and the UK's application of the criteria attached to permanent residence under Article 16 CRD.

1.2.2. Additional conditions in law or practice for family members (especially third country national family members) to exercise their free movement rights

To a **greater extent**, the **formal conditions** attached to the exercise of free movement rights, including for **third country national family members**, **correspond** to those permitted under the **CRD**. The only additional, albeit significant, addition is the compulsory requirement that **non-EU family members submit biometric information** to the UK immigration authorities as part of their application for entry/residence documentation[30].

[30] Reg 6A Immigration (Provision of Physical Data) Regulations 2006.

The UK continues to charge a **fee of £65 for all residence documentation** except the EEA family permit[31]. There are also a number of **practical obstacles** to the exercise of derived residence rights by family members, such as **delays** in processing applications and **additional document requests**, which are detailed further in ch.2, s.2.2.

1.2.3. The UK's approach towards the partners of EU citizens

Transposition of Article 3(2)(b) CRD (concerning the **residence rights of partners** with whom EU citizens are in a **durable relationship**) has to **a greater extent** been **transposed** into UK law by Reg 8(5) EEA Regulations. This provision includes within the definition of 'extended family members' any individual who 'can prove to the decision maker that he is in a durable relationship with the EEA national'. Though the burden of proof therefore lies with the applicant, this would appear to be in compliance with Article 3(2)(b) CRD, which allows partners of EU citizens to become beneficiaries under the CRD where their durable relationship is 'duly attested'. Once an individual's status as an 'extended family member' is confirmed, they have access to all of the usual rights of entry and residence enjoyed by Union citizen family members[32]. Reg 12 (on entry) and 16 and 17 (on residence) EEA Regulations make it clear that an extensive evaluation of personal circumstances is required when assessing the entry and residence rights of extended family members, while any denials of entry and residence must be justified. However, those provisions create an **exception** to the justification requirement for reasons of **national security**. Moreover, there is still **no transposition** of the **general obligation**, contained in Article 3(2) CRD, to **facilitate entry and residence** for **other family members**.

A number of **practical obstacles** appear to present themselves to the partners of EU citizens who wish to enter or reside in the United Kingdom. As mentioned above, non-EU nationals applying for residence documentation in the UK have been required to enrol their **biometric data** before it is issued, since 31 March 2015[33]. As detailed further in ch.2, s.2.2.1., **excessive processing delays** and the consequent **retention of personal documents** by UK authorities can present obstacles to the partners of EU citizens with repercussions also for the Union citizens themselves. In particular, the evidentiary burden on the unmarried partners of EU citizens can be onerous, which can be particularly problematic when coupled with lengthy or poor quality decision-making. Applications for unmarried partners must be accompanied by evidence that the relationship has subsisted for at least two years, since this is in line with the definition of a 'durable relationship' under Home Office Guidelines[34]. These guidelines do, however, instruct caseworkers that they must consider the individual circumstances of each application and whether it is appropriate to use discretion, for instance, where a relationship has not lasted for two years but appears to be durable as evidenced, for example, by the presence of children[35]. Home Office Guidance provides a non-exhaustive list of the types of documents that partners might be required to provide, including: proof that any previous relationships have permanently broken down; evidence of cohabitation in the previous two years such as bank statements, rent agreements or mortgage payments; evidence of joint finances; evidence of joint responsibility for any children; and other evidence demonstrating the applicants' commitment and relationship. In a case identified by Shaw et al, the applicants waited 953

[31] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/503658/Fees_table_18_March_2016_PDF.pdf Last accessed 6th March 2016.
[32] Via Reg 7(3) EEA Regs and then Reg 12 (on entry) and Regs 16 and 17 (on residence).
[33] Reg 6A Immigration (Provision of Physical Data) Regulations 2006.
[34] Home Office Guidance, 'Extended Family Members of EEA nationals', valid from 7 April 2015, 6.
[35] Home Office Guidance, *ibid*, 13-14.

days for the third country national partner to be issued with a residence card as an extended family member[36]. Similarly, petitions have been submitted to the European Parliament concerning excessive delays, with the accompanying retention of personal documents such as passports, in the processing of residence applications for 'other family members' under Article 3(2) CRD[37]. Nevertheless, in *B v Home Office*[38], 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 Articles 2(2) and 3(1) CRD and **not** the **procedural rights** conferred on **extended family members** by **Article 3 CRD**.

Home Office Guidance does note that the refusal of residence rights to the durable partners of EU citizens is likely to prevent the exercise of EU free movement rights by EU citizens since the parties are in a long-standing relationship akin to marriage. Nevertheless, since extended family members do not enjoy residence rights under EU law until residence documents are issued, **Home Office caseworkers** are **also required** to **consider whether** the **partner** has **taken part in any criminal activity** such that the person's presence in the UK **'would not be conducive to the public good'**. This is because non-EU citizens do not benefit from the higher level of protection from refusal at entry/deportation under the CRD until residence documents are issued[39]. Moreover, since **empirical research suggests** that **Home Office caseworkers do not engage proactively with** the **question of** whether third country nationals might benefit from a **derived right of entry/residence under Union law**, partners in a durable relationship with an EU citizen who are unaware of their rights **might be processed incorrectly and automatically under national immigration law**[40]. This potential obstacle is also visible in the Quarterly Reports of the Your Europe Advice service[41]. Similarly, petitions have been submitted to the European Parliament concerning the **repeated refusal of** a **visa to third country national spouses of Union citizens**[42].

Barriers are also visible in relation to procedural safeguards. Reg 26(2A) EEA Regulations was amended in 2012 to make clear that an **individual** who **claims** to be **in a durable relationship with** an **EU citizen may not appeal** a decision to refuse entry/residence **unless** she/he provides sufficient evidence to **demonstrate** that she/he is **in a relationship with that EU citizen**[43]. Although this evidentiary burden is lower than the requirement of proof of a 'durable' relationship, this amendment nonetheless introduces new obstacles to accessing procedural safeguards. Home Office Guidance provides a non-exhaustive list of examples of sufficient evidence of a relationship including evidence of cohabitation, joint finances or joint responsibility for children.

There is **no evidence** of **obstacles to free movement rights** by **EU citizens** in **same-sex relationships** in the UK. Furthermore, there is no evidence in the national case-law that same-sex couples are discriminated against in assessments as to the existence of a 'durable relationship duly attested', relating to rights enjoyed pursuant to Article 3(2) CRD.

[36] Shaw, J. et al, 'Getting to grips with EU citizenship: Understanding the friction between UK immigration law and EU free movement law', (2013) Edinburgh Law School Citizenship Studies, 7.
[37] Petition No 1340/2013 to the European Parliament.
[38] *B v Home Office* [2012] EWHC 226 (QB).
[39] Home Office Guidance, 'Extended Family Members' n.34.
[40] Shaw, J., Miller, N., 'When legal worlds collide: an exploration of what happens when EU free movement law meets UK immigration law', (2013) ELRev 137,155.
[41] Quarterly Feedback Report, Your Europe Advice service, Quarter 1/2014, 25.
[42] Petition No 2143/2013 to the European Parliament.
[43] Amended by Immigration (European Economic Area) (Amendment) (No.2) Regulations, SI 2012/2560 Sch.1 para.5(1).

The United Kingdom recognises both same-sex civil partnerships and, more recently, same sex marriage[44]. However, as identified above, one related issue is the UK's non-recognition of civil partnerships between opposite-sex civil partners. Under the UK's Civil Partnership Act 2004, a foreign civil partnership will only be recognised if it was entered into between members of the same sex[45]. The effect of the UK government's position is that **heterosexual partners** who have a **registered partnership in another Member State** are **not considered** as **'family members'** under Article 2(2) CRD**, although** they may be considered as partners in a '**durable relationship**, duly attested' under Article 3(2) CRD corresponding to the category of **'extended family members'**. Consequently, the **registered homosexual partner** of an EU citizen enjoys the **automatic right to reside** in the UK as a family member, whilst the **registered heterosexual partner** of an EU citizen **merely enjoys** the **right** to **have his residence 'facilitated' by** the **UK authorities**. This **also affects** the **retention** of **residence rights by partners**. In particular, Home Office Guidance makes clear that durable partners cannot retain a right of residence following the breakdown of the relationship even if this was due to **domestic violence**, since the EEA Regulations (and the CRD) only make provision for the retention of residence rights on the termination of a marriage or civil partnership[46]. The UK's approach to opposite-sex civil partnerships is being flagged as an 'interesting case' with increasing frequency in the Your Europe Advice service Quarterly Reports[47].

1.2.4. The UK's implementation of the Metock ruling

The UK government was **extremely slow to respond to the *Metock*** judgment. Despite the fact that this ruling was handed down in 2008, the UK did not amend the relevant provisions of the EEA Regulations until 2011[48]. Reg 12(1)(b) EEA Regulations **no longer imposes** a **requirement that** the **third country national family member resides lawfully** in **another Member State**. Furthermore, the EEA Regulations have also been changed to reflect the CJEU decision in *Rahman*[49], such that the **requirement** that the **family member/extended family must** have **resided in** a **country other than the UK *with* *the* *relevant EU citizen*** has been **removed**.

Although the UK Government and immigration authorities have been accused of 'heel dragging' in relation to implementation of *Metock*[50], the UK courts were quicker to react. Indeed, the English Court of Appeal disapplied the prior residence requirement before the UK government had amended the EEA Regulations[51]. Moreover, other national courts expressed their clear frustration with the UK Government's initially delayed response to *Metock*, stating that attempts by the Secretary of State to apply the prior residence rule post-*Metock* were 'flagrantly unlawful'[52]. Moreover, in *Aladeselu*, the Court of Appeal held that the requirement, contained in both the CRD and the EEA Regulations, that extended family members 'accompany or join' Union citizens in the host State must include circumstances in which the relative has entered the UK – whether legally or illegally – *prior* to the Union citizen[53]. On the related issue of dependency, there is evidence that **UK**

[44] The Civil Partnership Act 2004; The Marriage (Same Sex Couples) Act 2013.
[45] Ibid.
[46] Home Office Guidance, 'Extended Family Members' n.34, 24.
[47] E.g. Your Europe Advice Service Quarterly Feedback No.10, Quarter 4/2014, 27.
[48] Immigration (European Economic Area) (Amendment) Regulations 2011, SI 2011/1247.
[49] Case C-83/11 *Rahman and others* [2012] ECLI:EU:C:2012:519.
[50] See extracts from practitioner interviews in Shaw, J. et al, 'Getting to Grips', n.36, 52.
[51] *ZH (Afghanistan) v Secretary of State for the Home Department* [2009] EWCA Civ 1060.
[52] *R (on the application of Owusu) v Secretary of State* [2009] EWHC 593 (Admin).
[53] *Aladeselu v Secretary of State for the Home Department* [2013] EWCA Civ 144, paras.39 and 44.

courts offer a **more generous approach** to this criterion than **strictly required by** the **case-law of** the **Court of Justice**. Specifically, again in *Aladeselu*,[54] the Court of Appeal concluded that the **situation of dependency need not** have **arisen in** the **recipient's country of origin**, arguably providing more generous conditions than those presented in *Rahman*[55].

1.2.5. Requirements for obtaining the right of residence beyond those contained in Article 7(1) and (2) of the Directive

Article 7(1) and (2) CRD (right of residence for more than three months for Union citizens and their third country national family members) are transposed into UK law via Reg 14(1), (2) and (3) of the EEA Regulations. These provisions provide an 'extended right of residence' to EU citizens so long as they remain 'qualified persons' under the Regulations and their family members so long as they remain 'family members' of 'qualified persons' or retain that status. Reg 6 defines a qualified person as a jobseeker, worker, self-employed person, a self-sufficient person, or a student. Accordingly, **Article 7(1)** and **(2) CRD are largely wholly** and **correctly transposed** into UK law. **Practical obstacles** arise, however, usually in relation to applications for residence documents confirming longer-term residence in the UK. **Excessive delays, retention of personal documents** and **additional documentary burdens** are frequently reported. This issue is explained further in ch.2, s.2.1.2 concerning persisting barriers to residence. In addition, the UK continues to impose fees for the issuing of residence documentation except for the EEA Family Permit. For the year 2016, a **fee of £65 per applicant** is required for registration certificates, registration cards, documents certifying permanent residence, permanent residence cards, and derivative residence cards[56]. This is a consistent cause of complaint to the Your Europe Advice Service[57].

One frequently occurring issue with regard to Article 7 CRD is the UK's continuing **refusal to recognise** that its **National Health Service** may **constitute 'comprehensive sickness cover'** for the purposes of meeting the conditions for the **residence rights of self-sufficient Union citizens**. EU citizens refer this issue to the Your Europe Advice service with increasing frequency[58]. Nevertheless, Home Office Guidance to EEA caseworkers explicitly rejects access to the NHS as proof of comprehensive sickness insurance[59] and this approach has been held to be permissible by the Court of Appeal[60].

1.2.6. Conditions attached to the right of permanent residence beyond Article 16 of the Directive

The right to **permanent residence** under the CRD is transposed into UK law via Reg 15 EEA Regulations and is **broadly consistent** with the substance of **Article 16 CRD**.

[54] *Ibid*
[55] Case C-83/11 *Rahman,* n.49. Issue identified by Horsley in Horsley, T. and Reynolds, S, 'Union Citizenship: National Report on the UK' FIDE XXVI Congress, Copenhagen 2014.
[56] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/503658/Fees_table_18_March_2016_PDF.pdf Last accessed 6th March 2016. Derivative residence cards are issued to individuals residing in the UK directly under Article 21 TFEU as a result of the *Chen* and *Ruiz Zambrano* rulings.
[57] E.g. Quarterly Report, Your Europe Advice service, Quarter 2/2012, 8; Quarter 3/2012, 3; Quarter 1/2013, 11; Quarter 2/2013, 15; Quarter 3/13, 13; Quarter 1/2014, 13; Quarter 2/2014, 16; Quarter 4/2014, 16.
[58] Quarterly Report, Your Europe Advice service, Quarter 1/2015, 25; Quarter 2/2015, 27; Quarter 3/2015, 23; Quarter 4/2015, 20.
[59] Home Office Guidance, 'European Economic Area nationals qualified persons', 7 April 2015, 41.
[60] *Ahmad v Secretary of State for the Home Department* [2014] EWCA Civ 988.

Although Reg 15 does not refer to the fact that permanent residents are not required to meet the same conditions of residence as EU citizens exercising their rights under Article 7 CRD (right of residence for more than three months), this is arguably implicit in Reg 14, which transposes Article 7 CRD on extended residence rights. This provision states that those rights are in addition to any rights enjoyed pursuant to Regulation 15. Nevertheless, given the **relatively high number of complaints** to the Your Europe Advice Service that the **UK** (along with other Member States) often **imposes Article 7 residence requirements also on permanent residents**, it may be helpful to make this rule more explicit[61].

Delays in the issuing of permanent residence cards have been reported through the Your Europe Advice Service, with consequent impacts on the ability to cross borders temporarily for work in other Member States[62]. Complaints about **excessive documentation and evidential requirements** for establishing a permanent right of residence have also been received[63].

The UK's **refusal to include access to** its **National Health Service** as '**comprehensive sickness insurance**' for the purposes of Article 7(2) CRD also has **repercussions** for **accumulating** the **five years' lawful residence required** under the Directive for the purposes of acquiring a **permanent right of residence**[64]. Indeed, national courts have allowed administrative rejections of applications for permanent residence on the basis that an applicant's sickness insurance only complemented rather than replaced all services provided by the NHS[65].

As explained in ch.2, s.2.1.2, the UK has **recently placed limitations on** the **residence rights** of **job-seekers** and **retention** of **worker status**. O'Brien has pointed out that this has **repercussions** for the enjoyment of **future permanent residence rights**. Specifically, if an EU citizen loses her/his job in the UK, does not retain worker status, and fails to meet the new, stricter definition of 'job-seeker', his/her continued residence in the UK will have to be based on Article 7(1)(b) CRD. However, they will also not qualify for this status if they fail to secure private health insurance upon the loss of worker status. Accordingly, the requirement of 5 years *continuous, legal* residence required by Article 16 CRD to attain permanent residence rights will not be met[66].

The UK continues to **deny access** to **permanent resident rights** for ***Ruiz Zambrano, Chen*** and ***Teixeira/Ibrahim*** carers[67].

[61] Quarterly Report, Your Europe Advice service, Quarter 1/2015, 29 (Case 166435), 30 ; Quarterly Report 2/2015, 27 ; Quarterly Report 3/2015, 27.
[62] Quarterly Report, Your Europe Advice service, Quarter 1/2015, 29 (Case 166435).
[63] E.g. Quarterly Report, Your Europe Advice service, Quarter 4/2015, 29.
[64] Quarterly Report, Your Europe Advice service, Quarter 2/2015, 26.
[65] *FK (Kenya) v Secretary of State for the Home Department* [2010] EWCA Civ 1302.
[66] O'Brien, C., 'The Pillory, the Precipice and the Slippery Slope : the profound effects of the UK's legal reform programme targeting EU migrants' (2015) 37(1) JSWFL, 111-136, 117.
[67] Reg 15(1A) EEA Regs.

2. IMPLEMENTATION OF THE DIRECTIVE: DESCRIPTION OF THE MAIN PERSISTING BARRIERS

KEY FINDINGS

- New and persisting barriers to the entry, residence and equal treatment rights of **Union citizens** include the introduction of a 'minimum earning threshold' to define a 'worker'; new restrictions regarding Union jobseekers; and a narrow approach to the conditions attached to the residence rights of economically inactive Union citizens. Practical obstacles such as excessive delays and additional document requirements persist.
- The most common trend in respect of the entry and residence rights of the **family members of Union citizens** is the UK's restrictive interpretation of the *Singh* ruling. Additionally, recognition of non-UK family residence cards can be limited in practice. A restrictive approach is taken to the derived rights *of Ruiz Zambrano* and *Chen* carers. Excessive delays, evidentiary burdens and the processing of third country national family members under ordinary immigration law appear common place.

2.1. Main barriers for EU citizens

2.1.1. Entry

There seems to be **little evidence of problematic trends** in relation to **entry rights of EU citizens** in the UK. Recent reports from the Your Europe Advice service do, however, suggest that the identity documents of Greek nationals are being overly scrutinised by UK border control officials. In some cases, Greek ID Cards are rejected and a passport is required[68]. Unconnected research from Shaw et al suggests this may be linked to the Eurozone crisis[69]. Similarly, there are a couple of cases of Hungarian citizens being denied access at the border on the sole basis of previous convictions[70].

The UK has also taken steps, via amendments to the EEA Regulations, to **limit for 12 months** the **re-entry** of Union citizens who have already been **expelled from the UK on the basis** that they are **not exercising free movement** rights under the CRD[71]. This issue is discussed further in ch.4, s.4.2.

2.1.2. Residence

There are a number of core trends identified in relation to the residence rights of Union citizens, namely how 'sufficient resources' are defined in respect of the residence rights of non-economically active EU citizens, new limitations on the beneficiaries of extended residence rights under Article 7 CRD; the extension of residence rights following the *Jessy*

[68] Quarterly Report, Your Europe Advice service, Quarter 2/2015, 19, (case 170773); Quarter 4/2015, 22, (case 186192).
[69] Shaw et al, 'Getting to Grips', n.36, 5
[70] Quarterly Report, Your Europe Advice service, Quarter 2/2015, 19, (cases 171273 and 171991).
[71] Reg 21B(1)(b) EEA Regs.

St Prix ruling; and practical obstacles facing those EU citizens who wish to exercise residence rights in the UK.

As noted in ch.1, the Home Office Guidance defines '**sufficient resources**' as 'enough money to cover an EU citizen's living expenses without becoming a burden on the social assistance system in the UK'. This can carry **additional evidential burdens**, including the requirement to provide documents such as bank statements or evidence of pension payments coupled with details of financial outgoings i.e. rent, loans, utilities and food costs[72]. Relatedly, the UK's continued **refusal** to **include access to** its **National Health Service** in its definition of '**comprehensive sickness insurance**' for the purposes of securing residence rights under Article 7(1)(b) or (c) CRD continues to impose barriers on the residence rights of Union citizens and is a **consistent source of complaint**, particularly by students, to the Your Europe Advice service[73].

Crucially, there remains a **disparity**, in both the CRD itself and the EEA Regulations, between **Article 14(1) CRD** - which ensures the **retention of residence rights** so long as Union citizens and their family members do **not** become an **'unreasonable burden'** on the social assistance of the host State – and **Article 7(1)(b) CRD**. The latter provision **confers residence rights** upon EU citizens who have sufficient resources '**not** to become a ***burden*** on the social assistance system of the Member State [emphasis added]'. The UK includes in its definition of 'qualified persons' – or beneficiaries – under the EEA Regulations EU citizens who meet the requirements of Article 7 CRD. Accordingly, recent amendments regarding the expulsion of EU citizens for failing to exercise residence rights in accordance with the CRD could be triggered without the need for an '*unreasonable*' burden on the UK social assistance system, though Reg 19(4) emphasises that deportation cannot be the automatic consequence of reliance on the UK welfare system.

The rights contained in Article 7 CRD, concerning the **residence rights of Union workers**, have arguably been **restricted** by the **administrative use of a minimum threshold** to define whether **work is 'genuine and effective'** or 'marginal and ancillary'[74]. Home Office Guidance states that EU citizens will be automatically classified as 'workers' if they meet the 'Primary Earnings Threshold' of HM Revenues and Customs. For the years 2014-2015, this was **£153 a week/£663 a calendar month**. This is based on an individual working a minimum of 24 hours a week at the national minimum wage. If EU citizens do not meet this standard, further investigations are required by caseworkers to confirm that their work is not marginal and ancillary, by reference to whether the work is regular or intermittent, the duration of the purported employment, the number of hours worked and the level of earnings. Puttick has pointed out that this threshold is **potentially problematic** in light of the proliferation of **low-wage, zero hours contract work** on the UK job market[75]. Cases have also been logged by the Your Europe Advice service whereby self-employed migrants have not been categorised as 'qualified persons' under the EEA Regulations as they have failed to meet this minimum earnings threshold[76]. The UK has also **amended** the EEA Regulations to **limit the continued residence** and **re-entry** of **jobseekers**, **requiring 'compelling evidence** of **job-seeking** and of a **genuine chance**

[72] Home Office Guidance, 'Qualified Persons', n.59, 37-38.
[73] Home Office Guidance, 'Qualified Persons', n.59, 41; *Ahmad v Secretary of State for the Home Department*, n.57; Quarterly Report, Your Europe Advice service, Quarter 1/2015, 25; Quarter 2/2015, 27; Quarter 3/2015, 23; Quarter 4/2015, 20.
[74] EU definition of 'worker' for the purposes of Article 45 TFEU, as provided by the Court of Justice. See e.g. Case 53/81 *Levin* [1982] ECLI:EU:C:1982:105.
[75] Puttick, K., 'EEA Workers' Free Movement and Social Rights after *Dano* and *St Prix*: Is a Pandora's Box of New Economic Integration and 'Contribution' Requirements Opening ?' (2015) 37(2) JSWFL 253.
[76] E.g. Quarterly Report, Your Europe Advice service, Quarter 2/2015, 20.

of **being engaged' after 91 days' residence** in the UK[77]. Moreover, any previous periods of job-seeking prior to the taking up of employment will be deducted from this 91 days should the EU citizen subsequently find themselves seeking employment (without retention of worker status) again, unless there has been a continuous absence from the UK of 12 months since the last period of work[78].

Additionally, the UK is yet to implement formally the CJEU decision in ***Jessy St Prix***, which extends retention of worker status to women who have had to cease work due to labour or childbirth but who will return to the labour market within a 'reasonable period'[79]. However, the case is **outlined in Home Office Guidance** on the recent relevant case-law of the Court of Justice[80]. Few cases have appeared before the national courts on this issue to date, though it is probable they will respond well to the judgment given that it was the UK Supreme Court that made the reference for a preliminary ruling in *Jessy St Prix,* in light of the fact that it considered that greater rights protection was probably desirable[81]. The Upper Tribunal has confirmed that retention of worker status under the *Jessy St Prix* ruling constitutes '**legal residence**' under the CRD for the **purposes** of acquiring a **permanent right of residence**[82].

Practical obstacles also impede the exercise of residence rights by Union citizens in the UK. These are most likely to arise in the context of applications for residence documentation. Under Reg 16 (issue of a registration certificate) and Reg 17 (issue of a residence card), documents may only be issued where, inter alia, it seems 'in all the circumstances appropriate' either to the entry clearance officer or the Secretary of State. Further, Reg 20B EEA Regulations permits the Secretary of State to verify residence rights when assessing the eligibility of a person for documentation. Though Reg 20B(7) clearly states that this must not be done systematically, the requirement of 'reasonable doubt' is not present in respect of verification assessments made in relation to residence documentation (whereas it is required with regard to general assessments of a right to reside under Article 7 CRD/Reg 14 EEA Regulations). This may explain the frequent complaints logged by the Your Europe Advice service regarding requests for **additional documents** by UK immigration authorities. These have included proof of return tickets, accommodation, travel insurance, or bank statements[83]. **Home Office Guidance** to caseworkers is **generally accurate in terms of the evidentiary burden** which may be placed on EU citizens and their family members (including the documents that must be produced). For instance, the Guidance is clear that although the UK has produced certain forms to facilitate applications for residence documentation, applications must be processed even if these forms are not used by the applicant[84]. Potentially **excessive documentary requirements** within this guidance seem to **relate to**, for instance, **evidence of sufficient resources** where an EU citizen wishes to reside in the UK as a self-sufficient individual[85]. Additional practical barriers that frequently appear in the Your Europe Advice service Quarterly Reports include: the **imposition of fees** for the issuing of residence

[77] Reg 6 EEA Regs.
[78] Immigration (European Economic Area) (Amendment) Regulations, SI 2014/1451.
[79] Case C-507/12 *Jessy St Prix v Secretary of State for Work and Pensions* [2014] ECLI:EU:C:2014 :2007.
[80] Home Office Guidance, 'European Economic Area (EEA) case law and appeals', 24th September 2015.
[81] *Jessy St Prix v Secretary of State for Work and Pensions* [2012] UKSC 49.
[82] *Weldemichael v Secretary of State for the Home Department v AIRE Centre* [2016] 1 CMLR 30.
[83] Quarterly Report, Your Europe Advice service, Quarter 2/2012, 8; Quarter 3/2012, 3 and11, Quarter 1/2013, 11 and 14; Quarter 2/2013, 15, 16; Quarter 3/2013, 13 and 19; Quarter 1/2014, 13; Quarter 2/2014, 16-18; Quarter 4/2014, 16, 26, 27; Quarter 1/2015, 17-20, Quarter 2/2015, 15; Quarter 4/2015, 18-19. See also Shaw et al, n.35; O'Brien, C., 'Politically Acceptable Poverty', (2014) 149, Poverty : Journal of the Child Poverty Action Group, 15-17.
[84] Home Office Guidance, 'Processes and procedures for EEA Documentation applications' 8th October 2015
[85] Home Office Guidance, 'Qualified Persons', n.59.

documents[86]; **excessive delays** in delivering residence and permanent residence certificates; and the **retention of personal documents** including passports and national identity cards[87]. Similarly, several petitions have been submitted to the European Parliament concerning delays in issuing residence documents. Not only have Union citizens considered such delays to be excessive, going **beyond the six-month timeframe** contained in the CRD, but they have complained that they have **inhibited their ability to exercise free movement rights** around the Union more generally[88].

2.1.3. Access to social security and healthcare

Key issues relating to access to social security and health care by Union citizens in the UK include its use of a 'right to reside' test to determine eligibility, the implications of the new minimum threshold test in this regard, and the similar repercussions in relation to access to the National Health Service. The UK's new limitations on the equal treatment rights of jobseekers are also highly relevant.

Prior to 2006, both UK and EU citizens were required to pass a 'habitual residence' test to access many social support mechanisms. The Social Security (Persons from Abroad) Amendment Regulations 2006[89] amended UK legislation on council tax benefit, housing benefit, income support, jobseekers' allowance, social fund maternity and funeral expenses and State pension credit to make clear that the habitual residence test requires a 'right to reside' in the UK. While British citizens continue to be able to prove this through habitual residence, in relation to EU citizens, the 2006 Regulations lists workers, self-employed EU migrants, and permanent EU residents amongst those enjoying a right to reside. Accordingly, **self-sufficient EU citizens** do **not enjoy** a **'right to reside'** for the **purposes** of **accessing** these **social security mechanisms**.

Consequently, it remains open to serious **question whether** the **UK 'right to reside' test complies** with the ***Grzelczyk* requirement** of a certain amount of **financial solidarity** between the Member States where non-national self-sufficient EU citizens require temporary recourse to financial assistance[90]. However, in *VP,* the Upper Tribunal held that the prohibition of an automatic bar to social assistance, reaffirmed in *Brey*[91], does not usually apply in the UK since this rule could only apply to claimants whose resources had been assessed when they had applied for a residence certificate. Since residence documentation is not issued as a matter of course in the UK, a benefit claim could be treated as evidence of a lack of sufficient resources on the part of the EU citizen claimant[92]. More broadly, the **UK 'right to reside' test** has been **challenged** at **national level** on the basis that, regardless of whether they qualify under the CRD, EU citizens enjoy a right to reside **directly under EU primary law** (Article 21 TFEU). This would then provide EU citizens with a right to equal treatment on the basis of Article 18 TFEU, bypassing the derogation in relation to social assistance contained in Article 24(2) CRD. This argument

[86] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/503658/Fees_table_18_March_2016_PDF.pdf.
[87] Quarterly Report., Your Europe Advice service, Quarter 2/2012, 8; Quarter 3/2012, 3 and11, Quarter 1/2013, 11 and 14; Quarter 2/2013, 15, 16; Quarter 3/2013, 13 and 19; Quarter 1/2014, 13; Quarter 2/2014, 16-18; Quarter 4/2014, 16, 26, 27; Quarter 1/2015, 17-20, Quarter 2/2015, 15; Quarter 4/2015, 18-19.
[88] Petition Nos 1051/2012, 1908/2012, 1141/2013, 1340/2013 and 2168/2013 to the European Parliament.
[89] SI 2006/1026.
[90] Case C-184/99 *Grzelczyk* [2001] ECLI:EU:C:2001:458.
[91] Case C-140/12 *Brey* [2013] ECLI:EU:C:2013:565.
[92] *VP v Secretary of State for Work and Pensions* [2014] UKUT 32 (AAC). Taken from O'Brien, n.66, 118.

has, however, been **rejected by the Court of Appeal**[93], which has specifically **linked** this to the issue of **benefit tourism**[94]. Direct **challenges** have also been made to the legality of the **'right to reside'** test itself on the basis that it is **discriminatory** both as a matter of EU and UK law. In *Patmalniece*, the **UK Supreme Court** (Lord Walker dissenting) **accepted** that the right to reside test was **indirectly discriminatory** since it is more easily passed by UK nationals than by other EU citizens. However, the Supreme Court considered that this was **justified** by the legitimate purpose of ensuring that a claimant has achieved economic or social integration in the UK for the **prevention of benefit tourism**[95].

The Commission also brought **infringement proceedings** against the United Kingdom for its use of the 'right to reside' test in relation to those social security mechanisms it considered to fall within the scope of Regulation 883/2004, specifically child benefit and child tax credit. The Commission argued that as social security measures, access to child benefit and child tax credit could only be assessed on the basis of *habitual residence*, determined by reference to the content of Regulation 883/2004. In addition, it argued that the 'right to reside' test is either directly or indirectly discriminatory and not justified under EU law[96]. However, the Court of Justice has very recently found the 'right to reside' test to be lawful. In its judgment, the Court stated that while the habitual residence test contained in the Regulation determined which Member State has competence for social security in relation to individual Union citizens, Member States were still free to determine the *conditions* for access to such social security mechanisms. The 'right to reside' test was found to be such a substantive condition and permitted. In addition, the Court accepted that the test was indirectly discriminatory but considered that it was justified in order to protect public finances [97].

Access to social support might also be **restricted for working EU citizens** who fail to be categorised as such under the UK's new **'Minimum Earnings Threshold'**, as this will exclude them from a right to reside as a worker under the Social Security Regulations. As both O'Brien and Puttick point out, this could have **adverse** and **disproportionate effects** on **single parents, carers,** and **disabled EU citizens**[98]. Indeed, the Your Europe Advice service has already received cases concerning the inability of working migrants to access social assistance as a result of the new threshold[99]. The use of the new 'minimum earnings threshold' **might** also **risk denying access** to **NHS services** for **low-wage, zero hours contract workers** who, not meeting the classification of 'worker', will require private healthcare to be categorised as 'self-sufficient' as a result of the UK's interpretation of Article 7(1)(b) CRD.

The UK has also introduced **new statutory instruments** to **limit jobseekers' access to social assistance**. In particular, jobseekers are now denied access to housing benefit[100]. They are also required to meet a three-month residence rule in order to claim child benefit and child tax credit[101], where previously they were able to access these benefits as a result

[93] *Abdirahman v Secretary of State* [2007] EWCA Civ 657.
[94] *Kaczmarek v Secretary of State* [2008] EWCA Civ 1310.
[95] *Patmalniece (FC) v Secretary of State for Work and Pensions* [2011] UKSC 11.
[96] Case C-308/14 *Commission v United Kingdom* [2016] ECLI:EU:C:2016:436.
[97] Ibid.
[98] Puttick, n.75; O'Brien, n.83.
[99] E.g. Quarterly Report, Your Europe Advice service, Quarter 2/2015, 20.
[100] Social Security (Jobseeker's Allowance : Habitual Residence) Amendment Regulations 2013, SI 2013/3196; Child Benefit (General) and Tax Credits (Residence) (Amendment) Regulations 2014, SI 2014/1511.
[101] Child Benefit (General) and Tax Credits (Residence) (Amendment) Regulations 2014, SI 2014/1511.

of claiming jobseekers' allowance[102]. O'Brien has questioned whether these changes comply with EU law when housing benefit and child benefit and tax credit can be seen as social support necessary to facilitate access to the job market[103]. Moreover, jobseekers will **not be able** to **apply** for **jobseekers' allowance until** they have **resided in** the **UK** for **three months**. O'Brien points out that this period is longer than the period of eight weeks previously declared unlawful by the CJEU in *Swaddling*[104], and argues, in any case, that the three-month rule goes beyond what is necessary to establish a 'real link' to the employment market as permitted by *Collins.* Nevertheless, given the Court's recent findings in *Commission v UK* and *García-Nieto,* a different position from the Court of Justice might now be anticipated[105]. Further, following three months' habitual residence, jobseekers will only be entitled to three months' jobseekers' allowance, child benefit and child tax credit under newly introduced rules[106], after which they **must demonstrate 'compelling evidence'** of a **'genuine prospect of work'**. 'Compelling evidence' is **very restrictively defined**, covering documentary evidence of a job offer or very recent material evidence of a change in circumstances, accompanied by pending outcomes of job interviews. Moreover, as O'Brien highlights, since the rule applies not just to new jobseekers but to non-national EU citizens who have recently lost employment in the UK (but who do not retain worker status), new jobseekers appear to receive more favourable treatment under the amendments than the formerly employed. This is because longer-term residents in the UK may have already exhausted their three-month initial residence rights and right to reside for 91 days as a jobseeker, with the result that they are required to provide 'compelling evidence' of future work straight away[107].

2.1.4. Others

A number of frequently arising obstacles to the exercise of free movement rights by Union citizens can be identified across the quarterly reports of the Your Europe Advice service. In particular, issues have arisen in relation to the introduction **of new rules** on the **exportability** of the **UK's winter fuel allowance** for **pensioners**[108], as well as **disability living allowance**[109]. O'Brien notes that in response to CJEU case-law on the **exportability of sickness benefits**, the UK has actually acted to impose more onerous administrative requirements to ensure they are not taken up, though this is subject to a challenge before the courts[110]. Further, the UK has cited the decision in Case C-503/09 *Stewart*[111] requiring the exportability of Employment and Support Allowance in youth as a central reason for abolishing the benefit altogether[112].

[102] Social Security (Jobseeker's Allowance : Habitual Residence) Amendment Regulations 2013, SI 2013/3196; Child Benefit (General) and Tax Credits (Residence) (Amendment) Regulations 2014, SI 2014/1511.
[103] O'Brien, n.64, 114-117.
[104] Case C-90/97 *Swaddling* [1999] ECLI:EU:C:1999:96.
[105] Case C-138/02 *Collins* [2004] ECLI:EU:C:2004:172; O'Brien, n.64; Case C-308/14 *Commission v UK,* n.96; Case C-299/14 *García-Nieto* [2016] ECLI:EU:C:2016:114.
[106] The Immigration (European Economic Area) (Amendment) (No.3) Regulations 2014, SI 2014/2761.
[107] O'Brien, n.64.
[108] Quarterly Report, Your Europe Advice service, Quarter 1/2014, 50; Quarter 2/2015, 38.
[109] Quarterly Report, Your Europe Advice service, Quarter 2/2012, 4; Quarter 1/2015, 41. See also O'Brien, n.64.
[110] O'Brien, n.64, 125, See in particular Case C-299/05 *Commission v Parliament and Council* [2007] ECLI:EU:C:2007:608 and Case C-537/09 *Bartlett* [2011] ECLI:EU:C:2011:278. The requirement that UK claimants are currently receiving contributory benefits from the UK is being challenged in *Linda Tolley (deceased) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1471.
[111] Case C-503/09 *Stewart* [2011] ECLI:EU:C:2011:500.
[112] See O'Brien, n.64, 125.

Second, EU citizens are often treated as overseas students, for the purposes of calculating **university fees**, where they have lived outside the EU prior to commencing their studies[113]. This is also visible in the Petitions which have been made to the European Parliament[114]. There are also reports of the impact of the UK's 'minimum earnings threshold' on the ability of working students to access student loans and maintenance grants on an equal basis with UK nationals or simply a **denial** of **equal treatment rights** in relation to **maintenance grants** for **working students**[115].

Third, a **lack of recognition of qualifications** across the Member States, particularly in relation to medical and architecture qualifications appears to be ongoing.

Fourth, reports that **national authorities are failing to communicate effectively** for the purposes of coordinating social security contributions/payments and pension contributions/payments are relatively common[116].

Finally, **access to goods and services** can often be limited by the **restrictive ID requirements** of many shops. Specifically, they will usually only accept passports or UK driving licences as proof of age and argue that it is too costly to train staff to recognise other European driving licences or identity cards[117].

2.2. Main barriers for family members of EU citizens

2.2.1. Entry

The main obstacles regarding the entry rights of family members of Union citizens relate to **excessive delays** and **documentary burdens** during the **visa application process**, the **limited recognition** of **visas issued by other Member States**, and the UK's **limited implementation** of the ***Singh*** judgment.

In accordance with Article 5(2) CRD, Reg 12 EEA Regulations requires entry clearance officers to issue an EEA family permit to family members of Union citizens, 'other family members' and family members retaining that status where the EU citizen resides in the UK in accordance with the CRD and the family member joins him/her there. Reg 12(2) EEA Regs makes clear that EEA family permits must be issued free of charge and as soon as possible.

Nevertheless, there is evidence within the Your Europe Advice service reports of excessive delays and requests for additional documents (such as evidence of a return trip, accommodation, travel insurance or bank statements) made by UK immigration authorities to individuals trying to obtain entry visas[118]. **Personal documents**, such as the passport of the 'EU sponsor' and/or the family member are also **retained**[119]. The Your Europe

[113] Quarterly Report, Your Europe Advice service, Quarter 2/2012, 17; Quarter 2/2014, 43; Quarter 4/2015, 44; Quarter 1/2014, 40 – with discrimination appearing to be particularly targeted at Bulgarian and Romanian students.
[114] Petition Nos 1783/2014 and 2158/2014 to the European Parliament.
[115] Quarterly Report, Your Europe Advice service, Quarter 2/2012, 18.
[116] Quarterly Report, Your Europe Advice service, Quarter 1/2014, 64; Quarter 4/2015, 33.
[117] Quarterly Report, Your Europe Advice service, Quarter 2/2012, 29; Quarter 3/2014, 55.
[118] Quarterly Report, Your Europe Advice service, Quarter 4/2015, 18-19; Quarter 1/2014, 23-24.
[119] Quarterly Report from Your Europe Advice Quarter 2/2012, 8; Quarter 3/2012, 3 and 11, Quarter 1/2013, 11 and 14; Quarter 2/2013, 15, 16; Quarter 3/2013, 13 and 19; Quarter 1/2014, 13; Quarter 2/2014, 16-18; Quarter 4/2014, 16, 26, 27; Quarter 1/2015, 17-20, Quarter 2/2015, 15; Quarter 4/2015, 18-19.

Advice quarterly reports rightly note that this can present significant obstacles to ordinary life in the UK including in relation to accessing accommodation and employment[120]. There is also evidence in both the Your Europe Advice reports and Home Office Guidance of a **restrictive approach to defining 'family member'**, which can result in requests for additional documents, such as joint rental contracts[121]. Moreover, there is **some suggestion that visas are not processed free of charge** or that individuals are required to pay for a premium service in order to make sure they receive their visa on time[122].

These findings are supported by empirical research. Shaw et al remark that 'UK authorities routinely take longer than they are permitted to decide upon applications by TCN family members, have erred in the manner in which they have applied the rules relating to evidencing family relationships, and have been less than careful in their management of documentation and correspondence'[123]. They note that **third country national family members** are **commonly processed under national immigration law**, rather than EU law, with little proactive engagement from immigration authorities to verify their status[124]. For instance, third country national spouses are commonly required to demonstrate that their EU citizen wife or husband has the sufficient resources to support them required under national law, whether or not they are economically active[125]. These conclusions are further reinforced by the national case-law. For instance, in the case of *Bassey*, the Court of Appeal strongly criticised the approach of the then-UK Border Agency for treating a third country national family member, who had entered Northern Ireland without a visa, 'as a straightforward case of illegal entry by deception by an individual with no arguable right to be in the country'[126].

As noted in ch.1, following the CJEU decision in *McCarthy*[127], the UK has **addressed** the question of **visa exemptions** under Article 5(2). Reg 11(2) EEA Regulations now provides a right of admission to family members of EU citizens upon the production of a valid passport and 'a **qualifying EEA State** residence card'[128]. Though initially, this only covered Germany and Estonia, due to their use of biometric data, the UK's regulations were recently amended to include all EEA States except Switzerland within this definition[129]. Though decreasing, the Your Europe Advice service has been inundated with queries from Union citizens following the *McCarthy* ruling[130]. This may be due to some inertia in updating Home Office guidance as well as the possibility that the amendment has not been effectively communicated to **private airline companies**, who may **continue to refuse to board third country national family members** onto a flight in the **absence of a UK-issued EEA family permit**[131].

[120] *Ibid*
[121] Quarterly Report, Your Europe Advice service, Quarter 1/2014, 23-24.
[122] Quarterly Report, Your Europe Advice service, Quarter 4/2015, 18-19; Quarter 1/2014, 23-24.
[123] Shaw et al, 'Getting to Grips', n.36, 23.
[124] Shaw and Miller, n.40,155.
[125] Quarterly Report, Your Europe Advice service, Quarter 3/2014, 64.
[126] *Bassey v Secretary of State for the Home Department* [2011] NICA 67.
[127] Case C-202/13 *McCarthy and others*, n.22.
[128] Amended by the Immigration (European Economic Area) (Amendment) (No.2) Regulations 2013, SI 2013/3032, Sch.1 para.6(a).
[129] Immigration (European Economic Area) Regulations SI 2006/1003, Reg 2, as amended by Immigration (European Economic Area) (Amendment) Regulations SI 2015/694,
[130] Quarterly Report, Your Europe Advice service, Quarter 1/2015, 2/2015, 3/2015 and 4/2015.
[131] Home Office Guidance, 'Direct Family Members of European Economic Area (EEA) nationals, 29 September 2015, 5; Quarterly Report, Your Europe Advice service, Quarter 4/2015, 17.

By far the **most common issue** reported by the Your Europe Advice service is the question of both **entry and residence rights** for the **third country national spouses of British citizens** who return to the UK after having exercised their free movement rights[132]. The UK takes a **restrictive approach** to the ***Singh*** ruling, which holds that such individuals usually fall within the scope of the CRD. Specifically, Reg 9 EEA Regulations **limits** the application of *Singh* to circumstances in which the British citizen was previously exercising rights as a ***worker*** or ***self-employed migrant*** in another Member State. In the case of spouses, the couple must have been living together in the host Member State. Finally, the British citizen must have **'transferred the centre of his life**' to that EU Member State. The Regulation includes factors such as the period of residence in the host State, the location of the British citizen's principal residence, and the degree of integration of the British citizen in the host State. Following the finding of the Court of Justice in *O & B* that the rule in Singh does not just cover economically active Union citizens, this approach is plainly contrary to Union law[133]. There also continues to be significant confusion amongst Union citizens about when they will be considered to have 'transferred the centre of their life to another Member State'[134]. ***Singh* rights** appear to be **frequently denied** to UK citizens and their family members, who are instead processed under ordinary UK immigration law[135].

The Your Europe Advice service reports that EU citizens are generally well informed about the existence of *Singh* entry and residence rights and often seek to use them to **circumvent increasingly strict national immigration rules**[136].

2.2.2. Residence

Issues relating to the residence rights of family members are broadly similar to the trends identified in relation to entry outlined above, including **excessive delays** in processing residence documentation (e.g. petitions have been made to the European Parliament's Petition service concerning excessive delays, with the accompanying **retention of personal documents** such as passports, in the processing of residence applications for 'other family members' under Article 3(2) CRD), the application of **fees** and requests for **additional documentation**, as well as the restrictive approach to the *Singh* ruling and, more broadly, the **processing** of **third country national family members under ordinary UK immigration rules**.

In relation to the latter issue, the **national courts** have been **critical** of the failure of **Home Office staff** to recognise the automatic derived residence rights of TCN spouses under Union law, exposing couples to **intrusive questions** in order to demonstrate that their **marriage** is not one **of convenience**[137]. Discussed further in ch.4, the Your Europe Advice service, as well as empirical research, demonstrates an **overreliance on marriage of convenience** as a means of **denying residence** to third country national members who would otherwise enjoy residence rights under EU law[138].

[132] Quarterly Report, Your Europe Advice Service, Quarter 4/2014, 7, Quarter 4/2013, 14; Quarter 3/2015, 7; Quarter 2/2013, 21.
[133] Case C-456/12 *O & B* [2014] ECLI:EU:C:2014:135. See also, Shaw, J., 'Between Law and Political truth? Member State Preferences, EU Free Movement Rules and National Immigration Law, UACES 44th Annual Conference, 13.
[134] Quarterly Report, Your Europe Advice service, Quarter 1/2015, 2/2015, 3/2015 and 4/2015.
[135] *Ibid.*
[136] Quarterly Report, Your Europe Advice service, Quarter 1/2015, 2/2015, 3/2015 and 4/2015.
[137] *ZH (Afghanistan) v Secretary of State for the Home Department,* n.51.
[138] Quarterly Report, Your Europe Advice service, Quarter 1/2014, 28; Quarter 2/2014, 19, Quarter 3/2014, 64; Quarter 2/2015, 22.

An additional significant issue is the UK's **restrictive approach** to residence rights under the ***Chen*** and ***Ruiz Zambrano*** case law. The Immigration (EEA) (Amendment) Regulations 2012 amend the EEA Regulations to give effect to the *Chen* decision, while the Immigration (EEA) (Amendment) (No.2) Regulations 2012 implement the *Ruiz Zambrano* judgment[139]. In *Ruiz Zambrano*, the Court of Justice held that Article 20 TFEU precludes national measures that have the effect of depriving Union citizens of the 'genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'. On the facts, this resulted in conferral of the right to reside and the right to work on the third country national father of a child with Belgian citizenship, who had never crossed an EU border, since the refusal of such rights would require the EU citizen child to leave the Union territory. Subsequent domestic transposing provisions take a very strict approach to such residence rights, which **follows very closely** the **factual situation of that case and later judgments of the Court of Justice**[140]. Significantly, where a Union citizen minor has two primary carers, the amended EEA Regulations state that *both* primary carers must be required to leave the UK before a derivative right of residence can be enjoyed[141]. This interpretation has largely been confirmed by the national courts[142].

National rules have also been amended to **exclude** individuals who enjoyed a 'derivative right of residence' pursuant to the *Chen* or *Ruiz Zambrano* decisions from **access to social assistance benefits**[143]. *Chen* and *Ruiz Zambrano* carers **cannot acquire permanent residence** rights under the CRD[144] and **do not enjoy its higher level of protection from deportation**. Rather, expulsion decisions are assessed under the national immigration law, which asks whether removal would be 'conducive to the public good'[145].

UK courts have consistently upheld the requirement in *Chen* that residence rights are derived from *self-sufficient* Union citizens who must have sufficient resources and comprehensive medical cover within the UK, with the result that *Chen* rights cannot be relied upon to access a work permit for third country national carers[146]. Similarly, *Ruiz Zambrano* is understood by the national courts as being 'exceptional' in character, such that maintenance of family ties will not be sufficient to trigger the right, unless denial of residence rights would compel the Union citizen to leave the EU territory[147].

Following the CJEU ruling in *McCarthy*, the UK has also amended the EEA Regulations so that **British citizens** who hold **dual nationality** with **another Member State cannot trigger** the **more favourable family reunification rights** enjoyed under **EU law**, **without having left** the **United Kingdom**, by relying on the fact that they are also nationals of another Member State[148]. Accordingly, the Your Europe Advice service has started to receive requests for information about whether family reunification can be triggered if British citizenship is renounced[149].

[139] Regs 11 and 15A within the EEA Regs 2006.
[140] Though this is arguably permissible, in light of the CJEU's subsequent clarifications of *Ruiz Zambrano.* See e.g. Case C-434/09 *McCarthy* [2011] ECLI:EU:C:2011:277; Case C-256/11 *Dereci and others* [2011] ECLI:EU:C:2011:734; Case C-40/11 *Iida* [2012] ECLI:EU:C:2012:691.
[141] Reg 15A(7A) EEA Regs.
[142] *Harrison v Secretary of State for the Home Department* [2012] EWCA Civ 1736.
[143] Social Security (Habitual Residence) (Amendment) Regulations 2012, SI 2012/2587.
[144] Reg 21A EEA Regs.
[145] Reg 21A EEA Regs.
[146] *W (China) v Secretary of State for the Home Department* [2006] EWCA Civ 1275.
[147] *Harrison,* n.145.
[148] Reg 2(1) EEA Regs, as amended by the Immigration (European Economic Area) (Amendment) Regulations 2012/1547, Sch.1 para.1.
[149] Quarterly Report, Your Europe Advice service, Quarter 3/2015, 16.

2.2.3. Access to social security and healthcare

Access to social security and welfare issues in relation to family members of Union citizens are largely the same as those detailed with regard to EU citizens and will not be repeated.

However, questions have arisen following the *Ruiz Zambrano* judgment as to whether other rights should be afforded to third country national family members – beyond a right of residence and a right to work - in order to ensure an EU citizen is not forced to leave Union territory. In particular, UK **restrictions on access to welfare** by ***Ruiz Zambrano*** carers have been challenged as **defeating the genuine enjoyment of Article 21 TFEU** rights by Union citizens. In its *Sanneh* judgment, the **Court of Appeal** concluded that the UK was **required** to make **social assistance** available to *Ruiz Zambrano* carers when it is ***essential* for their *basic* support**. This was the furthest that the UK had to go since, having only a derivative right of residence, ***Ruiz Zambrano* carers did not enjoy a personal right to equal treatment under the Treaty**. However, it did not need to be shown that the *Ruiz Zambrano* carer would in fact have to leave the EU, since the Court of Appeal considered that living in destitution could undermine the benefits of EU citizenship as much as being forced from its territory. The Court of Appeal also held that the EU principle of proportionality did not apply but that, even if it did, the UK approach would be justified by the legitimate aim of safeguarding public finances[150].

2.2.4. Others

No other obstacles to free movement and residence rights for family members of EU citizens were identified.

[150] *Sanneh v Secretary of State for Work and Pensions* [2015] EWCA Civ 49.

3. DISCRIMINATORY RESTRICTIONS TO FREE MOVEMENT

KEY FINDINGS

- **Discrimination on the basis of nationality:** research demonstrates some sections of the British press tend to apply negative labels *en masse* to EU10 and EU2 nationals. More generally, EU10 and EU2 nationals may be disproportionately affected by restricted access to welfare and be more likely to face indirect discrimination in the workplace.
- **Discrimination based on sexual orientation/civil status**: the UK continues not to recognise opposite-sex civil partnerships, with the result that heterosexual civil partners fall under Article 3(2) 'other family members', rather than within the more favourable Article 3(1) CRD.
- Reports of **discrimination against the Roma community** are mixed but there is some evidence that they are disproportionately at risk of exploitative labour practices.

3.1. Discrimination based on nationality

Case study 1: Media coverage of EU issues (taken from FIDE Congress Report on the United Kingdom 2014)[151]

EU citizenship and related issues feature very frequently in the mainstream UK media. Mirroring the UK legislative framework - which sites EU free movement within existing immigration structures rather than adopting a rights-based approach[152] - 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 on **incoming 'migrants'**. The dominant and recurring themes in the UK media related to EU citizenship include **entitlement to social benefits**; access to **public services** (particularly the UK National Health Service and State education); the rights of entry and residence of **third country national family members**; and EU rules governing the **expulsion of Union citizens**.

In relation to access to social welfare, some newspapers (e.g. *Telegraph, Daily Mail, Daily Express*) typically present headline-grabbing projections of both the number of incoming 'EU migrants' and the direct costs to the UK taxpayer[153]. Moreover, as Shaw et al have remarked, there appears to be a certain preoccupation amongst large sections of the UK press that EU citizens exercise their Treaty rights solely to exploit the United Kingdom's

[151] Horsley and Reynolds, n.55.
[152] See Shaw et al, 'Getting to Grips', n.36.
[153] Mendick R, and Duffin, C, 'True Scale of European Immigration', The Telegraph, 12 October 2013, available at: http://www.telegraph.co.uk/news/worldnews/europe/10375358/True-scale-of-European-immigration.html and Chorley, M, 'One in 10 dole claimants is from outside the UK as Cameron moves to limit access to benefits for foreigners', Daily Mail, 15 October 2013, available at: www.dailymail.co.uk/news/article-2460704/One-10-dole-claimants-outside-UK-Cameron-moves-limit-access-benefits-foreigners.html.

benefit system[154]. There is, however, some evidence of clear attempts to counter-balance these accounts by certain quarters of the UK media[155].

Some sections of the press have also shown some tendency to present certain categories of EU citizens as 'bad' or '**undesirable' migrants**. Further, these labels are often **applied *en masse*** to EU10 and EU2 nationals. Particularly prior to the end of transitional arrangements in relation to **Romania** and **Bulgaria**, The *Daily Express, Daily Mail, and Daily Telegraph* all published articles on the prospect of an 'invasion' by Romanian nationals[156]. Reports in all three papers frequently present a distorted image of CEE migrants, particularly of Roma origin[157].

Beyond the FIDE Report, Shaw et al have also remarked upon the way in which Romanian and Bulgarian nationals are presented by the UK media and have commented, more broadly, on the fact that immigration issues and **EU issues** were both **identified** as **problematic** areas in terms of **press coverage** by the 2012 **Leveson Inquiry on the Culture, Practices and Ethics of the Press**[158].

Case study 2: the Treatment of EU10 and EU2 nationals

As well as receiving arguably disproportionate attention from the UK press, Shaw et al have highlighted that Central and Eastern European citizens are likely to be **disproportionately affected** by recent UK government schemes to **deport homeless individuals** residing in the UK. Specifically, they state that:

'Although the Homelessness Pilot was not specifically aimed at citizens of the recently acceded Member States of the EU, the impact was felt most by these Central and Eastern European nationals. This was due, on the one hand, to the rules set out in the transitional arrangements which limited access for A8 and A2 nationals[159] to social assistance for a certain period. Without access to benefits or job seekers allowance, this group faced an increased risk of homelessness in times of financial hardship or unemployment. On the other hand, this group was more exposed than other EU citizens to being found 'not to be exercising treaty rights'. The transitional arrangements limit the circumstances where an A8 or A2 national will be deemed to be exercising [such rights]'[160].

[154] Shaw et al, 'Getting to Grips', n.36, 27.
[155] Portes, J, 'A crisis over the UK's benefits bill for EU migrants? What crisis?', The Guardian, 6 March 2013, available at: http://theguardian.com/commentisfree/2013/mar/06/uk-benefits-eu-migrants-what-crisis; http://news.bbc.co.uk/1/hi/7525472.stm.
[156] E.g. Little, A and Brown, M, 'Join Our Crusade Today… Stop New EU Migrants Flooding into Britain', The Express, 31 October 2013, available at: http://www.express.co.uk/news/uk/440206/Join-our-Crusade-today-stop-new-EU-migrants-flooding-in-to-Britain , Webb, S., 'Up to 70,000 Romanian and Bulgarian migrants a year 'will come to Britain' when controls on EU migrants expire', The Daily Mail, 17 January 2013, available at: http://www.dailymail.co.uk/news/article-2263661/Up-70-000-Romanian-Bulgarian-migrants-year-come-Britain-controls-EU-migrants-expire.html and Barrett, D., 'Diplomats admit 35,000 Romanian and Bulgarian migrants may come to Britain', The Telegraph, 23 April 2013, available at: http://www.telegraph.co.uk/news/uknews/immigration/10013810/Diplomats-admit-35000-Romanian-and-Bulgarian-migrants-may-come-to-Britain.html respectively. Cf. Boffey, D., 'Row breaks out between UK and Romania over targeting of migrants', The Guardian, 2 February 2013, available at: http://www.theguardian.com/world/2013/feb/02/romania-uk-immigrants-diplomatic-row.
[157] E.g. Duffin, C., 'Roma Invasion of Paris… Next Stop Britain', The Telegraph, 6 October 2013, available at: http://www.telegraph.co.uk/news/worldnews/europe/france/10358319/The-Roma-invasion-of-Paris...-next-stop-Britain.html.
[158] Shaw et al, 'Getting to Grips', n.36 xii, 27-28.
[159] The term EU8 or A8 refers to the Central and Eastern European countries joining the EU as part of the 2004 accession, including the Czech Republic, Estonia, Hungary, Latvia, Lithunia, Poland, Slovakia and Slovenia. The term EU2 or A2 refers to Romania and Bulgaria, who acceded to the European Union in 2007.
[160] Shaw et al, 'Getting to Grips', n.36, 31.

Shaw et al also emphasised that the Homelessness Pilot, detailed further in ch.5, s.5.2 is a symptom of a much more significant issue, namely the existence of homeless and destitute Union citizens in the UK. They note that a study by the Combined Homeless and Information Network found that 28% of rough sleepers in London in 2011 were Central and Eastern European nationals and one in ten newly homeless people were Polish[161].

Beyond the treatment of citizens from recently acceded Member States, Shaw et al also identified continued difficulty in the UK to ascertain the place of Turkish nationals within the scheme of EU law and free movement rights in particular in relation to the impact of the Ankara Agreement. However, they note that these difficulties seem to be derived from a lack of clarity at the EU level[162].

According to the European Commission's Report on the Free Movement of Workers in 2012-2013 (the 2012-2013 Report), **indirect discrimination against EU workers** has been the cause of some concern. In particular, the UK's Trade Union Congress has voiced **particular concern** about the treatment of **EU8 workers**. As a result, it ran a campaign to inform these workers of their rights under UK labour law, translated into various European languages[163]. The Report also notes particular problems experienced by EU8 workers in the UK as a result of delays in registration (during the transitional period), which have repercussions in terms of eligibility for non-contributory benefits[164].

Case study 3: Eurozone Crisis

As outlined in ch.2, s.1.1, there is some evidence, particularly in the wake of the Eurozone crisis, that Greek nationals are being treated differently at the UK border. Recent reports from the Your Europe Advice service suggest that the **identity documents of Greek nationals are being overly scrutinised** by UK border control officials. In some cases, Greek ID Cards are rejected and a passport is required[165]. Unconnected research from Shaw et al suggests this may be linked to the Eurozone crisis[166].

3.2. Discrimination based on civil status/sexual orientation

Both civil partnerships and marriage are legal for same-sex couples under UK law[167]. The **UK** does **not appear** to **place any obstacles in the way of** the **exercise of free movement rights by homosexual Union citizens and their spouse or civil partner**. No examples of discrimination against homosexual Union citizens were found through the research conducted. However, one related issue, already discussed in ch.1, s.1.2.3, is the UK's **non-recognition of civil partnerships between opposite-sex civil partners**, since it does not allow civil partnerships between heterosexual couples under UK law. Union citizens have complained about this difference in treatment to the Your Europe Advice service[168]. Finally, Reg 2 EEA Regulations prevents parties to a marriage, civil partnership

[161] Shaw et al, 'Getting to Grips', n.36, 33.
[162] Shaw et al, 'Getting to Grip', n.36, 36-37.
[163] Groenendijk et al, 'European Commission Report on the Free Movement of Workers in Europe in 2012-2013' (2014), 82.
[164] *Ibid*, 117.
[165] Quarterly Report, Your Europe Advice service, Quarter 2/2015, 19, Case 170773; Quarter 4/2015, 22, (case 186192).
[166] Shaw et al, 'Getting to Grips', n.36, 5.
[167] The Civil Partnership Act 2004 and The Marriage (Same Sex Couples) Act 2013.
[168] E.g. Your Europe Advice Service Quarterly Feedback No.10, Quarter 4/2014, 27.

or a durable relationship from asserting free movement rights as family members of EU citizens in cases where the EU citizen already has a spouse, civil partner or durable partner in the UK (non-recognition of polygamy). This approach is, however, compliant with Union law.

3.3. Discrimination based on ethnic/racial origin

Case study 1: The Treatment of Roma Workers

In the Commission's 2012-2013 Report, the Latvian *rapporteur* confirmed information submitted in previous reports that 'persons of **Roma origin** claim that they are able to find employment…especially in Ireland and the United Kingdom, and also feel **free from everyday discrimination** in their social life, with the result that an estimated 10,000 (out of 15,000) Latvian Roma have made use of their free movement rights'[169]. By contrast, that Report which was delivered prior to the lifting of **transitional measures for Romania and Bulgaria**, also noted, more broadly, that these measures **limited employment options**, disproportionately exposing members of the Roma community to the **risk of exploitative working environments**[170].

Moreover, the Report presented different findings from the UK *rapporteur*, particularly in relation to **limited access to mainstream employment** with decent wages:

'Roma workers are often employed as casual day labourers and opportunities for this type of work have decreased during the economic recession. While there have been instances of severe exploitation, sometimes amounting to forced labour, according to rapporteurs, the social and economic marginalisation of the community and their limited trust in authority has made it difficult to begin to address this exploitation. Moreover the situation of the Roma has been worsened by cuts in employment-related benefits introduced by the coalition government and they are also frequently denied welfare benefits through misapplication of the habitual residence test by staff of the Department of Work and Pensions. Furthermore, the rapporteurs highlight the lack of any national strategy to promote the social inclusion of the Roma population'[171].

No complaints or petitions have been lodged in relation to this ground of discrimination.

Case study 2: Post-Brexit incidents of racism and xenophobia

Post-drafting note: Following the outcome of the UK referendum on EU membership, there have been frequent reports in the press of racist and xenophobic incidents targeted both towards non-national Union citizens[172] and minority ethnic nationals and non-nationals[173]. This has been explicitly linked to the post-referendum environment[174].

[169] Commission 2012-2013 Report, n.163, 33.
[170] *Ibid.*
[171] Commission 2012-2013 Report, n.163, 33.
[172] Burman, J., ''No More Polish Vermin' : Racist Flyers Posted in Homes of Eastern Europeans After Brexit', The Daily Express, 26 June 2016, available at : http://www.express.co.uk/news/uk/683448/Brexit-EU-Referendum-Vote-Racist-Polish-Muslim-Eastern-European-Flyer-Cambridgeshire
[173] Sherwood, H, Dodd, V, Khomami, N, Morris, S, 'Cameron Condemns Xenophobic and Racist Abuse after Brexit Vote', The Guardian, 27 June 2016, available at : https://www.theguardian.com/uk-news/2016/jun/27/sadiq-khan-muslim-council-britain-warning-of-post-brexit-racism
[174] *Ibid*

4. MEASURES TO COUNTER ABUSE OF RIGHTS

KEY FINDINGS

- There is evidence that the United Kingdom has been increasing its monitoring in relation to **sham marriages** between non-national Union citizens and third country nationals. There also appears to be a general over-reliance on marriages of convenience to deny entry and residence rights for third country national spouses more generally. Automatic rights of residence seem to be frequently ignored and additional documentary requirements imposed.

- Recent amendments to UK legislation now define attempts to re-enter the UK within 12 months of having been removed for not meeting the conditions attached to extended residence, as an '**abuse of residence**' rights, where those conditions are still not met.

4.1. Marriage of convenience

The UK defines marriages of convenience as an 'abuse of the right to reside' under Reg 21B(1)(c) EEA Regs. While Article 35 CRD permits Member States to refuse, terminate or withdraw the rights it confers in the case of **marriages of convenience**, there is evidence to suggest that the United Kingdom **employs this tool on a potentially disproportionately frequent basis to restrict the residence rights of Union citizens**[175]. The Commission's 2012-2013 Report speculated that this was the result of a tightening up on third country national marriages to British nationals, with the resultant **perception** that **sham marriages to non-national EU citizens** would become **more common**[176]. More broadly, there are numerous examples of the national authorities requiring EU citizens and their third country national partners to **demonstrate that their marriage is not one of convenience**, as a matter of course under UK immigration law, rather than acknowledging the automatic residence rights of the spouses and civil partners of Union citizens[177]. S.24 Immigration and Asylum Act 1999 imposes an **obligation** on registrars **to inform the Home Office** where they **suspect** a **marriage of convenience** will take place. The Commission's 2012-2013 Report presents anecdotal evidence that registrars take this obligation seriously to the extent that Home Office officials are attending marriage ceremonies and **calling parties to interview with increasing frequency**[178]. It also suggests that the quality of decision-making can be poor[179].

Home Office Guidance requires caseworkers **systematically to decide whether marriages** or civil partnerships **might be for convenience** before issuing entry or residence documentation[180]. The Guidance makes clear that an applicant can prove a family relationship through a valid marriage certificate, and that, where a marriage of convenience is suspected, the burden of proof is subsequently on the Secretary of State to demonstrate this. Nevertheless, one issue identified in the Commission's 2012-2013 Report is that, officially, EU citizens and their spouses/civil partners are only formally required to provide a

[175] Commission 2012-2013 Report, n.163, 60.
[176] Commission 2012-2013 Report, n.163, 62.
[177] Commission 2012-2013 Report, n.163, 59.
[178] Commission 2012-2013 Report, n.163, 62.
[179] *Ibid*
[180] Home Office Guidance, 'Direct family members', n.131, 14

marriage certificate to demonstrate their relationship, in accordance with their rights under the CRD. However, residence documentation will then often be refused on the basis that applicants have not spontaneously provided evidence that their relationship is genuine and subsisting, a condition under ordinary UK immigration law[181]. Indeed, there are **countless examples** in the Your Europe Advice service reports of UK Home Office officials **applying national immigration rules** on marriages or **presuming that long-standing genuine marriages are a sham**[182]. There are also cases where it appears **presumptions** as to the authenticity of the marriage are made on the **basis of the differing cultural backgrounds** of the individuals concerned[183]. While information has been removed from the publicly available Home Office Guidance as to the factors caseworkers will take into consideration when making this decision, there is evidence within the Your Europe Advice service quarterly reports that presumptions will be made in relation to third country nationals from countries considered to be 'high risk'[184].

More broadly, the treatment of third country national partners and the assessment of the existence (or not) of marriages of convenience is probably the area in which so-called **seepage between UK immigration law and the EU free movement framework**, identified by Shaw et al, is most visible[185]. Thus, there are examples in the national case-law of immigration officials assessing whether spouses of Union citizens enjoy residence rights on the basis of the third country nationals 'bad immigration history' and of national courts assessing the **'credibility' of individual litigants** – a benchmark of UK immigration law – in their examination of the case[186]. Nevertheless, the **national courts** have also been **critical** in several cases **of** the **Home Office's failure** to recognise that the third country national spouse of an EU citizen enjoys **automatic derived rights** to enter and reside in the UK **as a matter of EU law**. For instance, in *Papajorgji,* an entry clearance officer initially refused to issue residence documents to the Albanian wife of a Greek national on the basis that further evidence had not been submitted, beyond the 115 written questions that they had answered and the numerous documents that they had already supplied. The Upper Tribunal made clear that the burden of proof was on the Home Office to demonstrate that their marriage of 14 years, which had produced two children, was a sham[187].

However, there is also evidence in the Hungarian submission to the Commission's 2012-2013 Report that in 2009, 13 Hungarian nationals were arrested for **accepting money in exchange for a marriage**, with a further 25 being placed under arrest in 2010. In the same year, 30 Romanians, 63 Czechs, 53 Slovakians, and 91 Poles were arrested on the same basis[188].

[181] Commission 2012-2013 Report, n.163, 62
[182] A selection of examples can be found in Quarterly Report, Your Europe Advice service, Quarter 1/2014, 28; Quarter 2/2014, 19, Quarter 3/2014, 64; Quarter 2/2015, 22.
[183] *Ibid*.
[184] Quarterly Report, Your Europe Advice service, Quarter 2/2015, 22
[185] See Shaw et al, 'Getting to Grips', n.36.
[186] E.g. *R (on the application of Adetola v First Tier Tribunal (IAC), Secretary of State for the Home Department* [2010] EWHC 3197 (Admin); *R (on the application of Essa) v Upper Tribunal (IAC), Secretary of State for the Home Department* [2012] EWHC 1533. See also Shaw and Miller, n.40, 156.
[187] *Papajorgji* [2012] UKUT 00038 (IAC). See also *ZH (Afghanistan) v Secretary of State for the Home Department*, n.51.
[188] Commission 2012-2013 Report, n.163, 59.

4.2. Fraud – UK rules on 'abuse of a right to reside' under Directive 2004/38

In January 2014, the UK amended the EEA Regulations to introduce **new measures** to tackle **'abuse of rights and fraud'**[189]. Specifically, Reg 21B EEA Regulations defines as 'an abuse of a right to reside': engaging in conduct which appears to be intended to circumvent the requirement to be a qualified person[190]; **attempting to enter the United Kingdom within 12 months of being removed as a result of being found not to be exercising free movement rights under the CRD**; entering, attempting to enter or assisting another person to enter or attempt to enter a marriage or civil partnership of convenience; or fraudulently obtaining or attempting to obtain, or assisting another to obtain or attempting to obtain, a right to reside. The Secretary of State may make an exclusion or deportation order on the grounds of 'abuse of rights' where there are '**reasonable grounds** to **suspect** the **abuse** of the right to reside and it is **proportionate** to do so'. The provision makes clear that it **may not be relied upon systematically**.

The explanatory note accompanying this amendment claims that Reg 21B is necessary to give effect to Article 35 CRD, which allows Member States to adopt the necessary measures to refuse, terminate or withdraw any rights conferred by Directive 2004/38/EC in the case of abuse of rights or fraud. The explanatory note makes clear the UK Government's intention to prevent EU citizens from evading the requirements for extended residence rights under Article 7 CRD by leaving and then re-entering the UK in order to re-trigger initial residence rights granted by Article 6 CRD.

There is **little guidance** on what will be considered an **'abuse of the right to reside'** beyond attempts to re-start the clock on Article 6 CRD rights by temporarily leaving the UK, or entering into marriages of convenience. This relatively new amendment is only recently being cited before national courts and current case-law, since it focuses on marriages of convenience, does not provide any further indication as to the operation of Reg 21B. However, the UK Government did announce, through its Budget 2014 Policy Costings document that the **recent restrictions on access to social security**, outlined in ch.2, would be **accompanied by additional compliance checks by HM Revenues and Customs** 'to improve detection of when an [EU citizen] ceases to be entitled to these benefits'[191]. All claims by EU citizens for social welfare will now trigger a compliance check. This policy is arguably in breach of Article 14(2) CRD, which stipulates that verification checks relating to an EU citizen's continued right to reside in the host State will not be carried out systematically[192].

[189] Amended by the Immigration (European Economic Area) (Amendment) (No.2) Regulations 2013, SI 2013/3032, Sch.1, para.18.
[190] i.e. an EU worker, a self-employed Union citizen, or a self-sufficient Union citizen with comprehensive medical insurance, as required for extended residence rights under Art.7 CRD
[191] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/295067/PU1638_policy_costings_bud_2014_with_correction_slip.pdf, 54 Last accessed 7th March 2016.
[192] See also O'Brien, n.83.

5. REFUSAL OF ENTRY OR RESIDENCE AND EXPULSIONS OF EU CITIZENS AND THEIR FAMILY MEMBERS

KEY FINDINGS

- Rules relating to the expulsion of Union citizens on grounds of public policy, public security, and public health, are generally accurately transposed in the UK. The UK's approach to determining the effect of periods of imprisonment on length of residence for the purposes of protection from expulsion have also been confirmed as permissible by the Court of Justice.
- As a result of administrative changes and a more concerted effort to remove foreign national offenders, refusals of entry, rejection of residence documentation, and expulsions are on the rise in the UK. Nevertheless, national courts consistently recognise the 'European dimension' to deportation cases.
- *Chen* and *Ruiz Zambrano* carers do not benefit from the protection from deportation offered by Directive 2004/38/EC.
- Recent amendments to UK transposing measures provide a legislative footing to administrative programmes, which seek to remove individuals for not meeting the requirements of a right to reside under the Directive.

5.1. Refusal of entry or residence

Articles 27 and 28 CRD are transposed into UK law by virtue of Regs 19, 20(6), and 21 EEA Regulations. These provisions permit refusal of entry and residence on the grounds of **public policy, public security and public health**, though with restrictions on the use of these provisions as a result of permanent residence or ten-year residence, in accordance with the Directive. However, the UK does seek to emphasise this right to restrict entry and residence within its territory by making explicit reference to Reg 19 (and related provisions) in those EEA Regulations that confer residence rights upon EU citizens and their family members[193]. **Home Office Guidance also requires caseworkers to consider these issues before issuing residence documentation**[194]. Although **national courts** accept that activity triggering public policy and public security grounds does not have to be criminal, they have held that it will **rarely be permissible to refuse to admit** an individual in relation to **activity that is not even unlawful under UK law**[195].

Statistics issued by the UK Home Office indicate that 1,409 Union citizens were refused entry and removed at a port in 2014. This figure increased by 26% to 1,779 in 2015. The Home Office states that 'increases in the removal of EU nationals comprise the removal of more criminals and those not exercising Treaty rights'[196]. In relation to the former, this might relate to a change in administrative guidance to the effect that **<u>all</u> Union citizens**

[193] i.e. Regs 13, 14, and 15 EEA Regs.
[194] Home Office Guidance, 'Direct family members', n.131.
[195] *GW (Netherlands)* [2009] UKAIT 50, concerning the expression of views that Islam should not be tolerated or followed.
[196] National Statistics 'Removals and Voluntary Departures', October – December 2015, p.6, available at: www.gov.uk.government/publications/immigration-statistics-october-to-december-2015/removals-and-voluntary-departures .

issued with a custodial sentence must be considered for deportation, where previously this was restricted to sentences of over two years' imprisonment[197].

Statistics relating to the exercise of residence rights by Union citizens and their family members are more complex, since the **UK does not oblige Union citizens to apply for residence documentation**. Nevertheless, the **refusal of residence certificates and cards**, where Union citizens do apply, has **risen steadily**, though this might relate to the UK's reclassification of previously 'invalid applications' (this category allows for a procedural rejection of an application for residence documents on the basis that important information is missing from the application. Where an application is categorised as invalid, EU citizens must apply again and pay the UK's 'processing fee' for a second time) to outright rejections. In 2012, 9,478 applications for residence documentations were rejected, with a further 14,438 categorised as invalid. In 2013, there were 20,922 refusals and 4,100 invalid applications. 2014 saw the rejection of 21,719 applications for residence certificates or cards and the refusal to issue a further 6,387 on the grounds that applications were invalid. However, by way of comparison, 32,219 applications for residence documents were granted in 2012, 38,746 in 2013, and 42,638 in 2014[198].

The majority of national case-law concerning residence rights and Articles 27 and 28 CRD concern whether or not EU citizens or their family members enjoy permanent residence rights. In particular, national courts have held that **time spent in prison will not constitute 'legal' residence for the purposes of attaining a permanent residence** right under Article 16 CRD[199]. Similarly, they have concluded that terms of imprisonment **break the continuity of residence required** by Article 16 CRD and that an **individual cannot aggregate periods of legal residence before or after imprisonment** to accumulate the requisite five years[200]. Nevertheless, domestic courts have also displayed a willingness to question this approach in line with developments in EU law, following the CJEU decisions of *Tsakouridis* and *PI*[201]. However, following a reference for a preliminary ruling[202], the **Court of Justice has confirmed these conditions as correct**[203].

As discussed in ch.4, beyond refusal of entry and residence rights on grounds of public policy, public security and public health, the UK has recently introduced new rules on re-entry that potentially infringe the Article 6 CRD rights of Union citizens. Reg 21B defines as an **'abuse of rights', an attempt to enter the UK within 12 months of being removed from its territory as a result of not meeting the residence conditions of the CRD** where the individual is not able to meet any conditions of a right to reside beyond those conferred by Article 6.

Reasons for refusals of entry and residence are not provided by the Home Office beyond the fact that individual citizens do not meet the requirements of Article 7 CRD. In other words, **it is likely that individuals are being deported following an application for**

[197] Home Office Guidance, 'Criminal Casework – European Economic Area (EEA) Foreign national offender (FNO) cases', 6 October 2015, 5.
[198] National statistics, 'Table ee_02: Grant and Refusal of Residence Documentation (excluding Worker Registration Scheme) to EEA Nationals and their Family Members, by Country of Nationality', available at: https://www.gov.uk/government/publications/immigration-statistics-april-to-june-2015/list-of-tables#european-economic-area .
[199] *PM (Turkey) v Secretary of State for the Home Department* [2011] UKUT 89 (IAC); *HB* [2008] EWCA Civ 806; *Jarusevicus v Secretary of State for the Home Department* [2012] UKUT 120 (IAC); *C v Secretary of State for the Home Department* [2010] EWCA Civ 1406.
[200] *LG and CC (Italy)* [2009] UKAIT 00024 ; *C v Secretary of State for the Home Department, ibid*.
[201] Case C-145/09 *Tsakouridis* [2010] ECLI:EU:C:2010:708; Case C-348/09 *PI* [2012] ECLI:EU:C:2012:300.
[202] *Onuekwere* [2012] UKUT 269 (IAC).
[203] Case C-378/12 *Onuekwere* [2014] ECLI:EU:C:2014:13.

social security/welfare, with the consequent decision that they lack the resources required for self-sufficiency which is required for extended residence rights to be enjoyed by non-economically active Union citizens. Indeed, as mentioned in section 4 above, the UK Government announced as part of its Budget 2014 Costings that **recent restrictions** on **access to social security** will be **accompanied by additional compliance checks** by **HM Revenue and Customs 'to improve detection** of **when an [EU citizen] ceases** to **be entitled** to… **benefits'.** This would establish when an EU citizen ceases to be a worker, and also, therefore may cease to have residence rights under the CRD, depending on retention of status, self-sufficiency and health cover.

In terms of **procedural safeguards** in relation to refusals of entry and residence cards, **concerns raised** in the **Commission's** report and the **European Parliament's study** about UK transposition of Articles 30 and 31 CRD **do not appear to have been addressed**. In fact, more **recent amendments** to the EEA Regulations appear to **widen the gap** between the protection offered by the Directive and the Regulations. For instance, as discussed previously in s.1.2.3, **new restrictions** have been imposed in relation to the **appeal rights of partners in durable relationships** with Union citizens, requiring them to provide proof of relationship before appeal rights will be granted. More broadly, the UK imposes a **requirement that family members produce evidence that they are**, *inter alia*, indeed the **family member of an EEA national *before* they are granted appeal rights**[204]. This is clearly potentially problematic since, where an individual is refused entry or residence on the basis that they are not family members under the CRD, the requirement to provide proof of the applicant's status as a family member is the very basis of the substantive appeal. Reg 27(1) EEA Regulations continues to stipulate that **certain appeals cannot be made from within the United Kingdom**.

5.2. Expulsions of EU citizens and their family members

Regs 19 and 21 EEA Regulations transpose the **rules on expulsion** contained in Articles 27 and 28 CRD into UK law and, it is submitted, are **compliant with the Directive**. Reg 21(5)(e) EEA Regulations explicitly stipulates that a person's previous criminal convictions do not of themselves justify an expulsion decision. However, recent changes to Home Office Guidelines mean that **all EU offenders given one or more custodial sentences are referred for consideration for deportation**. There is no longer a requirement that the sentence is of particular length before referrals are made[205]. 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 the offence was committed to inform a deportation decision[206]. 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[207], escalating violence[208], and even financial circumstances[209], to determine a present threat on the facts. The **risk of re-offending is often central to the question of whether the appellant poses a *present* threat** to a fundamental interest of society but, post-*Tsakouridis*, national courts have also shown a **willingness to consider the impact of**

[204] Reg 26(3) EEA Regulations.
[205] Home Office Guidance, 'Criminal Casework – European Economic Area (EEA) Foreign national offender (FNO) cases, 6th October 2015, 5.
[206] *A, B, C v Secretary of State for the Home Department* [2013] EWHC 1272 (Admin); *BF (Portugal) v Secretary of State for the Home Department* [2009] EWCA Civ 923.
[207] *Jarusevicius v Secretary of State for the Home Department*, n.199.
[208] *Batista v Secretary of State for the Home Department* [2010] EWCA Civ 896.
[209] *Flaneur's Application for Judicial Review, Re* [2011] NICA 72.

deportation on rehabilitation and have acknowledged 'a **shared interest between the EEA countries in helping progress towards a better form of life'**[210]. Prospects for rehabilitation in the UK may be compared against those in the home State[211], though more recently the Court of Appeal has noted that less weight will be given to rehabilitation considerations where an individual does not enjoy permanent residence. Moreover, the fact that he/she will not have access to a probation officer if deported will not preclude expulsion[212].

National measures accurately reflect the different levels of protection from deportation offered to EU citizens and their family members residing under Article 7 CRD, permanent residents, and residents exercising free movement rights in the UK for ten years or more[213]. In ascending order, these tiers of protection are labelled 'Levels 1, 2 and 3' by UK administrative authorities and by national courts. The **Court of Justice** has **recently confirmed the UK approach of requiring *continuous, legal* residence** in the ten years prior to the **deportation** decision for Level 3 **protection to be triggered**, though this is not an explicit requirement of the CRD[214]. **Meaningful access** to Level 3 protection is arguably **severely hindered by these requirements**, since periods of imprisonment do not constitute legal residence and can also break the continuity of residence. Most deportation decisions follow a period of imprisonment thereby precluding access to Level 3 protection even for EU citizens who had lived in the UK for decades prior to their imprisonment. Nevertheless, the Court of Justice has confirmed that the UK approach of counting *backwards* for the deportation order is in line with the wording of Article 28, though a holistic consideration of the EU citizen's integrative links is also required[215]. This approach has been incorporated into Home Office Guidance[216]. Nevertheless, **at the administrative level, a lack of consistency** as to whether a person will be considered to have resided in the UK for the past ten years, despite a period of imprisonment prior to the deportation order, has led to a 'luck of the draw' application of Level 3 protection[217].

UK courts consistently recognise that **restrictions on free movement rights** on grounds of public policy, public security and public **health must be interpreted strictly**[218]. They have also explicitly stated that **operational manuals do not provide formal legal categories**[219] and have openly questioned whether administrative guidance adequately distinguishes between different levels of protection, particularly 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[220]. This is now also made plain in administrative guidance[221].

Examples of crimes justifying deportation of EU citizens residing under Article 7 CRD include culpable homicide[222], the use of forged or stolen passports[223], and conspiracy to

[210] *Ibid.*
[211] *R (on the application of Essa) v Upper Tribunal (IAC)* [2012] EWCA Civ 1718.
[212] *Secretary of State for the Home Department v Dumliauskas, Wozniak, Me (Netherlands)* [2015] EWCA Civ 145.
[213] Regs 19 and 21 CEEA Regs.
[214] Case C-400/12 *MG* [2014] ECLI:EU:C:2014:9. At national-level, see *HR (Portugal) v Secretary of State for the Home Department* [2009] EWCA Civ 371.
[215] Case C-400/12 *MG*, ibid.
[216] Home Office Guidance, 'Criminal Casework', n.205, 5.
[217] Compare *Bulale* [2008] EWCA Civ 806 and *VP (Italy) v Secretary of State for the Home Department* [2010] EWCA Civ 806.
[218] *Essa* [2012] EWHC 1533 (Admin).
[219] *LG (Italy) v The Secretary of State for the Home Department* [2008] EWCA Civ 190.
[220] *Secretary of State for the Home Department v FV (Italy)* [2012] EWCA Civ 1199.
[221] Home Office Guidance, 'Criminal Casework', n.205.
[222] *NYK* [2013] CSOH 84.

handle stolen goods[224]. Concrete **examples** of offences that have been held to **constitute 'serious' grounds of public policy and security** include serious domestic burglaries[225], and violent crimes against the person[226]. The Court of Appeal considers that UK authorities have a certain amount of discretion in deciding the level of violence law-abiding citizens must tolerate, with due regard to the seriousness of the conduct under domestic law[227]. Administrative guidance provides the following examples of conduct **constituting 'imperative grounds of public security'**: murder, terrorism, drug trafficking, serious immigration offences or serious sexual or violent offences carrying a maximum penalty of ten years or more imprisonment[228]. Nevertheless, **UK courts have generally adopted a restrictive approach** here holding that even if, in line with the CJEU judgments in *Tsakouridis* and *PI,* the thresholds include 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'**[229]. The future commission of even serious offences will not be sufficient and the difference between 'serious grounds of public policy' and 'imperative grounds of public security' is not merely a matter of degree but also a qualitative difference[230].

As already noted, the UK does not consider ***Chen* and *Ruiz Zambrano* carers** to benefit from the higher level of protection from deportation afforded by the CRD. Instead, **expulsion decisions are made under ordinary UK immigration law**, according to the question of whether deportation would be 'conducive to the public good'[231].

According to **official statistics**, there were **20% more enforced removals of EU citizens in 2015 than in 2014** (3,765, compared with 3,128). In addition, there were 54% more voluntary departures (714 in 2015 compared to 463 in 2014). Though voluntary departures might occur for a variety of reasons, in the context of Union citizens convicted of criminal convictions, this may be the result of the **introduction of the Early Removal Scheme and the Tariff-expired Removal Scheme for foreign national offenders**. The former scheme allows determinately sentenced foreign national offenders to be released from prison any time after the halfway point of their custodial sentence for the specific purpose of being removed from the UK to their home State. The latter scheme applies to indeterminately sentenced foreign national offenders who can be released having served their minimum tariff, and without the need for consideration by a parole board, for the purposes of deportation. However, both schemes are processed under official deportation orders[232].

Reg 21 EEA Regulations **transposes the stipulation** in Article 27 CRD that **deportation decisions shall not be made to serve economic ends**. Moreover, Reg 19(4) EEA Regulations transposes the rule, laid down in Article 14(3) CRD, that removal will not be the automatic consequence of recourse to the social assistance system of the United Kingdom. Nevertheless, the UK has **recently taken regulatory steps to enforce the removal of EU citizens whom it considers no longer meet the residence conditions of the CRD**. Specifically, Reg 19(3) now explicitly states that an EU citizen may be

[223] *R v Clarke (Thomas)* [2008] EWCA Crim 3020.
[224] *Jarusevicius v Secretary of State for the Home Department*, n.199.
[225] *R v Laurusevicius (Vytautas)* [2008] EWCA Crim 3020.
[226] *B (Netherlands) v Secretary of State for the Home Department* [2008] EWCA Civ 806.
[227] *Ibid*.
[228] Home Office Guidance, 'Criminal Casework', n.205.
[229] *LG (Italy),* n.219.
[230] *Ibid.*
[231] Reg 21A(3)(a) EEA Regulations.
[232] Home Office Guidance, 'Criminal Casework', n.205, 12

removed from the United Kingdom if that person does not have, or ceases to have a right to reside under the EEA Regulations[233].

In any case, prior to this, there was clear evidence of **targeted administrative efforts to deport EU citizens from the UK on economic grounds**. For instance, in April 2010, the then-UK Border Agency introduced a scheme, which ran across London and the South of England, whereby homeless EU citizens were required to attend an interview at a local police station to determine whether they were exercising residence rights under the CRD. *The Guardian* reported in July 2010 that 200 people had been targeted by the project, 100 of whom were served removal notices and 13 of whom had already been deported, one month into the project[234]. Shaw et al question the lawfulness of such deportations since homeless EU citizens, not relying on social welfare in the UK, arguably reside in the UK as self-sufficient citizens. They note that, in one unreported case, the measures have been successfully challenged as disproportionate[235]. While Shaw et al remark upon the inherent irony of the pilot scheme since it **ignores the fact that EU citizens, as a matter of EU law, have the right to return**[236], **this legal possibility has been closed** by the recently introduced Reg 21B(b) EEA Regulations, which defines **re-entry following such removals without meeting the conditions for an extended right to reside as an abuse of free movement rights**. However, the compatibility of these provisions with EU law remains open to question.

A 2013 report by *Inside Housing* indicates that this removal scheme was revived, on at least one occasion. The article states that 63 Romanians were questioned in London, around 20 of whom were subsequently deported 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…on the grounds that they did not enjoy a right of residence in the UK under Union law**[237] [emphasis added]'.

The **removal of EU citizens on economic grounds** comes **before the courts extremely rarely**. More usually, cases determining the residence rights of Union citizens arise in the context of applications for social welfare. While courts frequently conclude that EU citizens and/or their family members do not enjoy residence rights for want of sufficient resources, this determination **usually leads national courts to categorise such individuals as 'lawfully present' in the United Kingdom but without a 'right to reside' under the CRD**. Individuals are then subject to ordinary UK immigration control and potentially liable for deportation by the Secretary of State[238].

In conclusion, the number of refusals of entry or residence, as well as expulsions of Union citizens from the UK territory, is steadily on the rise. As outlined above, Home Office documents indicate that this is the result of a more concerted effort to refuse entry or to expel Union citizens convicted of a criminal offence and Union citizens who do not meet the conditions attached to the enjoyment of extended residence rights under Article 7 CRD (where no other residence rights under EU or national law are available).

[233] Amended by the Immigration (European Economic Area) (Amendment) (No.2) Regulations 2013, SI 2013/3032, Sch.1 para.13(b), entering into force 1 January 2014.
[234] Neilen, C., 'Plans to Deport Eastern European Rough Sleepers Comes Under Fire', The Guardian, 20 July 2010, available at: http://www.thequardian.com/society/2010/jul/20/eastern-european-rough-sleepers-deported;See also Shaw et al, 'Getting to Grips', n.36, 31.
[235] Shaw et al, 'Getting to Grips', n.36, 32.
[236] *Ibid.*
[237] http://www.insidehousing.co.uk//6527844.article Last accessed 6th March 2016. Information taken from the contributions of T. Horsley to Horsley and Reynolds, n.55. See also Commission 2012-2013 Report, n.163, 21.
[238] *Kaczmarek v Secretary of State for Work and Pensions*, n.94, particularly para.5.

6. CONCLUSIONS

Directive 2004/38/EC remains largely and correctly transposed into UK law. Indeed, some of the potential barriers to Union citizens' free movement rights identified in the past have been removed. For instance, the CJEU judgment in *Metock* has now been implemented in the UK, such that Union citizens are no longer required to have lived in their home State with a family member before the latter can enjoy derived residence rights under the CRD.

However, some legal and practical obstacles to free movement still stand, affecting a wide range of individuals who seek to exercise free movement rights (or derived rights) and related equal treatment rights. For instance, self-employed Union citizens continue to have a more limited opportunity to retain that status under the UK's transposing EEA Regulations, than is offered by Article 7(3) CRD. The UK is still yet to transpose Article 24(1) CRD on equal treatment into national law. A particular concern is the UK's use of a 'right to reside' test for access to many of its social security and welfare benefits, which can be particularly problematic for non-economically active Union citizens. In addition, the UK Home Office, supported by national courts, continues to refuse to consider access to the UK's National Health Service as a means of meeting the requirement of 'comprehensive medical insurance' for the enjoyment of extended residence rights by non-economically active individuals. In specific circumstances, this could also have repercussions for the permanent residence rights of Union workers.

Crucially, significant recent changes at the national level have introduced new obstacles to free movement. This includes the introduction of a 'minimum earnings threshold' as the primary approach to categorising individuals as workers, which when combined with the 'right to reside' test, has potentially serious repercussions for access to social security and assistance as well as health-care by Union workers. This could be particularly problematic for workers on low wages and/or zero-hours contracts. Further, having already been identified in previous reports as failing to transpose directly the more favourable residence rights available to Union jobseekers, recent amendments at the national level have, in fact, further limited their entry, residence and equal treatment rights.

The UK has also taken steps to define a Union citizen's re-entry into the UK under Article 6 CRD, having been removed for not meeting the requirements of Article 7 CRD, as an abuse of free movement rights. These statutory amendments place on a legislative footing existing and ongoing administrative efforts to remove Union citizens from the UK for failing to meet the conditions for extended residence required by Article 7 CRD. In respect of deportations on grounds of public policy, public security, and public health, Articles 27 and 28 CRD are generally accurately transposed into UK law, while UK approaches to calculating duration of residence for the purposes of enhanced protection from deportation have recently been confirmed as permissible by the Court of Justice. Increases in deportations of Union citizens convicted of a criminal offence are underpinned by administrative changes in approach, including the referral of all Union citizens convicted of one or more custodial sentences to the Home Office for consideration for deportation. However, the UK courts have consistently shown an ability to recognise the 'European dimension' to such deportation cases, and generally apply the material safeguards contained in the CRD effectively. The UK is still yet to transpose Article 27(4) CRD directly within the EEA Regulations. This provision obliges the UK to allow re-entry to those Union citizens, to whom it has issued a passport, even if that document has since expired.

In relation to the third country national family members of Union citizens, the UK has taken steps to remove some of the legal barriers to free movement, though others remain. Thus, following the Court of Justice's *McCarthy* judgment, the UK now recognises the residence cards of third country national family members of Union citizens issued by 'qualifying EEA States'. This covers all EEA States except Switzerland. The UK continues to adopt a restrictive approach to the *Singh* ruling, allowing only those British nationals who have been employed or self-employed in another Member State, to bring third country national family members back with them to the UK as beneficiaries under Article 3 CRD. Beyond Directive 2004/38, the UK has also taken a restrictive approach to the residence and equal treatment rights of *Ruiz Zambrano* and *Chen* carers.

In addition to the various legal obstacles to free movement summarised above, the most recurring barriers to the exercise of free movement rights by Union citizens and their family members are more practical in nature. Petitions to the European Parliament and complaints to the Your Europe Advice service reveal frequent issues with delays in relation to applications for residence documentation. Original documents, such as passports, are frequently retained during the application process, making other travel extremely difficult but often also making it harder to secure work and accommodation in the UK. As well as administrative delays, there are further bureaucratic issues caused by frequent requests for additional documentation, often to prove that marriages or long-term relationships are genuine. Relatedly, there is consistent evidence of an over-reliance on accusations of marriages of convenience as a means of denying entry to third country national family members. Alternatively, third country national family members are, at times, erroneously processed under ordinary immigration law.

Reports of discrimination against Union citizens in the UK are mixed. The treatment of EU citizens by the British media was highlighted as problematic by a UK inquiry into the ethics of the press. There is also evidence that citizens from those Member States that acceded to the EU in 2004 and afterwards may be exposed to discrimination in the workplace as well as being disproportionately affected by administrative efforts to remove EU citizens for not meeting the conditions for extended residence contained in Article 7 CRD. Following the outcome of the UK's referendum on Union membership, there have been reports of a growing number of racist and xenophobic incidents. The discrepancy between the treatment of same-sex and opposite-sex civil partnerships also persists.

Thus, while overall the majority of Directive 2004/38/EC is correctly transposed into UK law and effectively implemented at the administrative and judicial levels, some potentially significant barriers remain. Critically, some of these obstacles – such as new limitations to the residence and equal treatment rights of Union jobseekers - generally arise not from a lack of transposition of the provisions of the Directive but from more proactive recent amendments to UK transposing legislation to curtail the exercise of free movement by Union citizens and their family members.

ANNEX I: TRANSPOSITION OVERVIEW TABLE

Table 1: Transposition overview

Directive's provisions	National provisions	Assessment	Changes since 2008
Article 3(2) Beneficiaries: Family members Partners	The Immigration (European Economic Area) Regulations 2006, SI 2006/1003 Regulation 7(3) Regulation 8 – "Extended Family Member" Regulation 12 – Issue of an EEA Family Permit Regulation 16 – Issue of a registration certificate Regulation 17 – Issue of residence card	**Incomplete transposition** The UK's Immigration (EEA) Regulations are broadly in line with the rights contained in Article 3(2) CRD. However, there are arguably some gaps in protection, but also some evidence of more favourable rights. 1) Accessibility: Article 3(2) CRD not only defines beneficiaries but also provides brief information on the rights conferred. Reg 8 EEA Regulations only provides definitions with associated rights detailed over several other regulations. 2) Facilitating entry: Regs 12, 16 and 17 provide an exception from the requirement to justify denial of entry of extended [other] family members for reasons of national security. The requirement to undertake an extensive examination of personal circumstances is transposed. There is no explicit replication of the general obligation to facilitate entry and residence for family members. The focus is on the issuing of residence documentation where 'in all circumstances' it appears 'appropriate' to issue the relevant documents. This can be considered a gap in tansposition. 3) More generous provision: the UK's EEA Regulations appear more generous than the strict	The Commission's 2008 Report considered that the UK had failed to transpose Article 3(2) CRD correctly. The Commission's concerns appear to relate to the UK's failure to transpose the substance of the Metock ruling. The UK has now amended the EEA Regulations to give effect to this ruling and also to the CJEU decision in Rahman: The Immigration (European Economic Area) (Amendment) Regulations, SI 2011/1247, reg 2(3) removed the requirement that the family member/extended family member had previously resided 'in another EEA State', with 'in a country other than the United Kingdom'. The Immigration (European Economic Area) (Amendment) (No.2) Regulations, inter alia, give effect to the CJEU ruling in Case C-83/11 Rahman by removing the stipulation, previously contained in the EEA Regulations, that the family member/extended family member must have resided in a country other than the UK with the relevant EU citizen.

Directive's provisions	National provisions	Assessment	Changes since 2008
		wording of the CRD regarding the entry/residence of extended family members on serious health grounds. The latter focuses on personal care of the family member by the Union citizen. Under Reg 8(3), the former permits entry/residence where personal care is required by the EEA national, his spouse, or his civil partner. Reg 8(4) EEA Regulations also extends entry and residence rights to extended family members of EU citizens who would meet the requirements of ordinary national immigration rules. Reg 8(5) EEA Regulations can be viewed as broadly comparable to Art 3(2)(b) CRD, though the phrasing is altered from 'duly attested' in the Directive to 'can prove to the decision maker that he is in a durable relationship with the EEA national', in the Regulations.	
Articles 5(1) and 5(2) Right of entry No entry visa or equivalent formality may be imposed on Union citizens. • To facilitate granting third country	The Immigration (European Economic Area) Regulations 2006, SI 2006/1003 Regulation 11 – Right of Admission to the United Kingdom Regulation 12 – Issue of EEA Family Permit	**In line with the Directive** Following an amendment to the EEA Regulations, (by Immigration (European Economic Area) (Amendment) (No.2) Regulations 2013/3032 Sch.1 para.6(a) April 7, 2014), Reg 11 (2) EEA Regulations permits a third country national family member to enter the United Kingdom where they have a valid passport and a 'qualifying EEA State residence card'. Previously the UK only admitted TCN family members who had an 'EEA family permit' issued by the UK. Initially, however, only Germany and Estonia were categorised as 'qualifying EEA States'.	The Commission's 2008 Report listed the UK amongst five Member States which 'do not provide for the visa exemption for family members holding a residence card issued by another Member State'. This issue has now been addressed following UK implementation of the CJEU judgment in Case C-202/13 McCarthy (see adjacent column).

Directive's provisions	National provisions	Assessment	Changes since 2008
family members the necessary entry visas		However, following the CJEU decision in Case C-202/13 *McCarthy*, Reg 2 of the Immigration (EEA) Regulations 2006 has been amended, via the Immigration (EEA) (Amendment) Regulations, so as to include all EEA States except Switzerland within the definition of 'qualifying EEA State'.	
Article 6 Right of residence up to 3 months without any conditions or any formalities other than ID	The Immigration (European Economic Area) Regulations 2006, SI 2006/1003 Regulation 13 – Initial Right of Residence	**In line with the Directive** The UK's transposing regulations broadly comply with the requirements of Article 6 CRD, namely that Union citizens are given an initial right of residence of up to three months subject to no formalities other than the presentation of a valid passport or identity card. Similarly, third country national family members are only required to provide a valid passport to acquire the same residence right. However, the language of Reg 13 suggests a more permissions-based, as opposed to rights-based approach in the UK regulations, e.g. EEA nationals may reside for 'a period not exceeding three months…provided that he holds a valid identity card or passport'. Derogations from free movement on grounds of public policy, public security and public health, under Arts 27 and 28 CRD, are incorporated into the substance of the initial right of residence in Reg 3(4).	The Commission did not identify any problems with the UK's transposition of Article 6 CRD in its 2008 Report. No changes since 2008 report.
Articles 7(1) and 7(2) Right of residence for more than 3 months for EU	The Immigration (European Economic Area) Regulations 2006, SI 2006/1003 Regulation 14 – Extended Right	**In line with the Directive** Regulation 14 seeks to make it clear that former family members of EU nationals, who retain their family member status under the Regulations,	The 2008 Report from the European Commission did not identify any issues with the UK's transposition of Article 7(1) and (2) CRD. No changes since 2008 report.

Directive's provisions	National provisions	Assessment	Changes since 2008
citizens and their family members based on employment, sufficient resources or student status	of Residence Regulation 6 – "Qualified person" Regulation 4 – "Worker", "self-employed person", "self-sufficient person" and "student"	continue to be entitled to an 'extended right of residence' for as long as they retain that status. As with Article 6 CRD, outlined above, the language of the UK's transposition of Article 7 CRD reflects the UK's permissions-based approach to free movement e.g. while Article 7 CRD confers free movement rights on 'all Union citizens', Regulation 6 talks instead of 'qualifying persons' i.e. those who meet the conditions for residence set by the CRD. Similarly, the free movement derogations contained in Articles 27 and 28 CRD are incorporated into the substance of extended residence rights within Regulation 14. The conditions attached to the exercise of free movement rights by non-economically active EU citizens (and their family members) - i.e. sufficient resources and comprehensive sickness insurance cover - are contained in Reg 4 EEA Regulations and are compliant with the CRD. Indeed, except where more detail is provided, the CRD is largely reproduced verbatim. In line with Article 7 CRD, Reg 4 requires non-economically active Union citizens to have 'sufficient resources not to become a burden on the social assistance system of the United Kingdom'. This risks creating administrative confusion when compared with the reference to unreasonable burden in Article 14 CRD/Reg 13 EEA Regulations, and the CJEU's approach in Case C-184/99 Grzelczyk. This has led to complaints to the Your Europe Advice Service. However, this is a potential problem with the	However, the Report did include the UK amongst a group of Member States that had failed to transpose Article 7(3) CRD, on retention of worker status, correctly. Since this table does not include that provision, it will not be discussed here but this situation is discussed in Question 1 'Overview of the Transposition of Directive 2004/38/EC and Recent Developments'.

Directive's provisions	National provisions	Assessment	Changes since 2008
		Directive itself, and not UK transposition.	
Article 14 Retention of residence rights as long as they do not become an unreasonable burden on the social assistance system	The Immigration (European Economic Area) Regulations 2006, SI 2006/1003 Regulation 13 – Initial Right of Residence Regulation 14 – Extended right of residence Regulation 20B – Verification of Right of Residence Regulation 19 – Exclusion and Removal from the United Kingdom Regulation 6 – "Qualified person"	**Incorrect transposition** While the transposition of Article 14 is largely in line with the Directive, with the transposition of Article 14(4) appears incorrectly with regards jobseekers. There are significant potential disparities between the protection offered by Article 14 CRD and by the UK's EEA Regulations. However, the differences between the EU and UK instruments are the result of a deliberate change in policy within the UK. Article 14(1) is fully transposed into UK law, via Regulation 13. Regulation 14 adequately transposes the first paragraph of Article 14(2) into UK law. However, the wording and the structure of the UK's transposition of the second paragraph of Article 14(2) CRD is potentially problematic. This might provide some explanation for the frequent complaints in the Your Europe Advice reports that individuals are subject to additional checks. While Reg 20B EEA Regulations requires 'reasonable doubt' from the Secretary of State before verifying an EU citizen's/family member's right to reside, this requirement is not repeated for the issuing of residence documentation. This is where most additional documentation complaints arise. Indeed, Reg 20B permits the Secretary of State to require supporting evidence and/or invite the EU citizen or family member (where relevant) to interview.	In the Commission report, the UK was not included in a list of Member States that had explicitly transposed the provision prohibiting systematic verification of the conditions attached to the right of residence. However, the EEA Regulations were amended (by virtue of Immigration (European Economic Area) (Amendment) (No.2) Regulations, SI 2013/3032 Sch.1 para.16, in January 2014. Reg 20B(7) now makes clear that verification of the right of residence cannot be done systematically. However, related problems still persist in relation to the issuing of residence documentation, outlined in the adjacent column. As per the 2008 Report, the UK continues to exclude expulsion as an automatic consequence of recourse to its social assistance system explicitly, via Reg 19(4) EEA Regulations. The most significant development in relation to Article 14 CRD since the Commission's Report is the amendments to the EEA Regulations to restrict the residence rights of jobseekers. These changes are explained in the adjacent column, while the potential obstacles they present to free movement rights is

Directive's provisions	National provisions	Assessment	Changes since 2008
		Moreover, a combined reading of the provisions under Reg 20B clearly states that the Secretary of State may decide that an individual does not have a right to reside following a factual inference drawn about that person's right to reside after they, without good reason, failed to provide information. Reg 20B(7) makes it plain that 'this regulation may not be invoked systematically'. Article 14(3) CRD has now been fully transposed into UK law, via Reg 19(4) EEA Regulations. The largest potential gap in protection relates to the residence rights of jobseekers and the compliance of Reg 6(4)-(11) is open to question. Within the first 91 days of job-seeking, the conditions applied to the residence rights of jobseekers mirror the wording of Article 14(4)(b) CRD almost exactly. They require evidence that the jobseeker is 'seeking employment and has a genuine chance of being engaged'. After 91 days, a jobseeker must provide compelling evidence that he/she is seeking employment and has a genuine chance of being engaged. Any previous periods of job-seeking will be deducted from this 91 days unless there has been a continuous absence from the UK of 12 months since the last period of seeking work. Pursuant to Reg 6(11), unless there is an absence from the UK for a period of 12 months or more, EU citizens who have exhausted their 91-day period may not leave the UK for a short period and restart	discussed in the main text. Chronology of changes: 1 January 2014: introduction of the need for compelling evidence that an EU citizen is seeking work and has a genuine chance of being engaged after having sought work for 6 months - (Immigration (European Economic Area) (Amendment) Regulations (No.2) SI 2013/3032 Sch.1 para.3(e). According to the explanatory note accompanying these amendments, this was to 'reflect the requirements of Article 7(3) of Directive 2004/38/EC'. July 2014: Immigration (European Economic Area) (Amendment) Regulations SI 2014/1451). According to the explanatory note, this was to reflect an interpretation of the CJEU ruling in Case C-292/89 *Antonissen*, in which the Court stated that six months could be considered a reasonable period in which to find work. The UK government interpreted this as spanning periods of employment. As a result, individuals who have worked in the UK but do not retain worker status, are not able to restart the '6-month clock' when their period of employment ends, unless they leave the UK for 12 months or more. Where the 6-month period has been exhausted 'compelling evidence' of work seeking and of a genuine chance of being

Directive's provisions	National provisions	Assessment	Changes since 2008
		the clock on their return, but must provide 'compelling evidence' of job-seeking and of a genuine chance of becoming employed immediately upon their return to the UK.	employed is required. 10 November 2014: reduction of the period of job-seeking to 91 days. According to the explanatory note accompanying the amending regulations (Immigration (European Economic Area) (Amendment) (No.3) Regulations 2014/2761), this reduction reflects the fact that an EU citizen enjoys an 'initial right of residence' under Article 6 CRD/Reg 13 EEA Regulations. When this is combined with 91 days afforded to an individual, after the period of initial residence, as a jobseeker, the EU citizen has enjoyed 6 months residence in the UK.
Article 16 Right of permanent residence	The Immigration (European Economic Area) Regulations 2006, SI 2006/1003 Regulation 15 – Permanent Right of Residence Regulation 3 – Continuity of Residence Regulation 14 – Extended right of residence	**In line with the Directive** The permanent residence rights contained in Article 16 CRD are replicated almost verbatim in the UK's EEA Regulations. The statement in Article 16(1) CRD that 'This right shall not be subject to the conditions provided for in Chapter III' is not explicit in the EEA Regulations. However, it is arguably implied in Reg 14(4), which states that extended residence rights enjoyed under that provision (which are subject to the conditions imposed by the CRD such as employment/self-employment or sufficient resources and comprehensive medical cover) are additional to any rights provided pursuant to Reg 15 on permanent residence.	The 2008 Commission report did not identify any issues regarding the UK's transposition measures in relation to the permanent right to reside. Obstacles arose as a result of the UK's treatment of periods of residence by EU citizens prior to their countries' accession to the European Union as non-qualifying for the purposes of accruing legal residence for permanent residence rights. This has arguably been addressed, by analogy, by the national courts' interpretation of Article 16/Reg 15 EEA Regulations. See e.g. *LG and CC (Italy)* [2009] UKAIT 00024 74; and *Secretary of State for the Home Department v FV (Italy)* [2012] EWCA Civ 1199. This case-law is also reflected in administrative guidance.

Directive's provisions	National provisions	Assessment	Changes since 2008
		Given the quite common complaint, visible in the Your Europe Advice logs, that applicants for permanent residence are often required to meet the ordinary criteria for residence, it may, however, be useful to make this rule more visible in the UK regulations.	
Article 24(1) Equal treatment	Not directly transposed.	**Gap in transposition** The general right to equal treatment conferred upon EU citizens by Article 24 CRD is not directly transposed into the EEA Regulations or national regulations dealing with social security and assistance. Instead, relevant domestic legislation sets the conditions by which Union citizens will gain access to welfare. This is commonly through establishing a 'right to reside' in the UK by residing as a worker or self-employed migrant. For instance: Social Security (Persons from Abroad) Amendment Regulations 2006, SI 2006/1026 This instrument amends existing UK legislation relating to: council tax benefit; housing benefit; income support; jobseekers' allowance; social fund maternity and funeral expenses; and state pension credit. The 2006 Social Security Regulations make access to these social security mechanisms possible for (certain) Union citizens. However, it is clear that the instrument seeks to transpose Article 24(2) rather	The Commission's 2008 Report does not discuss transposition of Article 24(1) CRD. However, there are have been significant developments since 2008 in the UK's approach to Article 24(1) and (2), which should be considered. See the adjacentcolumn for further information.

Directive's provisions	National provisions	Assessment	Changes since 2008
		than Article 24(1) CRD. The 2006 Regulations require applicants to pass an 'habitual residence' test for access to social welfare. 'Habitual residence' is now defined for EU citizens by a 'right to reside' test. The provisions list workers, self-employed migrants and permanent residents as meeting the right to reside test. Individuals residing as self-sufficient EU citizens therefore do not meet the requirements for access to social security. Further, EU jobseekers are also expressly excluded from these key social benefits. The explanatory note, accompanying the 2006 Regulations, explicitly indicates that the amendments were made as a result of the enactment of the CRD, with the purpose of taking account of Article 24(2) CRD. The right to reside test is also contained in instruments regulating other benefits such as the employment and support allowance (The Employment and Support Allowance Regulations, SI 2008/794, Reg 70); and the recently introduced 'universal credit' for contributory benefits in some areas (The Universal Credit Regulations 2013, SI 2013/376). The Education (Student Support) Regulations 2011, SI 2011/1986 Sch.1 Part 2 makes student maintenance support available to EU workers and self-employed EU migrants, but, transposing Article 24(2) CRD and the relevant case-law, restricts access for other EU	

Directive's provisions	National provisions	Assessment	Changes since 2008
		citizens to three years' residence. Since competence to regulate student finance is devolved to the Northern Irish, Scottish and Welsh administrations, similar specific regulations exist in this regard: The Education (Student Loans) (Scotland) Regulations, SI 2007/154; The Education (Student Support) (No.2) Regulations (Northern Ireland), SI 2009/373; The Education (Student Support) (Wales) Regulations, SI 2012/3097. The Social Security (Jobseeker's Allowance: Habitual Residence) Amendment Regulations 2013, SI 2013/3196 explicitly states that claimants will not be considered habitually resident (which is required for access to jobseeker's allowance) until they have resided in the UK (or common travel area) for 3 months. (Regulation 2). The Child Benefit (General) and Tax Credits (Residence) (Amendment) Regulations 2014, SI 2014/1511 restricts jobseekers' access to child benefit and child tax credit to those who have been living in the UK for at least three months (Regs 3 and 5). The Housing Benefit (Habitual Residence) Amendment Regulations 2014, SI 2014/539 amend the Housing Benefit Regulations 2006 to ensure that an EU citizen residing in the UK as a jobseeker and receiving income-based jobseeker's allowance is excluded from housing benefit, where they were previously granted access.(Reg 2).	

Directive's provisions	National provisions	Assessment	Changes since 2008
Article 27 Restriction on the freedom of movement and residence of Union citizens and their family members, on grounds of public policy, public security or public health	The Immigration (European Economic Area) Regulations 2006, SI 2006/1003 Regulation 19 – Exclusion and removal from the United Kingdom Regulation 21 – Decisions taken on public policy, public security, and public health grounds	**Incomplete transposition** The transposition of Article 27 is largely complete and there appear to be no gaps in protection, though Article 27(3) and (4) is not transposed within the Immigration (European Economic Area) Regulations 2006.	The Commission's 2008 Report did not include the UK amongst those Member States it considered to have correctly and fully transposed the material safeguards contained in Article 27 CRD. This is likely to relate to the UK's non-transposition of Article 27(4) CRD within the EEA Regulations. There have been relevant no changes since the 2008 Report.
Article 28 Protection against expulsion	The Immigration (European Economic Area) Regulations 2006, SI 2006/1003 Regulation 21 – Decisions taken on public policy, public security, and public health grounds	**In line with the Directive** One area of potential divergence relates to the highest level of protection from deportation under Article 28(3) CRD/Reg 21(4) EEA Regulations. Reg 21(4) stipulates that the EEA national must have resided in the UK for a continuous period of ten years prior to the relevant decision, whereas Article 28(3) CRD makes no reference to continuous residence. While Reg 21(4) requires the EEA national to have resided in the UK for 'at least ten years prior to the relevant decision', Article 28(3) CRD introduces the arguably more general condition of residence in the 'previous ten years'. This raises the question of whether eligibility for the highest level of protection from deportation under the CRD should be assessed by counting backwards from the date of the deportation order (often following a criminal conviction), or whether a potentially more generous approach permitting	The Commission's 2008 Report did not identify any issues with the UK's transposition of Article 28 CRD. There have been no changes since the 2008 Report.

Directive's provisions	National provisions	Assessment	Changes since 2008
		residence in the UK in the previous ten years should be used. However, the CJEU confirmed that the UK approach, of counting backwards from the deportation order, complied with the CRD in Case C-400/12 *MG*. This must, however, be part of a wider assessment of whether integrative links with the host State have been broken.	
Article 35 Abuse of rights	The Immigration (European Economic Area) Regulations 2006, SI 2006/1003 Regulation 21B – Abuse of rights or fraud Regulation 19 – Exclusion or removal from the United Kingdom	**Incorrect transposition** The UK rules on abuse of free movement rights and fraud arguably go further than Article 35 CRD. In this context, however, this would not equate to offering a more favourable position to EU citizens exercising their free movement rights. Article 35 CRD provides marriages of convenience as an example of abuse of rights, though this is unlikely to be exhaustive. The UK Regulations are much broader, including marriages of convenience but also the circumvention of the conditions attached to free movement (such as work, self-employment or self-sufficiency) or fraudulently obtaining the right to reside. In line with Article 35 CRD, Reg 21B requires that deportation decisions are proportionate and the Regulation cannot be relied upon systematically. A right of appeal is also created though this can only be exercised from outside the UK. Of particular concern is the apparent denial of entry	The Commission's 2008 Report did not identify any issues with the UK's transposition of Article 35 CRD. However, this report was drafted before the UK amended its rules on abuse of rights and fraud which risk non-compliance with the Directive. Thus, there have been potentially problematic changes in the UK since the 2008 Report.

Directive's provisions	National provisions	Assessment	Changes since 2008
		into the UK simply because an EU citizen has been removed in the past 12 months for not residing in the UK as a 'qualified person' i.e. as a working, self-employed or self-sufficient individual, where the EU citizen cannot demonstrate that the conditions for a right to reside, beyond Article 6 CRD rights, will be met. This arguably contravenes the Directive, specifically Article 6 CRD, which allows a right of entry simply with a valid passport or ID card. Moreover, Article 32 CRD arguably limits exclusion orders to those concerning deportation on grounds of public policy and public security.	

ANNEX II: DATA ON REFUSALS AND EXPULSIONS

Table 2: Data on refusal of entry, refusal of residence and expulsions

Data	2012	2013	2014	2015 if available	Reasons
Refusal of entry	N/A	N/A	1,409	1,779	Reasons for refusals of entry and residence are not provided by the Home Office beyond the fact that individual citizens do not meet the requirements of Article 7 CRD. In other words, it is likely that individuals are being deported following an application for social security/welfare, with the consequent decision that they lack the resources required for self-sufficiency which is required for extended residence rights to be enjoyed by non-economically active Union citizens. Also, Union citizens convicted of criminal offences are being refused entry.
Refusal of residence	9,478 refusals (+ 14,438 'invalid' applications)	20,922 refusals (+ 4,100 'invalid' applications)	21,719 refusals (+ 6,387 'invalid' applications	N/A	See column above
Expulsion	N/A	N/A	3,128 (+ 463 'voluntary departures'	3,765 (+ 714 'voluntary departures')	Increase in deportations explained in the Home Office Report accompanying these statistics are the result of the removal of more Union citizens convicted of criminal offences and of those not exercising Treaty rights

Source: National Statistics, 'Removals and Voluntary Departures', October – December 2015, p.6, available at: www.gov.uk.government/publications/immigration-statistics-october-to-december-2015/removals-and-voluntary-departures; National statistics, 'Table

ee_02: Grant and Refusal of Residence Documentation (excluding Worker Registration Scheme) to EEA Nationals and their Family Members, by Country of Nationality', available at: https://www.gov.uk/government/publications/immigration-statistics-april-to-june-2015/list-of-tables#european-economic-area.

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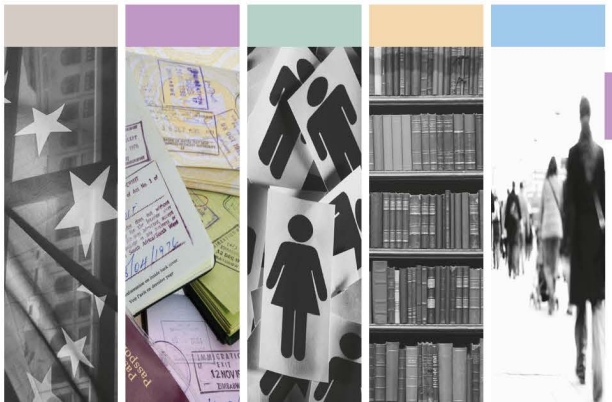

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