

**“FAMILY MEMBERS WHO ARE NOT  
NATIONALS OF A MEMBER STATE”  
UNDER DIRECTIVE 2004/38**

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## INTRODUCTION

- The status of family members.
- Rights of entry and residence of family members under the 2004 Directive.
- The *Metock* Case and its aftermath.
- Addressing abuse of rights.
- Focus on Directive’s provisions, not on problems of implementation by Member States.

## THE STATUS OF FAMILY MEMBERS

- Rights of family members are (at beginning at least) derived through Union citizen.
- Family members may themselves be Union citizens – “any person having the nationality of a Member State.” Have direct actual or potential rights of Union citizenship.
- A family member who is not a national of a Member State not a Union citizen. Rights to be understood differently.

## THE RIGHTS OF ENTRY AND RESIDENCE OF FAMILY MEMBERS(I)

- How are rights structured according to Union/ non-Union citizenship of family member?
- Preamble: rights of Union citizen to be granted to family members, “irrespective of nationality”.
- Rationale for grant: exercise of primary Union citizen’s right should be “exercised under objective conditions of freedom and dignity”.

## RIGHTS OF ENTRY AND RESIDENCE OF FAMILY MEMBERS (II)

- Chapter I: Subject, definitions, beneficiaries
  - Applies to all family members who accompany or join.
- Chapter II: Right of exit and entry
  - Different documentation requirements for UC and non-UC. Facilitation of entry visa for non-UC.
- Chapter III: Right of residence
  - 3 months for all, different documents, non-UC must accompany or join.
  - Plus 3 months, UC right extended to non-UC, different formalities (UC – certificate, non-UC – card).
  - Differential treatment re retention of right of residence.

## RIGHTS OF ENTRY AND RESIDENCE OF FAMILY MEMBERS (III)

- Chapter IV: Right of permanent residence
  - UC to have resided for five years, non-UC to have legally resided *with* Union citizen.
  - Different documentation regimes for UC/non-UC.
- Chapter V: Common provisions
  - Access to employment “irrespective of nationality”, equal treatment for UC extended to non-UC.
- Chapter VI: Restrictions
  - Apply irrespective of nationality. UC has more favourable position re expulsion.
- Chapter VII: Final provisions
  - Article 35 on abuse of rights applies to all. In fact, it will have more of an impact on non-UC where application of national immigration rules in issue.

## METOCK AND ITS AFTERMATH

- *Metock*:
  - *Outlawed* prior lawful residence requirement on grounds of its dissuasive effect on free movement;
  - Rejected strict interpretation of “accompany or join” requirement.
- Calls to amend Directive (Denmark and Ireland).
- November 2008 JHA Council Conclusions.
- Commission action: working group, July 2009 Guidance.

## DEALING WITH ABUSE OF RIGHTS (I)

- Article 35 introduced late in the process.
- Recital 28 of Preamble:
  - marriages of convenience, etc., for “sole purpose” of free movement rights.
- *Metock*:
  - Court mentioned Article 35 as a sop to immigration concerns.
  - AG Poiares Maduro: abuse deemed to cover *Akrich*.
- November 2008 JHA Conclusions:
  - Importance of protecting right of free movement from abuses created by illegal immigration.

## DEALING WITH ABUSE OF RIGHTS (II)

- Commission Guidance (July 2009).
- Directed at other Member States.
- Community law cannot be relied on in case of abuse: there can be no abuse where Union citizens have a Community law right of residence.
- “Sole purpose” test in defining abuse.
- Marriages of convenience and other relationships. Bringing immigration or other advantage not enough. Quality of relationship immaterial.
- Supremacy of Community law: assessment to be carried out in Community law framework, not with regard to national migration law.
- Systematic checks prohibited, but Member States may “rely on previous analyses and experience showing a clear correlation between proven cases of abuse and certain characteristics in such cases”.
- Indicative criteria.
- Burden of proof lies on authorities.

## DEALING WITH ABUSE OF RIGHTS (III)

- Other forms of abuse:
  - Moving to another Member State with sole purpose of evading home Member State immigration laws preventing family reunion.
  - Test is whether exercise of Community rights is “genuine and effective”.
  - If so, Member State of origin should not inquire into personal motives triggering previous move.
- Measures and sanctions against abuse and fraud.
  - Civil, administrative or criminal law sanctions must be effective, non-discriminatory and proportionate.

## CONCLUSION

- Directive provides for high level of protection for non-UC family members. Conceptual fault line between UC and non-UC family members, but, with some exceptions, a broad equality of treatment applies.
- Focus on “freedom and dignity” as much as on dissuasive effect.
- Guidance generally welcome, but at places unclear and “succinct”. Addresses the *Akrich* issue (not covered by the Directive), but not the *Metock* dilemma(which is).