

REPORT
on the Free Movement of Workers
in France in 2010-2011

Rapporteurs: Syham Ghemri
and Fabrice Riem
University of Pau and Pays de l'Adour

October 2011

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Introduction

Several basic texts relating specifically to citizens of the European Union, have been adopted over the period under consideration.

In this context, we can refer specifically to the Circular of 10 September 2010 relating to the conditions for exercise of the right of residence of nationals of the European Union, of other States party to the European Economic Area (EEA) and the Swiss Confederation, as well as their family members.¹

The particular problem of the Roma was a crucial aspect of the French debate on immigration.

1 Circular no. NOR/IMIM/1000/116/C of 10 September 2010 regarding the conditions for the exercise of the right of residence of nationals of the European Union, of other States party to the European Economic Area (EEA) and the Swiss Confederation, as well as members of their family, a text which did not appear in the Official Journal.

Chapter I: The worker: entry, residence, departure and remedies

1. TRANSPOSITION OF PROVISIONS SPECIFIC TO WORKERS

1.1 Circular of 10 September 2010 relating to the conditions for exercising the right of residence of nationals of the European Union, other States party to the European Economic Area (EEA) and the Swiss Confederation, as well as their family members² and Law no. 2011-672 of 16 June 2011 relating to immigration, integration and nationality.³

In its introduction, the Circular stipulates that it, ‘does not cover issues relating to the methods of removal of citizens of the EU’, who were the subject of Circular NOR/IMIM/09/00064/C of 19 May 2009.⁴ It is intended for Prefects and work directors.

The circular recalls that the decision to issue a residence card to a citizen of the EU not subject to the transitional system does not have the effect of granting a right of residence. The card issued simply confirms the existence of this right at the time of the decision. Thus, by virtue of Article L. 121-2 of the CESEDA⁵, the obligation to hold a residence card does not apply to nationals of EU countries who are not subject to the transitional system. This optional nature of the residence card is a benefit granted to citizens of the EU who alone can judge when it is appropriate to make use of it.

The issue of a residence card does not however imply recognition of an automatic right of residence for these nationals. The right of residence beyond the first 3 months is subject to the following conditions: compliance with the conditions envisaged in Article L. 121-1 of the CESEDA⁶ and the absence of a threat to law and order.

The circular informs Prefects that they will be required to assess this right of residence:

- Either following reporting of the parties in question by the police or *gendarmérie* on law and order grounds;

2 Circular no. NOR/IMIM/1000/116/C of 10 September 2010 regarding the conditions for the exercise of the right of residence of nationals of the European Union, of other States party to the European Economic Area (EEA) and the Swiss Confederation, as well as members of their family, a text which did not appear in the Official Journal.

3 Its entry into force is planned for 30 September 2011.

4 Circular NOR/IMIM/09/00064/C of 19 May 2009 relating to Obligations to Leave French Territory issued with respect to citizens of the EU. Cf. French Report for 2009.

5 Code for the Entry and Residence of Foreigners and the Right of Asylum.

6 Unless their presence poses a threat to law and order, all citizens of the European Union and all nationals of another State party to the European Economic Area agreement or the Swiss Confederation have the right to reside in France for a period of longer than three months if they satisfy one of the following conditions:

1. exercise of a professional activity in France;
2. possession, for themselves and their family members as referred to under 4, of sufficient resources and of health insurance;
3. registration at an establishment operating according to the legislative and regulatory provisions in force for the primary purpose of studying or, within this context, of pursuing vocational training and the guarantee of possession of health insurance and sufficient resources for themselves and their family members as referred to under 5, so as not to become a burden on the social security system;
4. if they are direct descendants aged under twenty-one or dependents, direct dependent ascendants, spouses, ascendants or direct dependent ascendants of the spouse, or of a national who meets the conditions set forth under 1 or 2;
5. if they are spouses or dependent children of a national who meets the conditions set forth under 3.

- Or following submission of a case to the Prefectural services by an administration from whom these nationals have claimed a right or a social security allowance, the granting of which is subject to legality of residence.

The examination must be individual and based only on the situation and the personal behaviour of the person in question. The decisions taken must be in proportion to the length of residence in France of the citizen in question, to his family situation, age, health and the extent of his social and cultural ties to France.

The existence of a criminal sentence cannot, on its own, justify the application of a restriction on the right of residence. The notion of a disturbance to law and order rules out using economic reasons as a basis.

If it emerges from the examination that the person in question does not have a right of residence, a decision to deny residence, to issue or to renew a residence card or to withdraw it must be considered. A removal measure may, if appropriate, be envisaged according to the provisions of the 2009 circular relating to Obligations to Leave French Territory, taken with respect to EU citizens.⁷

- *Regarding periods of residence of less than 3 months*

The principle recalled by the circular was that, ‘The right of residence of less than 3 months is granted to all EU citizens, on no other condition than that they hold an identity document and subject only to the law and order provision. The reason for the residence is of little importance here. For these periods of residence, EU citizens are assumed to possess adequate resources and means of subsistence to meet their needs, if necessary’. The circular stipulates that this assumption is the necessary condition for allowing effective exercise of the freedom of movement. Now, the *Law of 16 June 2011 regarding immigration, integration and nationality*⁸ introduces a new Article L. 121-4 into the CESEDA, which modifies this principle: ‘Provided they do not become an unreasonable burden on the social security system, citizens of the European Union (...), as well as their family members (...), have the right to reside in France for a maximum period of three months, subject to no other conditions or formalities except those envisaged for entry to French territory.’

It should be emphasised that the circular of 20 September 2010 already stipulated that, during periods of residence of less than 3 months, a request for a social security allowance would be an indication of an obvious lack of adequate means of subsistence. The right to free movement and residence is then likely to be questioned if it appears that the holder of this right poses an ‘unreasonable burden on the social security system’.⁹ The administrative departments in question were therefore asked to take into account the nature and duration of the cover requested and its cost, in order to assess whether the reliance on social security was excessive. The existence of an unreasonable burden would be confirmed if the recourse to social security were to recur during periods of residence of less than 3 months or if it is clearly established that the sole purpose of the residence is to benefit from French social security or allowances.

⁷ Op. cit.

⁸ Law no. 2011-672 of 16 June 2011 regarding immigration, integration and nationality, French Official Gazette no. 0139 of 17 June 2011, page 10290, which will enter into force on 30 September 2011.

⁹ Article R. 121-3 of the CESEDA.

*The Circular of 17 June 2011*¹⁰ regarding the entry into force of the law relating to immigration, integration and nationality adds details to this modification resulting from the new law: ‘Article 22 of the law raises to the legislative level, in a new Article L. 121-4-1, the provisions hitherto listed in Article R. 121-3 of the CESEDA, recognising the right of citizens of the EU and their family members to reside on French territory for a maximum period of three months, with no other conditions or formalities than those envisaged for entry to the national territory, ‘provided they do not become an unreasonable burden on the social security system’. This condition transposes into French law the principle established in Article 14 of Directive 2004/38/EC of the European Parliament and of the Council regarding the right of citizens of the Union and their family members to move and reside freely on the territory of Member States.

It thus reinforces the legal consistency of the CESEDA, in accordance with the provisions of Article L 121-1, which govern the right to residence of more than three months. Thus, nationals of the European Union and their families are supposed to possess, during this period of three months, resources and means of existence allowing them to meet their needs. If, during this period, they were to have recourse to social security and to receive social security or allowances, it will be up to [the Prefectural services] to examine whether this recourse does or does not constitute an unreasonable burden that would call into question their right of residence.

In examining these situations, the Prefectural services will have to conduct an examination of the entire situation of the interested parties. In fact, in accordance with European Union law, recourse to social security in and of itself cannot justify an automatic challenge to the right of residence; consequently, the circumstance in which the person in question has recourse to the social security system could not in and of itself justify a removal measure (on the basis of Article L 511-3-1 of the CESEDA, which is not immediately applicable). Thus, in a case-by-case analysis, the nature of the difficulties encountered, whether or not they are temporary, the amount and nature of the assistance granted, the health of the person in question, his family situation and any other element of a personal or humanitarian nature should be taken into account in determining whether or not he represents an unreasonable burden, beyond his simple recourse to the social security system.

- *Regarding periods of residence of more than 3 months*

Article L. 121-1 of the CESEDA recalls the exact conditions under which citizens of the EU can effectively exercise their right to residence of more than 3 months, until they acquire a permanent right of residence. Three categories of EU citizen are defined: workers, salaried or not; ‘non-workers’ and students. Article L. 121-2 of the CESEDA states that these nationals, wishing to establish their place of habitual residence in France, must make a statement of residence. However, the circular stipulates that the order establishing the methods of registration has not yet been published.

- *Practice of an economic activity*

The circular recalls the applicable rules in this respect. From now on, residence cards to be issued to Community workers will mention only the right to practise all professional activi-

¹⁰ Circular of 17 June 2011 no. NOR: IOC/K/11.1077/C relating to the entry into force of the law regarding immigration, integration and nationality.

ties, officially noting the end to the sectoral approach to the right of residence since Directive 2004/38. These nationals are not obliged to hold a residence permit and if they apply for one, they will receive the ‘EC – all professional activities’ permit. The term of the card issued may be modified, up to a 5-year limit, which is the maximum established before acquisition of the permanent right of residence. For salaried workers, the circular stipulates that presentation of a statement of intent or employment from the employer will be sufficient to prove that activity. For non-salaried workers, they will have to provide all documents demonstrating the existence and the permanent nature of the activity, as well as registration in the trade and companies’ register or in the directory of trades to establish the existence of the activity. Proof of the permanent nature of the activity may be provided by a professional use lease, membership of professional bodies, insurance policies, etc..

EU citizens who practise a professional activity in France enjoy a right of residence based on the sole condition of the absence of a threat to law and order. Thus, the circular requests the Prefectural services, in the absence of rules regarding the practise of a professional activity, only to impose consequences in terms of residence in rare cases where this absence would represent a particularly serious threat to law and order. These are the most important sanctions envisaged for nationals that must be applied.

- *Permanent right of residence*

Citizens of the EU and similar who can prove five years of regular and uninterrupted residence in France acquire a permanent right of residence, subject to the absence of a threat to law and order. This right is also granted, with the same reservation, to their family members who hold the nationality of a third-party State, if they have resided legally together in France for an uninterrupted period of five years. The acquisition of a permanent right of residence confirms the right to reside permanently on the national territory and to practise any professional activity. In this regard, it implies an important consequence in terms of protection from removal.

It is therefore necessary to examine every situation closely in order to determine whether the applicants – at the time they claim the benefit of this law – do actually meet the conditions for making this claim. It is up to the parties involved to prove, by any means, that they have resided in France for the required period of five years and that, throughout this period, they have met the conditions required by Articles L. 121-1 and L. 121-3 of the CESEDA for each of the categories of beneficiary of the right of residence.

The circular supports the fact that the presentation of a residence card will not be sufficient proof to establish the effectiveness and continuity of the right of residence, in so far as the residence permit only establishes the right at the time it is issued and changes could then have taken place to the situation of its holder. Presence on the territory can thus be proved by the presentation of various documents issued by administrations or private entities, such as bank statements, rent receipts, etc..

The circular requests the Prefectural offices to refer to developments relating to the various categories of the right of residence (working, non-working, student, family member). The resources cited by a student may on this occasion be the subject of a genuine verification – in retrospect – of their effectiveness, since the simple statement without indication of the amount solely payable over the first five years of residence is no longer sufficient.

In calculating the five years of residence, the following will be considered:

- periods where the right of residence is maintained, as envisaged in Article R. 121-6 in the event of involuntary unemployment and disability;

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- periods where the right of residence is maintained, as envisaged in Articles R. 121-7, R. 121-8 (in the event of the death of the national being accompanied or joined, divorce or annulment of marriage) and R. 121-9 (in the event of death or departure of the national being accompanied or joined, providing compulsory schooling at secondary level has been completed), for family members;
- all periods of legal residence, whether before or after entry into the EU of the country of which the applicant is a national. As a result, residence while covered by residence cards under general law must be taken into account;
- temporary absences from French territory not in excess of a total of six months per year. The same will apply in the event of longer absence on the grounds of military service obligations or in the event of absence not in excess of twelve months for important reasons, specifically medical or professional, in accordance with Article R. 122-3 of the CESEDA.

Periods of residence for the purposes of maintaining the right referred to in Articles R. 121-7 and R. 121-8 will be taken into account under specific conditions. Thus, in the case of maintenance of the right of residence, the family member will be able to obtain permanent residence if he can prove that he entered individually in one of the categories defined in Article L. 121-1 of the CESEDA during the period of residence covered by the provisions for the maintenance of the right described in the preceding paragraphs, in other words:

- either he practises a professional activity;
- or he can demonstrate conditions associated with the status of non-worker;
- or he has renewed a family tie with a citizen of the EU who holds a right of residence;
- or he is pursuing studies (this latter possibility is not however offered to family members who are nationals of third-party States).

The circular states that citizens of the EU who have been holders of ten-year residence permits (in the capacity as workers or beneficiaries of the right to stay or the right of establishment) on the basis of the former regulations and therefore renewable ipso jure, will be given permanent right of residence subject only to the continuity of their residence in France, under the conditions defined in Article L. 122-1 of the CESEDA. Thus, their residence in France will have to have been uninterrupted for the past five years. This continuity of residence will not be affected by the situations described in Article R. 122-3 of the CESEDA.

The circular requests Prefectural services to recognise a permanent right of residence before the five-year period for nationals of the EU and similar who have held the capacity of worker and have ceased their professional activity in France as a result of permanent disability or in order to collect their retirement entitlements, under the conditions defined in Article R. 122-4.

Recognition of the permanent right of residence can be demonstrated by the issue of the permanent residence card. In accordance with Article 19 of the Directive, the host Member State issues a document confirming the permanent nature of the residence. This document takes the form, in France, of a residence permit bearing the words, 'EC – permanent residence – all professional activities'. The circular requests the Prefectural services to investigate all cases of applications for permanent residence cards, even if they come from nationals for whom the card is optional. They will have to issue the residence card requested as soon as possible, once the conditions have been met. This card will be valid for twenty years, except for family members of third-country nationals, for whom its validity is limited to ten

years. The words, ‘EC – permanent residence – all professional activities’ will be shown on all cards issued to nationals of the EU, as well as their family members, regardless of the previous basis for their residence (family member, non-worker, worker, etc.), since they benefit in any event from the right to work.

The permanent right of residence can be questioned, in application of Article L. 122-2, when its holder leaves France for more than two consecutive years. When they return to France after this period, nationals who lose this right under these conditions must have their situation examined under the conditions of general law as envisaged in Article L. 121-1. The circular requests the Prefectural offices, when they observe that a citizen of the EU who holds a residence permit on the basis of a permanent right of residence has lost this right, to withdraw his card in compliance with the rules for the procedure in which both parties are heard. Apart from cases of departure from France, the permanent right of residence can only be challenged in a situation where the presence of the person in question poses a particularly serious threat to law and order, justifying the implementation of an expulsion measure. Once the permanent right of residence has been acquired it cannot therefore be challenged, subject to the preceding condition, even if the Community citizen then no longer fulfilled the conditions that prevailed for the acquisition of the right. This rule is also valid for family members, regardless of their nationality, who would have their family ties broken.

1.2 The system of free movement of citizens of the EU and their family members in Wallis-et-Futuna in French Polynesia, Mayotte and New Caledonia.

Several decrees of 19 November 2010¹¹ have detailed the methods for the entry and residence of citizens of the European Union and their family members in three French overseas territories – Wallis-et-Futuna, French Polynesia, Mayotte (now a French *département*) and New Caledonia.

Specifically, these decrees envisage that citizens of the EU who have established their place of habitual residence in one of these territories for less than five years will receive, upon request, a residence card showing the words, ‘EC – all professional activities’. The recognition of their right of residence is not conditional upon holding this document. This document is of an equivalent term of validity to that of the employment contract signed in accordance with local regulations or, for non-salaried workers, the planned length of professional activity. Its term of validity cannot exceed five years.

Its issue is conditional upon production by the applicant of an identity card or current passport as well as:

- 1) for salaried workers, current work authorisation if this is required by local regulations or, in other cases, of a certificate of employment;

¹¹ Decree no. 2010-1433 of 19 November 2010 regarding the entry and residence of citizens of the European Union mentioned in Article 13 of Order no. 2000-371 of 26 April 2000 and their family members in the islands of Wallis-et-Futuna, Decree no. 2010-1434 of 19 November 2010 regarding the entry and residence of citizens of the European Union mentioned in Article 14 of Order no. 2000-372 of 26 April 2000 and their family members in French Polynesia, Decree no. 2010-1435 of 19 November 2010 regarding the entry and residence of citizens of the European Union mentioned in Article 13 of Order no. 2000-373 of 26 April 2000 and their family members in Mayotte, Decree no. 2010-1436 of 19 November 2010 regarding the entry and residence of citizens of the European Union mentioned in Article 14 of Order no. 2002-388 of 26 April 2002 and their family members in New Caledonia.

- 2) for non-salaried workers, proof of their registration in the social security system applicable to them.

With the exception of local regulations regarding access to work, the system is roughly identical to that applicable in mainland France.

2. THE SITUATION OF JOB-SEEKERS

2.1 Maintaining the right of residence for citizens of the EU in the event of an end to professional activity

The circular of 10 September 2010 described the maintenance of the right of residence of citizens of the EU in the event of an end to professional activity. This system will be applied to all citizens of the EU, whether or not they are subject to the transitional system.

A right of residence in the capacity as a worker can be maintained under certain conditions, as detailed in Article R. 121-6, for:

- salaried workers in duly established involuntary unemployment, employed for more than one year and registered as a job-seeker with the competent employment office;
- those who find themselves involuntarily unemployed during the first twelve months of their employment and registered as a job-seeker with the competent employment office, for whom the right of residence is maintained for a period of six months;
- salaried workers at the end of their fixed-term employment contract of less than one year, for whom the right of residence is maintained for a period of six months;
- salaried or non-salaried workers affected by temporary disability resulting from an occupational accident or a professional illness;
- salaried or non-salaried workers entering vocational training with a link to the previous professional activity, except for those who are involuntarily unemployed.

The extension of residence based on Article R. 121-6 takes place when an application is made or when possession of the card is compulsory, by the issue of the residence permit, 'EC – all professional activities'.

The residence permit to be issued to an EU citizen whose maintenance of the right is limited to 6 months will have a period of validity corresponding to this period.

When this maintenance is not limited, the period of validity of the card will have to be adjusted, up to a maximum of five years, taking into account the possibility of switching to a permanent right of residence. In fact, a period of residence spent in France covered by Article R. 121-6 must be taken into account when calculating the five years of residence necessary to gain the permanent right of residence. Thus, a worker who has resided legally in France for four years and who is affected by temporary disability as the result of an illness, would not receive a card for a period longer than one year since, at the end of this period, he will in principle be able to enjoy permanent right of residence.

2.2 *Residence to look for work*

The circular of 10 September 2010¹² also described the conditions for residence in order to look for work. Specifically, it refers to the Antonissen jurisprudence of the ECJ.

Citizens of the EU must be given the possibility to enter the national territory in order to look for work there for a period of six months, if they are registered there as job-seekers. Beyond this period, if they have not found work, they can be forced to leave the national territory unless they can prove that they are still actively looking for work and that they have a genuine chance of being recruited.

This proof may be produced, for example, by the possession of a qualification that is sought-after on the labour market or by obtaining a recruitment commitment for a job in the near future. It is up to the citizen of the Union to produce these documents in order to establish eligibility for this transitional period of residence. If these elements of proof are not provided, the parties in question will not be given the opportunity to extend their residence.

These nationals will be issued with a residence permit, ‘EC – job-seeker’ for a renewable period of three months.

This provision is not open to nationals of the EU who are covered by the transitional system.

In a *judgment of 17 December 2010*,¹³ the judges of the Court of Appeal of Nantes refused to equate registration with the Employment Hub with the fact of looking for work.

Ms. X, a Portuguese national, lodged an appeal against the judgment dated 10 November 2009, in which the Administrative Court of Orléans rejected her request for annulment of the order of 23 April 2009 by the Prefect of Loiret, regarding the denial of a residence card and Obligation to Leave French Territory.

Ms. X, who had resided in France for more than three months on the date of the disputed order, maintains that she does not represent a burden on the French social security system. It emerges from the documents of the case that, between the months of November 2008 and April 2009, she received the sum of 1,868 euros, of which 1,186 euros were by way of payment for a training course financed by the Regional Central Council and 682 euros by way of social security paid by the General Council of Loiret, in other words a monthly average of 311 euros; she cannot therefore be regarded as demonstrating sufficient resources. The person in question was registered with the Employment Hub of Orléans South and began training in ‘cardboard furniture’ on 16 February 2009. However, she cannot demonstrate that, on the date of the disputed order, she was looking for work nor that the training she pursued was aimed at finding a job for which she would have a chance of being recruited. The circumstance, after the disputed judgment, in which the applicant was accepted to pursue training as a nursery school assistant from 11 May to 28 September 2009 and that she found jobs as a home help and babysitter beginning in the following October, is irrelevant to the legality of the judgment in question. Thus, and even though Ms. X does not represent a threat to law and order, the Prefect of Loiret, who did not take materially inaccurate facts as a basis, did not commit an error in law in considering that she did not fulfil the condition referred to in point 2 of Article L. 121-1 of the CESEDA.

¹² Op. cit.

¹³ Administrative Court of Appeal of Nantes, 17 December 2010, no. 10NT00088, Gassama, née Djacumba vs. Prefect of Loiret.

3. OTHER ISSUES OF CONCERN

3.1 *Residence of non-workers*

The circular of 20 September 2010¹⁴ also covers the right of residence of non-workers. Those included in the category of non-workers are all citizens of the EU and similar not practising a professional activity, not pursuing studies and not family members within the meaning of point 4 of Article L. 121-1 of the CESEDA. From now on, the category of non-worker must include Community nationals who do not belong to the category of those receiving a pension or retired, formerly envisaged by the decree of 11 March 1994.

The circular recalls that, even if the Community national in question does not apply for a residence card, the assertion of his right of residence in the capacity of non-worker is subject to possession of sufficient resources and of comprehensive health insurance, in other words, covering the allowances envisaged in Articles L. 321-1 and L. 331-2 of the Social Security Code. His right of residence is recognised, provided he meets both of these conditions.

Regarding the resources condition,¹⁵ the circular requests the administrative authorities to assess the amount of resources that the citizen of the EU must possess with respect to the Workers Solidarity Income (RSA) or, if the person in question meets the age condition in this respect (65 years old or, in some situations, 60), the amount of the Solidarity Allowance for the Elderly. These amounts must be adapted depending on the number of persons in the family of the national of the Union, in accordance with the RSA scale.

The citizen of the EU can prove that he meets this condition by any convincing means. In practice, this proof will require the production of documents of an administrative nature (such as, for example, bank account statements or pension slips), firmly establishing the amount of the resources at his disposal and allowing their continuity in time to be determined.

The means of existence can be either personal or come from cover provided by a third party. In the latter case, the person in question must prove the effectiveness and duration of the cover he receives, by providing all the necessary guarantees.

The resources condition is coupled with the condition of health and maternity insurance at the time of settlement in France and for as long as the person in question resides on French territory. The EU citizen is to provide proof by whatever means of the existence and duration of this health coverage. The competent Local Sickness Insurance Fund (CPAM) can usefully

14 Op cit.

15 Cf. Article R. 121-4 of the CESEDA. Nationals who fulfil the conditions referred to in Article L. 121-1 must hold one of the two documents envisaged for entry to French territory in Article R. 121-1.

The health insurance mentioned in Article L. 121-1 must cover the allowances envisaged in Articles L. 321-1 and L. 331-2 of the Social Security Code.

When required, the adequate nature of resources is assessed, taking into account the personal situation of the person in question. On no account can the amount required exceed the flat-rate amount of the Workers Solidarity Income mentioned under point 2 of Article L. 262-2 of the Social Action and Families Code or, if the person in question meets the age conditions for its award, the amount of the Solidarity Allowance for the Elderly mentioned in Article L. 815-1 of the Social Security Code.

The burden on the social security system that a national mentioned in Article L. 121-1 can place is assessed, specifically taking into account the amount of non-contributory social security allowances that are granted to him, the duration of his difficulties and his residence.

The nationals mentioned in the first paragraph of Article L. 121-1 who entered France to look for work there cannot be removed on grounds drawn from the illegality of their residence provided they are in a position to prove that they are still looking for work and that they have genuine chances of being recruited.

be consulted in order to confirm the existence of rights to French health insurance for the person in question.

The condition of health insurance will be fulfilled under the following conditions:

- either the person in question can confirm eligibility for French health insurance allowances, paid at the expense of a legal health insurance system of another Member State of the EU, other countries of the EEA and Switzerland, where this system refunds the French system for the healthcare covered;
- or he can prove that he is the insured party or the beneficiary of an insured party of a French social security system;
- failing the above, he can prove that he holds private insurance, taken out in France or abroad.

The circular requests the administrative authorities to assess the nature of the health coverage, ensuring that the care package is 'comparable' to the services in kind offered by French health and maternity insurance. The essential criterion to be examined is that there must be no categories of care, products or procedures excluded from the cover while French health insurance covers them.

A citizen of the EU can claim a right of residence provided he continues to meet the two aforementioned conditions and he does not constitute a threat to law and order. This implies that verification of these conditions can take place throughout the residence of the person in question in France, before acquisition of the permanent right of residence. Examination of the situation will have to take place if the EU citizen is effectively the holder of a right of residence and, if this is the case, for whatever period he holds this right. This duration will depend on the period covered by the supporting documents he has provided. For example, if the supporting documents provided establish that the EU citizen will be able to live on his resources for a period of two years, his right of residence will be recognised for this period, subject to changes that could take place subsequently in his personal situation. In calculating the duration of the right of residence, the circular requests the Prefectural services to divide the amount of resources demonstrated by the person in question by the amount of the monthly minimum wage payable.

If they wish to hold a residence card, Community citizens will be issued with a card showing the words, 'EC – non-worker'. The period of validity of this card will have to be adjusted to take into account the validity of the right that has been demonstrated.

These provisions apply equally to nationals of all Member States of the EU, whether or not they are subject to the transitional system.

3.2 The problem of recourse to welfare benefits

In a situation where a Community national, who has no resources and does not have health insurance, rapidly makes use of the French system of care or systematically relies on emergency shelters, the circular of 22 June 2010 requests the Prefectural services to question the reasons for his residence. The specific case is put forward of a destitute person, suffering from a pathology confirmed in his country, who could come to France intentionally in order to receive care ultimately at the expense of French health insurance. However, it points out that the Prefectural services must respect medical confidentiality.

More specifically regarding non-workers, the circular stipulates that the Prefectural services will in practice have to check the conditions of their right of residence when a request for social security benefits is made to an entity responsible for allocating social welfare or social security benefits. Since some social security benefits are granted on condition of the legality of residence, the social entities may have to approach these services in order to assess the existence of the right of residence of the persons in question before the benefit is awarded.

By contrast, when a trial of life, for example, has justified maintenance of the right of residence, access to social security benefits may have been granted for a certain period, assessed by the social institutions. Thus, if the Prefectural services are able to establish clearly that the sole purpose of the residence is to receive French social welfare, the existence of this burden will be confirmed and the right of residence will not be maintained. Therefore, if appropriate, these services will have to assess, throughout the period of residence of the person in question, whether his presence involves a burden for social security with respect to the benefits or welfare for which he may apply. This assessment will have to be the result, in any event, of a case-by-case analysis, taking into account the nature of his difficulties associated with a trial of life, the duration of his residence, his family situation, personal ties with France (for example, birth on French territory), etc..

Based on various elements linked to the individual path of the person in question, it will be possible to determine whether this person can legitimately take advantage of the financial solidarity of the host Member State, specifically as a function of the accidental or temporary nature of his difficulties and of the absence of a voluntary insolvency organisation, aimed at benefiting improperly from coverage by social security services. The Council of State, in its opinion of 26 November 2008, deduced from Articles L. 121-1, R. 121-3 and R. 121-4 of the CESEDA that, even if the person in question is not yet effectively covered by the social security system, the insufficient nature of resources enables confirmation of the absence of a right of residence of a national of another Member State of the European Union who has resided in France for more than three months. In this same opinion, the Council of State emphasises that, ‘the administration can specifically rely on data from organisations that provide assistance when it refers to the burden that the Community national places on the social security system, or on statements previously made concerning the person in question’.

In a *judgment of 9 December 2010*,¹⁶ the judges of the *Administrative Court of Lyons* accept the legality of a denial of residence and of a removal measure with respect to a Community national and members of his family whose only resources come from social security.

Mr. and Mrs. A assert that they have been resident in France for more than five years with their daughter, born on 19 October 2006. However, it is not evident from the documents of the case that they possess particular ties to France. Under these conditions and with regard to the duration and conditions of their residence in France, which they entered when they were aged 39 in the case of Mr. A and 34 in the case of Ms. A, and in so far as nothing prevents them from resuming their family life in Belgium, a country whose nationality is held by Mr. A and where Ms. A, who holds a Belgian residence card, is legally admissible, the decisions to deny a residence card that have been issued to them do not represent a dispro-

¹⁶ Administrative Court of Appeal of Lyons, 9 December 2010, no. 09LY02508 and 09LY02509, Djafer vs. Prefecture of Isère.

portionate attack on their right to respect for their private and family life and do not therefore ignore Article 8 of the ECHR.

Mr. and Ms. A allege that the decisions establishing the country to which they must be removed are not adequately justified. However, these decisions stipulate, on the one hand, that Mr. A holds Belgian nationality and must be removed to the country whose nationality he holds or to any other in which he could prove legal admissibility and, on the other hand, that Mrs. A holds Algerian nationality, holds a Belgian residence card as the spouse of a Belgian national, and must be removed to the country where she holds nationality or any other in which she could prove that she is legally admissible. The applicants can therefore live their family life in Belgium.

Although a travel document was issued by the Prefect to their child on 14 November 2006, it is not evident from the documents of the case that Mr. and Ms. A, whose first application for a residence card is dated 16 July 2008, resided legally in France over the five years preceding the disputed decisions to deny a residence card, dated 24 February 2009. They cannot therefore refer to eligibility for a permanent right of residence.

Mr. and Ms. A allege that they have sufficient resources at their disposal, within the meaning of the relevant provisions of the CESEDA. However, it emerges from the documents of the case that their only resources come from welfare benefits, paid to them by the Family Allowances Office (CAF). Thus, even if the level of this income reached that of Income Support (RMI), they cannot be regarded as not placing a burden on the social security system and, thus, as possessing sufficient resources within the meaning of the provisions of Article L. 121-1 of the CESEDA. The removal decisions are therefore justified.

In a judgment of 22 June 2010,¹⁷ *the judges of the Administrative Court of Appeal of Lyons* find that the Trojani decision of the ECJ should not have been interpreted as opening up a right of residence to recipients of social security benefits. It is constant that the applicant, a Romanian national, does not possess sufficient resources for herself and her family members, beyond the social security benefits that she has been receiving since her entry into France and that she does not meet any of the conditions defined in Article L. 121-1 of the CESEDA. The circumstance that the person in question was allocated the benefit of universal health coverage for less than five years, the handicapped adult allowance and a housing allowance, albeit without fraud on her part, does not grant her a right of residence.

*In a judgment of 22 March 2010,*¹⁸ *the Court of Appeal of Limoges* draws the conclusions from the need to hold health insurance in order to prove legal residence in France with respect to social security benefits. Peter White, who is a British national resident in Creuse since February 2005, applied for Universal Health Coverage (CMU) on 26 March 2008 from the Local Sickness Insurance Fund of Creuse. The latter denied his application on 3 April 2008. Within the terms of Article L. 380-1 of the Social Security Code, any person residing in mainland France or in an overseas *département* in a stable and legal manner is covered by the general system if he is not entitled in any capacity to services in kind from a health and maternity insurance system. This article refers to a decree for determining the condition of residence. Under the terms of Article R. 380-1 of the Social Security Code, the persons referred to in Article L. 380-1 must prove uninterrupted residence for more than three months

17 Administrative Court of Appeal of Lyons, 22 June 2010, no. 09LY02161, Gheorghian vs. Prefecture of Côte-d'Or.

18 Administrative Court of Limoges, Social Chamber, 22 March 2010, no. 09/01202, Local Sickness Insurance Fund of Creuse (CPAM 23) vs. Peter White.

and persons of foreign nationality must also prove that they are in a legal situation with respect to the legislation pertaining to the residence of foreigners in France on the date of their membership. Since Peter White did not practise a professional activity, he is covered by Article L. 121-1 point 2 of the CESEDA, under which terms any citizen of the European Union has the right to reside in France for a period of longer than three months if he has sufficient resources, for himself and his family members, so as not to become a burden on the social security system, as well as health insurance. Since the condition of sufficient resources is not being questioned, Peter White must prove that he has health insurance since he lost his right to health insurance under the British system on 6 January 2007. Since then he has not resided legally in France with respect to Article L. 121-1 of the CESEDA, which, in application of Articles L. 380-1 and R. 380-1 of the Social Security Code, does not allow him to claim basic universal health coverage.

In a *judgment of 28 April 2011*,¹⁹ the judges of the Administrative Court of Appeal of Versailles confirmed an obligation to leave French territory with respect to a Community national who received State medical assistance. The Prefect of Val d'Oise passed an obligation to leave French territory with respect to the applicant, a Romanian national, within a period of one month on the grounds that she could prove no right of residence on the basis of Article L. 121-1 of the CESEDA regarding the residence of citizens of the European Union. The applicant therefore appealed this Prefectural order. The judges emphasise that, in order to assess the adequate nature of the resources mentioned in point 2 of Article L. 121-1 of the CESEDA, the Prefect must take all of the resources effectively at the disposal of the citizen of the European Union, regardless of their source. If, in this respect, the applicant asserts that the circumstance that she has received State medical assistance since 1999 does not constitute the presumption of a lack of resources and does not, consequently, enable confirmation that she would be a burden on the social security system, it is evident from the documents of the case and from the applicant's own statements that she is not working and is housed by an association, that she draws her principal resources – the figure she gives is 310 euros per month – from begging and an unspecified amount from financial support from her family group. Thus, the applicant does not demonstrate any stable means of subsistence and does not dispute that she is without health insurance.

The judges add that the provisions of Article L. 122-1 of the CESEDA²⁰ do not apply to the applicant because, even if she asserts that she has been living in France for more than five years, she could not claim the benefit of these provisions, which envisage the issue of a residence card *ipso jure*. In fact, she does not fulfil the condition relating to sufficient resources or therefore to the legality of residence.

19 Administrative Court of Appeal of Versailles, 28 April 2011, no. 09VE01938, *Caldaras vs. Prefecture of Val d'Oise*.

20 Article L. 122-1 of the CESEDA stipulates: 'Unless his presence represents a threat to law and order, the national referred to in Article L. 122-1 who has resided legally and without interruption in France for the previous five years acquires a permanent right of residence throughout French territory.'

3.3 *The removal of EU citizens*

The new law of 16 June 2011²¹ regarding immigration, integration and nationality introduces a new Article L. 511-3-1, with the following wording: ‘The competent administrative authority can, by justified decision, force a national of a Member State of the European Union (...) or a member of his family to leave French territory if it observes:

1. that he can no longer prove any right of residence as envisaged in Articles L. 121-1, L. 121-3 or L. 121-4-1;
2. or that his residence constitutes a misuse of the law.

The fact of renewing periods of residence of less than three months with the aim of settling on the territory, while the conditions required for residence in excess of three months are not met, represents a misuse of the law. Residence in France with the principal aim of benefiting from the social security system also constitutes a misuse of the law.

3. or that, during the period of three months starting from his entry into France, his personal conduct represents a genuine, present and sufficiently serious threat to a fundamental interest of French society.

The competent administrative authority takes into account all the circumstances pertaining to his situation, specifically the length of residence of the person in question in France, his age, his state of health, his family and economic situation, his social and cultural integration in France and the closeness of his ties to his country of origin.

The foreigner has a period of no less than thirty days from the time of notification in which to comply with the obligation imposed upon him to leave French territory, except in cases of emergency. Under exceptional circumstances, the administrative authority may grant a voluntary departure period in excess of thirty days. The obligation to leave French territory establishes the destination country to which he is returned in cases of automatic execution.’

Articles L. 512-1 to L. 512-4 regarding appeals against obligations to leave French territory are applicable to measures taken in application of the present article.

The law also introduces a new Article L. 521-5: ‘Expulsion measures envisaged in Articles L. 521-1 to L. 521-3 can be taken with respect to nationals of a Member State of the European Union (...) or a member of their family if their personal conduct represents a genuine, present and sufficiently serious threat to a fundamental interest of society. In order to take such measures, the administrative authority takes into account all the circumstances pertaining to their situation, specifically the length of their residence on the national territory, age, state of health, family and economic situation, social and cultural integration into French society as well as the closeness of their ties with their country of origin.

Article L. 521-2 of the CESEDA, modified by the same law, stipulates that an expulsion measure can only be taken if this measure constitutes an imperative for the security of the State or public safety with respect to: ‘6. The national of a Member State of the European Union, of another State party to the European Economic Area agreement or of the Swiss Confederation who has resided legally in France for ten years.

21 Law no. 2011-672 of 16 June 2011 regarding immigration, integration and nationality, French Official Gazette no. 0139 of 17 June 2011, page 10290, which will enter into force on 30 September 2011.

In a judgment of 13 January 2010, the *Council of State* stipulated that reference to the deadline granted to leave the territory is an element that contributes to the decision to remove a Community national.²² In a case of 8 July 2010,²³ the judges of the *Administrative Court of Appeal of Douai* correctly applied this jurisprudence. They emphasise that no provisions in the Code for the Entry and Residence of Foreigners and the Right of Asylum enable the Prefect to pass a repatriation order with respect to a national of a Member State of the European Union, in this case of Portuguese nationality, residing in France for more than three months on the grounds that his presence in France could pose a threat to law and order. When this national, upon expiry of a period of three months from the time of his arrival in France, can no longer prove a right of residence in application of Article L. 121-1 of this Code, in other words if his presence poses a threat to law and order, it is up to the Prefect, where appropriate, to take a justified decision forcing this person to leave French territory under the conditions envisaged in point 1 of Article L. 511-1 of the CESEDA.

Depending on whether he has resided in France for a maximum of three months or more than three months, the repatriation order or obligation to leave French territory issued with respect to a national of a Member State of the European Union on grounds drawn from the threat posed by his presence to law and order could not be taken on the basis of national law except in compliance with the objectives defined in Articles 27, 28 and 30 of the aforementioned Directive of 19 April 2004.

Mr. A is a Portuguese national, born in 1969, who has been resident in France since 1997 and thus for more than three months on the date of the disputed order of 10 November 2009. The result is that, taking this repatriation order on the grounds that the conduct of the person in question poses a threat to law and order, the Prefect of Seine-Maritime was unaware of the scope of the provisions of Article L. 511-1 of the CESEDA. In fact, he should have described in what way the conduct of the person in question posed such a threat.

4. FREE MOVEMENT OF ROMA WORKERS

The problem of the Roma has not specifically involved Roma workers, but Roma citizens of the EU.

The stakes became evident at the time of implementation of a circular dated 5 August 2010,²⁴ repealed and replaced by the circular of 13 September 2010.

- *Circulars relating to the Roma and the relevant jurisprudence.*

The circular of 5 August 2010, intended for Prefects and chiefs of police and the *gendarmérie*, stipulates from the outset that specific objectives exist for the evacuation of illicit camps: ‘300 illicit camps or settlements will have to have been evacuated within the next 3 months, especially those of the Roma’. The circular specifies that mobilisation must be reinforced, ‘the operations conducted since 28 July against illicit Roma camps have given rise to only a limited number of repatriation orders. These operations represent a significant commitment

22 EC, 13 January 2010, Rostas, req. no. 316488, see report for France for the year 2009-2010.

23 Administrative Court of Appeal of Douai, 8 July 2010, no. 10DA00069, Prefecture of Seine-Maritime versus Tadeu Pimenta.

24 Circular NOR: IOC/K/10/17881/J of 5 August 2010 of the Minister of the Interior regarding the evacuation of illicit camps.

on the part of the government (...). They currently require full mobilisation on your part of all personnel and services, with respect to illicit Roma camps as a priority. The operational steps include specifically:

- Thorough preparation involving all the services involved, especially those of the PAF (Border Police) and the OFII (French Immigration and Integration Service) for the Roma Camps;
- The evacuation of illicit camps and immediate repatriation of foreigners in an illegal situation;
- The systematic and immediate implementation, for sites that are not currently liable for eviction, of judicial procedures and of tax and social checks’.

The minister adds that, ‘these operations must not be confined to dispersal operations (...). Obviously, the creation of new illicit Roma camps should be prevented. In the event of a fledgling settlement, you will do everything possible to prevent it.’ A weekly summary was requested from the departments in question and tables to be completed were provided, listing in particular the number of minors and adults evacuated and the consequences of the evacuation, divided into repatriation orders, obligations to leave French territory, voluntary departures and others.

This circular was repealed and replaced by the circular of 13 September 2010.²⁵

In a *judgment of 7 April 2011*,²⁶ even if it has been repealed, the Council of State cancels the circular of 5 August 2010 because it was applied before its repeal. The administrative judges were of the opinion that: ‘The circular of 5 August 2010 that aimed at the priority evacuation of illicit Roma camps has been annulled. While the minister asserts that it was enacted with the aim of ensuring compliance with the law of ownership and to prevent attacks on public health, safety and peace, this circumstance did not authorise him, ignoring the principle of equality in law, to implement a policy of evacuating illicit camps, especially marking out some of their occupants because of their ethnic origins.’

The Council of State does not cancel the circular of 13 September 2010, which this time deals with the evacuation of all illegal settlements, regardless of their occupants. We may wonder about the practical application of the latter circular, which is much more succinct than the August circular.

Administrative practice with respect to the Roma remains disputed in France. Thus, the question arises of the use of Article L. 2215-1 of the General Code of the Territorial Communities²⁷ by a Prefect to have camps evacuated in an emergency, without alerting the mayor

25 Circular of 13 September 2010 of the Minister of the Interior regarding the evacuation of illicit camps.

26 EC, 7 April 2011, no. 343387, SOS Racisme versus Ministry of the Interior.

27 The municipal police force is provided by the mayor, however:

1. The State’s representative in the *département* can, for all the communes in the *département* or several of them and in all cases where this may not have been envisaged by the municipal authorities, take all measures relating to maintaining public health, safety and peace.

This right can only be exercised by the representative of the State in the *département* with respect to one single commune after notification has been made to the mayor to no effect;

2. If law and order is threatened in two or more adjacent communes, the representative of the State in the *département* can act as substitute, by justified order, for the mayors of these communities in order to exercise the powers mentioned under 2 and 3 of Article L. 2212-2 and Article L. 2213-23;

3. The State’s representative in the *département* is solely competent to take the measures pertaining to public law and order, safety, security and health, where their scope exceeds the territory of a commune;

4. In an emergency, when required by an observed or foreseeable attack on public law and order, health, peace and security and when the means at the Prefect’s disposal no longer allow for the pursuit of the objec-

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of the commune in question. The largest Roma camp in Seine-Saint-Denis was evacuated on 29 March 2011 at dawn without the Prefect's reacting to a previous complaint from the two towns jointly owning the land. On 10 March 2011, the Constitutional Council did however censor a provision of the Loppsi 2 law, which allowed Prefects to evacuate illegally occupied sites without going through the court or the owner in cases where they are unfit for habitation on health grounds. In order to carry out the evacuation, the trick the Prefect used was to issue an order, on 16 March 2011, based on Article 2215-1 of the General Code of Territorial Communities. This mentions the cases in which the State's representative can intervene, without involving the mayor, by taking 'measures pertaining to maintaining public health, safety and peace'. For the Prefect, 'the urgency' and 'the danger to public safety' justify the dismantling. In a communiqué, the Prefect refers to 'fraudulent' and 'hazardous electrical connections' observed by the ERDF, the public enterprise that manages the electricity network. If the use of Article 2215-1 were to be generalised, the Prefects could evacuate all sites, including in towns where the mayors tolerate them. Some communes that own occupied sites categorically refuse to lodge complaints, on both humanitarian and political grounds. The town of Bobigny, which regards as 'scandalous' the fact that it was not consulted, made a gymnasium and another site available for the displaced Roma. The Prefecture has already made it known to the town hall that this new location was just as 'unhealthy'.²⁸

In several judgments of 27 August 2010²⁹, the Administrative Court of Lille repealed the Prefectural orders for the repatriation of Roma individuals, passed on the basis of their illegal occupation of land. These orders followed on from the circular of 5 August 2010. The judges find that, in accordance with the objectives established by Directive 2004/38/EC of 29 April 2004 and specifically its Article 27, the conduct of a national of the European Union can, for application of the transposition provisions of Article L. 121-4 and those of point 8 of II of Article L. 511-1 of the CESEDA, only be regarded as posing a threat to law and order if he represents a genuine, present and sufficiently serious threat to a fundamental interest of society.

In this case, the illegal occupation of a site belonging to the urban community of Lille by a Romanian national, who entered France less than three months before the date of the removal measure pertaining to her, does not in and of itself represent, in the absence of special circumstances, a sufficiently serious threat to a fundamental interest of society and cannot consequently be regarded as a threat to law and order within the meaning of the aforementioned provisions. The Prefectural repatriation order issued with respect to her is repealed.

Moreover, it emerges from a joint reading of Articles L. 512-4 and L. 121-2 of the CESEDA that the obligation to issue provisional residence authorisation resulting from the repeal of a repatriation measure cannot be applied to Community nationals since they do not need a residence card in order to reside in France.

tives for which he holds police powers, the latter can, by justified order and for all communes in the *département* or several or only one of them, requisition any good or service, call upon any person necessary for the operation of this service or the use of this good and order any useful measure until law and order has been achieved or the conditions for maintaining it have been ensured.

The justified order establishes the nature of the services required, the duration of the requisition measure, as well as the methods of its application.

The Prefect can have the measures prescribed by the order he has enacted executed automatically.

28 Nea Say.

29 Administrative Court of Lille, 27 August 2010, no. 1005246, no. 1005253, no. 1005249, no. 1005254.

- *Communication from senators Jean-Rene Lecerf and Richard Yung, 'Roma and the EU: transposition into French law of the directive relating to freedom of movement and residence'*

On 6 October 2010, Messrs. Lecerf and Yung, senators, presented their communication about the Roma and the EU to the French Senate. They were interested in the fact that the European Commission is of the opinion that, 'France has not transposed the Directive [2004/38] in a way that makes its provisions completely effective and transparent' and have gathered the legal observations of the Commission, as well as those of the French government.

The Commission's grievances concern the definition of the threat to law and order and the guarantees surrounding the removal measures. 'The reservation of the 'threat to law and order' was written into internal law at the time of transposition, as permitted in the directive, both for residences of less than three months (Article R. 121-1 of the CESEDA) and for residences of more than three months (Article L. 121-1). Moreover, the provisions of Article L. 511-1 of the CESEDA are applicable to Community nationals, which permits deportation of a foreigner whose 'behaviour constitutes a threat to law and order'. On the other hand, the other instructions given in the directive have not been included in the CESEDA.

The European Commission admits that the definition of the notion of a threat to law and order is a matter for the national authorities. But it believes that the guarantees envisaged by the directive to identify the existence of a threat to law and order should be the subject of an explicit transposition. The Government asserts that the assessment of a threat to law and order is an individual matter, to the exclusion of any automatic operation. French law does not therefore define the law and order reasons that could justify a removal measure. Only an assessment in specific terms based on an examination of the individual situation allows the reality of this threat to be evaluated'.

In terms of the guarantees surrounding the implementation of removal measures, the senators stress that, 'the European Commission wishes all guarantees to be explicitly transposed into a specific text'. 'As for the Government, it asserts that these guarantees are all envisaged in French law. Some are written in the CESEDA: protection of certain persons from a removal measure (Article L. 511-4); justification of the repatriation order (Article L. 511-1); appeal with automatic suspensory effect against the repatriation order with a waiting period for the administration of 48 hours (Articles L. 512-2 and L. 512-3). Others are not the result of standards specific to alien law and were released well before transposition of the directive. The guarantees relating to the right to legal appeal are contained in the Administrative Justice Code (Article R. 421-5). The obligation to justify removal measures is prescribed by the Law of 11 July 1979. Unwritten standards of law also apply in this area, such as the principles of constitutional value (Constitutional Council decision of 13 August 1993) or the general principles of law, such as the proportionality principle (Council of State, 19 May 1933, Benjamin). Administrative jurisprudence also ensures that age is taken into account, together with the length of presence on the territory, ties to the country of origin and integration (Council of State, 29 June 1990, Ms. I). Generally speaking, in terms of measures taken with respect to a person, the administration is obliged to examine all the circumstances specific to the case, under the supervision of a judge, who specifically ensures respect for private and family life, which is a constitutional requirement, and who also examines the removal measures in the light of the European Convention on Human Rights (...). The Government asserts that it would scarcely be in conformity with concern for the quality of texts to withdraw the general principles that are often of higher value in the hierarchy of standards'.

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‘The European Commission requests an explicit transposition of the guarantees envisaged in the directive. It does not dispute the value of the general principles of the law, which the Government puts forward. But it asserts that individuals must be aware of their rights, which justifies a specific text. It emphasises that recalling the rules applicable in circulars, which are precarious by nature and unknown to the persons in question, cannot be sufficient. It asserts that this transposition would not deny the judge the flexibility necessary to assess various situations, but it would give him some indication of the criteria to be taken into account’.

The senators state that they were not convinced by the arguments made by the Government concerning the existence of jurisprudence that would enable the effective application of the directive. In fact, the concern for legal security must be borne in mind in order to allow everyone to identify his rights in a clear way. Consequently, if this result does not seem to be sufficiently achieved by the existing state of the law, there would probably be no disadvantage to writing the guarantees envisaged by the directive into the CESEDA, which would not yet be explicitly included even if, in practice, they are already implemented by virtue of the jurisprudence. A reading of the relevant articles of the directive and an examination of the way they are applied in internal law shows that such a step would be conceivable without affecting the balance of our legal order. This step should nevertheless be undertaken after a detailed legal analysis, so that useless redundancies can be avoided, using the flexibility built into the transposition procedure and preventing any rigidity of the judge’s assessment of situations of fact’.

They add that, ‘France has put itself in an unpleasant situation with its policy with respect to the Roma’.

Chapter II: Members of the family

1. THE DEFINITION OF FAMILY MEMBERS AND THE ISSUE OF REVERSE DISCRIMINATION

The circular of 10 September 2010³⁰ devotes several paragraphs to defining the family members of a Community national. Points 4 and 5 of Article L. 121-1 of the CESEDA describe the definition that should be given to a family member depending on the status of the Community national. Thus, the right of residence as a family member is awarded to the spouse, to children under the age of twenty-one or dependent, and to ascendants both of the originator of the right and of his spouse, unless the Community national is a student. In this case, the latter can only claim a right of residence for his own child and for his spouse. This definition concerns family members, regardless of their nationality.

Directive 2004/38/EC stipulates that Member States must, in accordance with their national legislation, favour the entry and residence of any other family member (regardless of nationality) of a citizen of the EU who is not covered by the definition of a family member as included in point 4 of Article L. 121-1 of the CESEDA. The personal situation of foreigners belonging to this category will be the subject of a thorough examination and any decision to deny the issue of a visa, if this is required, will be justified, subject to considerations relating to State security.

Thus, the persons falling within the situations described below are likely to be granted a right of entry and of residence:

- *Dependents or persons forming part of the household or seriously ill*

The circular requests the prefectural services to conduct a thorough examination of requests for admission for residence from persons with a family tie with the citizen of the Union and who fulfil one of the following two conditions:

- dependent or part of the household of the citizen of the Union in the country of origin. In order to determine whether these persons are dependent, it is necessary to assess, on a case-by-case basis, whether – taking their financial and social situations into account – they need material support to meet their essential needs in their country of origin or the country they came from when they applied to join the citizen of the Union;
- have serious health conditions, requiring urgent and personal care from the citizen of the Union. If necessary, the prefectural services can seek the opinion of the doctor of the regional health agency (formerly the public health inspector) or, in Paris, of the physician in charge of the medical department at police headquarters.

- *PACS partners and cohabiting partners*

PACS partners and cohabiting partners are not the same as spouses within the meaning of Articles L. 121-1 and L. 121-3. However, the circular requests the prefectural services to examine closely the situation of the partner with whom the EU citizen has a duly certified and permanent relationship (marriage contracted abroad between persons of the same sex, PACS (Civil Solidarity Pact) or foreign equivalent, cohabitation certified by a certificate and

³⁰ Op. cit.

documentary evidence of communal life). This proof can be provided using any appropriate means.

The permanent nature of the partnership will be associated with a minimum length of communal life in France and/or in the previous country of residence equal to one year and in accordance with that envisaged in circular NOR INTD0400134C of 30 October 2004 for the admission for residence of foreigners who have signed a Civil Solidarity Pact. If the certified nature of a relationship appears more fragile, such as in the case of cohabitation, the minimum length of communal life, in France and/or in another country, will be five years in principle, except in exceptional cases, in accordance with the indications in circular NOR INTD0500079C10 of 31 October 2005 regarding applications for admission for residence on the grounds of the protection of private and family life.

However, the requirement regarding the length of the relationship could be applied flexibly by taking into consideration other relevant elements, such as a joint mortgage, the birth of shared children, etc.. Unions such as same-sex marriages or the equivalent of the PACS, if they are conducted by authorities not governed by one of the Member States of the European Union – and in the absence of possible transcription into the national civil register of the EU country of origin of one of the spouses or partners – can also be taken into account. In this scenario, the prefectural services must be particularly vigilant concerning the permanent nature of the relationship. They are to make a circumstantial examination of each situation, asking the persons in question to provide all documentary evidence, specifically concerning the registration or the permanent nature of the relationship, establishing that they are effectively covered by one of the aforementioned situations. If this is the case, the persons concerned will be issued with a residence permit, ‘EC – family member – all professional activities’, with a term of validity in line with the right of residence of the recipient.

- *Parents of a child who is a citizen of the EU*

The parents of a child who is a citizen of the EU or national of a similar country can only enjoy a right of residence based on the European provisions on condition that they receive support from this child. Directive 2004/38/EC does not in fact envisage the recognition of a right of residence in favour of a national of a third-party State who cites his capacity as the parent of a European child.

However, European jurisprudence has considered (ECJ, case C-200/02, Zhu and Chen, 19 October 2004) that a right of residence must be granted in favour of a national of a third-party country who is the father or mother of a child of European nationality for whom he is effectively responsible, subject to compliance with the following conditions: the parent must take full responsibility for his child and must already possess sufficient resources and social security coverage for himself and the child, so that the latter does not become a burden on the public finances of the host Member State. If the parent can prove that he meets these conditions, the prefectural services will have to grant him a right of residence on the basis of a ‘visitor’ residence permit, or authorising the practice of a professional activity subject to satisfactory authorisation, specifically – in the case of a salaried activity – work authorisation.

2. ENTRY AND RESIDENCE RIGHTS

2.1 Legislation

The *circular of 10 September 2010*³¹ explains to Prefects that, during the investigation of an application for a residence card from a third-country national who is a family member of a citizen of the EU, they must assess the right of residence of the EU citizen, regarded as the originator of the right, before recognising that of the family member, who is the beneficiary of a derived right.

- *Regarding residence of less than 3 months*

Family members who hold the nationality of a third-party State must possess a valid passport, which must contain an entry visa if they are nationals of a country that does not benefit from the short-stay visa exemption. If they are holders of a currently valid residence card issued as family members of a citizen of the EU, they are exempt from having to produce this visa and are regarded as meeting the legal entry condition.

In a scenario where the family member is not in possession of the required documents, he will have to be given the opportunity – within a reasonable delay and using reasonable means – to obtain the missing documents or to establish, using various convincing means, his capacity as beneficiary of the right of free movement. The services in question (Air and Frontier Police or consulates) will have to facilitate entry into France of the family member. The visa will be issued free of charge.

- *Regarding residence of more than 3 months*

Before recognising a right of residence for a family member as defined in Articles L. 121-1 and L. 121-3, it is necessary to ensure that the originator of the right, the EU citizen, does in fact enjoy a right of residence. The term of validity of the residence card issued to the family member is thus directly related to the term of the recognised right of residence of the originator of the right. Only one person who benefits from a right of residence on an individual basis can open up this same right to a family member. This therefore rules out a family member's opening up a right of residence to another family member. The right of residence of the family member ends with that of the originator of the right, subject to specific provisions concerning the maintenance of this right, listed in Articles R. 121-7 to R. 121-9 of the CESEDA.

When this alternative is possible, the circular stipulates that recognition of the right of residence on an individual basis should be preferred, but not enforced, over recognition as a family member, so that the person in question can potentially be accompanied by his own family members.

If the EU citizen does not practise a professional activity, the presence of a family member at his side should be systematically taken into consideration for evaluating the threshold of minimal resources required for him and his family member to benefit from a right of resi-

31 Circular no. NOR/IMIM/1000/116/C of 10 September 2010 regarding the conditions for exercising the right of residence of nationals of the European Union, other States party to the European Economic Area (EEA) and the Swiss Confederation, as well as their family members, a text that was not published in the Official Journal.

dence. The same applies to evaluating the unreasonable burden if the right of residence is called into question.

- *Application of the Akrich jurisprudence to the spouse of a French national*

Moreover, and in accordance with the constant jurisprudence of the European Court of Justice, a family member of a French national cannot claim a right of residence in France as the family member of a citizen of the Union. In fact, the European directive is only applicable to citizens of the EU (and similar countries) going to or residing in a Member State other than the state whose nationality they hold, which is not the case of a French person who has always resided in France. The latter cannot therefore open up a right of residence to his spouse on the basis of the provisions of the aforementioned directive, governing the residence of family members.

This principle of non-application to family members of a French national of the rules of Community law relating to free movement and to the residence of citizens of the EU and their family does however contain an exception, recognised on several occasions by the jurisprudence of the European Court of Justice (specifically case C-109/01, Akrich, 23 September 2003); when a third-country national has obtained a right of residence in a European State as a family member of a Community national or of a national of a similar country, the provisions relating to free movement and the right of residence must be applied to him when he leaves this State to reside with the family member in the European country of which the latter is a national. Thus, the non-Community spouse of a French national must – without an inspection of his cohabitation – be granted a right of residence and the right to work after proving his previous right of residence in another EU State in the capacity as a family member of this same French national who himself has a basic right of residence. The person in question will be issued a residence permit bearing the words, ‘EC – family member – all professional activities’ for a period of five years before acquisition of a permanent right of residence. This initial document will be granted independently of the duration of the marriage.

- *Maintenance of right of residence*

Articles R. 121-7 to R. 121-9 of the CESEDA stipulate the conditions under which, despite the break in the family tie that initially justified the recognition of a right of residence, family members can continue to reside in France. The conditions for maintaining this right differ according to whether or not this family member is a national of a third-party State outside the EU. They are more restrictive when family members who are nationals of third-party States are concerned, since maintenance of the right is reserved for certain comprehensively listed situations.

When the family tie is broken under the conditions listed in these articles (death, departure of the originator of the right, divorce, etc.), the family member retains a right of residence. This right, which is retained as a family member, is not comparable to that held exclusively by nationals covered by points 1, 2 or 3 of Article L. 121-1, since it does not open up a right of residence to a potential new spouse or to ascendants and descendants aged under 21 or dependent on this spouse.

The circular requests the prefectural services, if they believe that a family member cannot benefit from maintenance of the right of residence, to examine systematically the possibilities for a change in status before contemplating a denial of residence.

- *Permanent right of residence*

Regarding family members, the permanent residence permit that will be issued to them will contain a reference to access to the practise of a professional activity.

A family member of a Community national who has lived in France while a minor and who can prove five years of residence under the conditions defined in point 4 or 5 of Article L. 121-1 or Article L. 121-3 can gain access to permanent right of residence with the possibility of practising a salaried activity without having to apply for work authorisation if he is a national of a country subject to a transitional or extra-Community regime. However, he may not – or does not have to if he is a national of a third-party State – apply for a residence permit until he reaches the age of majority. The last five years of residence in France preceding submission of the application will be taken into account, including those spent while the applicant was still a minor. The residence permit issued will bear the words, ‘EC – permanent residence – all professional activities’.

Jurisprudence

In a judgment of 2 February 2010,³² the Council of State, emergency judge, does not accept the application for suspension of the refusal of a long-stay visa handed down to a Moroccan national on the grounds that she did not, at the time of the application, hold the capacity of dependent ascendant of a national of the Member State of the Union (her Spanish son, residing in France). In fact, the applicant does not establish that her son sends her regular payments, allowing her to meet her needs. Moreover, her non-taxable son is not in a position to take responsibility for an additional person within his household, which already includes four dependent children.

2. IMPLICATIONS OF THE *METOCK* JUDGMENT AND ABUSE OF RIGHTS

- *Circular of 10 September 2010*

The circular of 10 September 2010 states that proof of the family tie by an applicant for a residence card can take the form of any official document from the State of origin (birth certificate, family record book). However, a transcript of the marriage certificate is not required, unless the marriage was solemnised in a third country and doubts exist concerning its validity.

The circular of 10 September 2010 also specified the scope of the *Metock* judgment according to the French authorities. The provisions of the CESEDA do not impose any condition that subjects the right of residence of a family member to the previous legality of his residence. In this respect, it should be recalled that European jurisprudence (ECJ, case C-459/99, *Mrax*, 25 July 2002) set forth the principle according to which a denial of residence and a removal measure cannot be enacted against a family member of a national of the EU, when this person is a national of a third-party State, solely on the grounds that his visa expired before he applied for a residence card.

In terms of whether or not the issue of the residence permit is subject to proof of legal entry, this was recently invalidated by a judgment of the European Court of Justice (case C-127/08, *Metock*, 25 July 2008), which was of the opinion that a right of residence must be

32 EC, ref. 2 Feb. 2010, no. 334549, Zammouri.

granted to this family member regardless of the place and date of his marriage to a Community citizen, as well as the way in which this third-country national entered the host Member State.

The circular reminds the prefectural services that, should doubts exist concerning the sincerity of the marital union between a citizen of the EU and a third-country national, they have the possibility of expediting an investigation in order to check whether the creation of this union does not in reality have the sole aim of obtaining a right of residence.

If, with respect to Community law, the lack of cohabitation between these spouses is not an enforceable condition, on the other hand it is possible for the prefectural services to investigate whether the application for admission for residence is not based on an act or intent of a fraudulent nature. The components of a fraudulent transaction can be investigated at the time of investigation of the initial request for a residence card as well as subsequent to the issue of the card.

In fact, by virtue of the jurisprudential theory of fraud put forward by the Council of State (*'fraus omnia corrumpit'*), the prefectural services can refuse any application for admission for residence, once the existence of the fraud has been established, as well as calling into question a residence card that may have been wrongfully obtained.

Finally, the residence card of a family member who is a third-country national can be withdrawn when the marriage is dissolved by divorce or annulled under the conditions established by point 2 of Article R. 121-8 of the CESEDA. This article states that, if the marriage has lasted for less than three years before the beginning of the judicial procedure for divorce or annulment, third-country nationals cannot claim maintenance of their right of residence, except under special circumstances.

Finally, the judgment of the Council of State of 19 May 2008 (no. 305670) cancelled the first paragraph of Article R. 121-14 of the CESEDA, introduced by the decree of 21 March 2007, which set at two months the period given to family members of a Community national from third countries to submit a request for a residence card, where the Council of State found that it was contrary to the provisions of Directive 2004/38/EC. It is therefore not possible to enforce the latter period on this category of foreign national, who will therefore have three months to file their application, in accordance with the European text.

- *Circular of 17 June 2011³³ regarding the entry into force of the law regarding immigration, integration and nationality*

This circular implements Article 32 of the new law³⁴ regarding the issue of the EC long-term resident's permit in the light of the risks of fraudulent marriage. This article completes Article L. 314-8 of the CESEDA, which makes issue of the resident's permit bearing the words, 'EC long-term resident' conditional upon uninterrupted legal residence of five years in France on the basis of one of the residence permits envisaged in the same Article. This new

33 Circular of 17 June 2011 no. NOR: IOC/K/11/10771/C regarding the entry into force of the law regarding immigration, integration and nationality.

34 This article states that, 'Years of residence under a temporary residence permit bearing the words, 'private and family life', withdrawn by the administrative authority on the grounds of a marriage with the sole aim of obtaining a residence card or French nationality, cannot be taken into account for the purposes of obtaining a resident's permit.'

provision represents a procedural consequence of the mechanism in the battle against fraudulent marriages, envisaged in Article L. 623-1 of the CESEDA.³⁵

From now on, a foreigner married to a French national who has had a temporary residence permit bearing the words, ‘private and family life’ withdrawn on the grounds that the marriage was entered into with the sole aim of obtaining or resulting in the issue of a residence card or of acquiring or resulting in the acquisition of French nationality can no longer take advantage of the duration of residence by virtue of this fraudulently acquired residence permit in order to obtain a resident’s permit on the basis of the length of his residence on the territory. Thus, the circular requests the prefectural services to refuse to issue, on these grounds, the resident’s permit bearing the words, ‘long-term resident – EC’ to the foreigner in question.

Jurisprudence

The Administrative Court of Appeal of Marseilles handed down apparently contradictory judgments applying the *Metock* jurisprudence. The debate seems to centre on the need for an entry visa in France.

In a *judgment dated 18 November 2010*,³⁶ the judges of this court required legal entry to the territory. Mr. Sydney A B, of Cape Verdean nationality, applied for the issue of a residence card on 26 June 2007, as the spouse of a national of a member country of the European Union. By order of 17 April 2008, the Prefect of Bouches-du-Rhône rejected this application and imposed an obligation to leave the territory upon the person in question, on the specific grounds that his spouse could not prove compliance with the requirements imposed by the aforementioned provisions of points 1, 2 or 3 of Article L. 121-1 of the CESEDA. A foreigner, who does not himself have the capacity of Community national and has not been exempted from the obligation to hold a visa, cannot take advantage of his capacity as spouse of a national of the European Union in order to obtain a residence card unless he entered France legally, regardless of the date on which he entered or married his spouse. In this case, Mr. A, a Cape Verdean national, was thus subject to the obligation to hold a visa in order to be admitted to French territory by virtue of the provisions of Article R. 121-1 of the CESEDA. Consequently, since the applicant did not enter France legally, he could not obtain the residence card for which he applied.

It should be emphasised that this judgment does not make explicit reference to the *Metock* judgment.

In a judgment of *28 March 2011*,³⁷ the judges of the Administrative Court of Appeal of Marseilles state that it is evident from the provisions of the CESEDA that a foreigner who is

35 Article L. 623-1 of the CESEDA; the fact of entering into a marriage or of acknowledging a child with the sole aim of obtaining or resulting in the obtaining of a residence permit or the benefit of protection from removal, or with the sole aim of acquiring or resulting in the acquisition of French nationality is punishable by five years’ imprisonment and a fine of 15,000 euros. These penalties are also incurred if the foreigner who has entered into the marriage concealed his intentions from his spouse.

The same penalties are applied in the event of the organisation or attempted organisation of a marriage or acknowledgement of a child for the same purposes.

The penalties rise to ten years’ imprisonment and a fine of 750,000 euros when the offence is committed by way of organised crime.

36 Administrative Court of Appeal of Marseilles, 18 November 2010, no. 08MA03953, Ramos Martins versus Prefect of the Provence-Alpes-Côte-d’Azur region.

37 Administrative Court of Appeal of Marseilles, 28 March 2011, no. 09MA01719, Trapani versus Prefect of Vaucluse.

not himself a Community national and has not been exempted from the obligation to hold a visa, which must be understood as an entry visa, not a residence visa, cannot take advantage of his capacity as the spouse of a national of the European Union to obtain a residence card unless he entered France legally, regardless of the date on which he entered or married his spouse. The judges are of the opinion that these provisions do not ignore the objectives of Articles 5 and 10 of Directive 2004/38/EC, as interpreted by judgment C-127/08 of the ECJ of 25 July 2008. It emerges from the documents of the case that Ms. A entered France illegally in 2001. For the judges, even though she married an Italian national residing legally in France on 21 July 2007, no text exempts the person in question from having to produce a visa for entry into France. No provisions state that it was up to the Prefect to request Ms. A to prove the tie with her spouse, which is not currently under discussion, since the referral of the case to the consular authority in any event only occurred at the initiative of the applicant for an entry visa. Consequently, the Prefect of Vaucluse was able, on these grounds alone, to refuse to issue the requested residence card.

In its *judgment of 12 May 2011*,³⁸ the Administrative Court of Appeal of Marseilles makes a more detailed reference to the *Metock* judgment. Mr. A, of Cameroonian nationality, appealed against the judgment dated 20 May 2009, in which the Administrative Court of Appeal rejected his request, made against the order dated 22 January 2009, in which the Prefect of Bouches-du-Rhône refused to issue him with a residence card in his capacity as a family member of a citizen of the European Union, imposed on him an obligation to leave French territory and established Cameroon as the country of destination.

Under the terms of Article L. 121-3 of the CESEDA, ‘Unless his presence poses a threat to law and order, the family member referred to under point 4 of Article L. 121-1.... a national of a third-party State, has the right to reside anywhere on French territory for a period longer than three months...’. The administrative judges state that, by virtue of judgment C-127/08, dated 25 July 2008 of the European Court of Justice, the terms describing persons accompanying or joining a Community national within the meaning of the Directive [2004/38], must be interpreted in the sense that the third-country national, who is the spouse of a citizen of the Union residing in a Member State of which he does not hold nationality, who is accompanying or joining this Union citizen, benefits from the provisions of this directive, regardless of the place and date of their marriage or of the way in which this third-country national entered the host Member State.

Article R. 121-1 of the CESEDA, taken in order to transpose this same directive into internal law, states that any family member of a citizen of the European Union, who is a national of a third-party State, is admitted to French territory on condition that his presence does not pose a threat to law and order and that, in the absence of a current residence card, he hold a current passport, visa or, if he holds an exemption, a document establishing his family tie. The consular authority issues the required visa to him free of charge and as soon as possible, upon proof of his family tie.

The judges are of the opinion that it is not evident from the aforementioned provisions that the foreigner must be in a legal situation on the date of his marriage in order to assert his capacity as spouse of a national of the European Union and to obtain a residence card. Thus,

38 Administrative Court of Appeal of Marseilles, 12 May 2011, no. 09MA02203, *Mballa Ze versus Prefect of the region of Provence-Alpes-Côte-d’Azur*.

in refusing, on these grounds, to issue a residence card to Mr. A, the Prefect of Bouches-du-Rhône therefore marred his decision with an error in law.

In a judgment of *18 February 2010*,³⁹ the judges of the Administrative Court of Appeal of Paris state that, by virtue of judgment C-127/08, dated 25 July 2008 of the European Court of Justice, the terms referring to persons accompanying or joining a Community national within the meaning of Directive 2004/38 must be interpreted in the sense that a third-country national who is the spouse of a citizen of the Union, residing in a Member State of which he does not hold the nationality, accompanying or joining this citizen of the Union, benefits from the provisions of that directive, regardless of the place and date of their marriage or of the way in which this third-country national entered the host Member State. The judges add that a foreigner who does not himself qualify as a Community national and has not been exempted from the obligation to hold a visa, can only assert his capacity as spouse of a national of the European Union in order to obtain a residence card if he entered France legally, regardless of the date on which he entered or married his spouse; that, on the other hand, it is not evident from the aforementioned provisions that the foreigner must be in a legal situation on the date of his marriage in order to assert his capacity as spouse of a national of the European Union and to obtain a residence card.

3. ACCESS TO WORK

The family members of a citizen of the EU can also practise any professional activity in France without having to apply for work authorisation. They remain subject to the rules that may have been envisaged for access to regulated professions, under the same conditions as nationals.

If they are themselves nationals of a Member State of the EU, they can – upon application – hold a residence permit bearing the words, ‘EC – family member – all professional activities’, even if the practice of a professional activity is not envisaged, since their status is first and foremost that of a family member.

On the other hand, if they are third-country nationals, family members are subject to the obligation to hold this type of residence card. The residence card issued to a family member, regardless of his nationality, remains valid provided its holder is not absent for more than six months per year. Absences for a longer period are permitted, however, to fulfil military obligations or an absence of a maximum of twelve consecutive months for an important reason such as pregnancy, labour, serious illness, study, vocational training or secondment abroad for professional reasons in another Member State or a third-party country.

In some cases, the family member who is a national of a Member State of the EU can choose to obtain a right of residence in his own capacity (1, 2 or 3 of Article L. 121-1) rather than in his capacity as a family member (4 or 5 of the same Article). Thus, for example, a Spanish doctor who is the husband of a German student, pursuing her studies in France. The choice of status is made in the last resort by the applicant. Nonetheless, the circular requests the prefectural services to encourage him to choose admission for residence as originator of the right when this is more advantageous. In order to assess these advantages, these services should essentially take into account:

39 Administrative Court of Appeal of Paris, 18 February 2010, no. 09PA04280.

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- the scope of the recognised rights to work;
- the term of validity of the residence card issued;
- the conditions for maintaining the right of residence in the event of a change of circumstances (breakdown of family tie, end of professional activity, etc.).

Chapter III: Access to employment

1. ACCESS TO EMPLOYMENT IN THE PRIVATE SECTOR

1.1 Equal treatment in access to employment (e.g. assistance from employment agencies)

Many texts have simplified access to some regulated professions by recognising qualifications, eliminating the nationality condition or abolishing certain licences previously required in order to practise these activities.

- Activity of artistic agent

Law no. 2010-853 of 23 July 2010⁴⁰ eliminated the need to obtain a licence to practise the activity of artistic agent.⁴¹ Decree no. 2011-517⁴² states that the physical person or legal entity operating on the national territory in the position of artistic agent is to register in advance on the national register of artistic agents with the ministry responsible for culture. This registration must be carried out prior to the first provision of service on the national territory by the artistic agent who is a national of a Member State of the European Community or of another State party to the European Economic Area agreement.⁴³

- Activity of sports agent

Law no. 2010-626 of 9 June 2010⁴⁴ modified the Sports Code. Thus, the new Article L. 222-15 of the Sports Code provides that the activity of sports agent can be practised on the national territory by nationals of a Member State of the European Union or of a State party to the European Economic Area agreement:

1. If they are qualified to practise it in one of the States mentioned in the first paragraph of the present Article, in which the profession of or training for sports agent is regulated;
2. Or if they have practised the profession of sports agent full-time for two years during the previous ten years in one of the States mentioned in the first paragraph, in which neither the profession nor the training for sports agent is regulated and they are holders of a certificate of competence or of another training qualification awarded by the competent authority in the State of origin.

A decree in the Council of State must establish the conditions governing the practice of the activity of sports agent by nationals of the European Union or of a State party to the European Economic Area agreement wishing to settle on the national territory, where a substantial difference in level exists between the qualification held by the persons in question and the requirements imposed for award of the licence referred to in Article L. 222-7.

The activity of sports agent can also be practised temporarily and casually by nationals who have settled legally in a Member State of the European Union or in a State party to the

40 Law no. 2010-853 of 23 July 2010 regarding consular networks, trade, crafts and services, French Official Gazette no. 0169 of 24 July 2010, page 13650.

41 New Article L. 7121-9 of the Labour Code.

42 Decree no. 2011-517 of 11 March 2011 regarding artistic agents.

43 New Article R. 7121-2 of the Labour Code.

44 Law no. 2010-626 of 9 June 2010 describing the profession of sports agent, French Official Gazette no. 0132 of 10 June 2010, page 10611.

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European Economic Area agreement. However, if neither the activity in question nor the training authorising its practice are regulated in the Member State of establishment, its nationals must have practised it for at least two years during the ten years preceding its practice on the national territory.

- Activity of medical biologist in the capacity as worker

Regarding professions associated with medical biology, Order no. 2010-49⁴⁵ modified the Public Health Code. The Public Health Code now envisages, in its Article L. 6212-2, that the competent authority can individually authorise a health professional to practise the functions of medical biologist, who is a national of a Member State of the European Union or of another State party to the European Economic Area agreement, who has successfully pursued a post-secondary course of study and who, without holding one of the qualifications mentioned in Article L. 6213-1, is the holder of:

1. a training qualification issued by a Member or party State and required by the competent authority of a Member or party State that governs access to these functions or to their practice and allowing these to be practised legally in this State;
2. or, if the person in question has practised in a Member or party State that does not regulate access to these functions or to their practice, a training qualification issued by a Member or party State, certifying preparation for the practice of these functions, accompanied by a certificate proving, in this State, its practice full-time or part-time for a period equivalent to two years full-time during the past ten years. This certificate is not required if the training leading to these functions is regulated;
3. or a training qualification awarded by a third-party State and recognised in a Member or party State, other than France, allowing these functions to be practised there legally.

In these cases, when an examination of the vocational qualifications demonstrated by all the training certificates and of the relevant professional experience shows substantial differences with respect to the qualifications required for access to these functions and their practice in France, the competent authority requires the person in question to submit to a compensatory measure that comprises, at the applicant's discretion, an aptitude test or an adaptation period. The issue of the authorisation to practise allows the recipient to practise the functions of medical biologist under the same conditions as persons who hold one of the certificates referred to in Article L. 6213-1. In the event that the training qualification from the State of origin (member or party state) is likely to be confused with a qualification requiring supplementary training in France, the competent authority can decide that the person in question will provide a statement of the training qualification of the Member or party State of origin, in an appropriate form that it will indicate. The person in question holds the professional title of medical biologist.

- Activity of medical biologist in the capacity as service provider

New Article L. 6213-4 stipulates: 'A health professional who is a national of a Member State of the European Union or of another State party to the European Economic Area agreement, who is established and legally practises the functions of medical biologist in a Member or

⁴⁵ Order no. 2010-49 of 13 January 2010 regarding medical biology, French Official Gazette no. 0012 of 15 January 2010, page 819.

party State, can perform professional acts in France on a temporary and casual basis without being registered on the corresponding roll. When the practice or training leading to these functions is not regulated in the State where he is established, the provider of services must demonstrate having practised there for at least two years during the preceding ten years.

The performance of these acts is dependent on a prior statement, which is accompanied by documentary evidence, the list of which is fixed by order of the minister responsible for health. The health professional is subject to the conditions for practice of the profession. He is subject to the professional rules applicable in France and, where appropriate, to the competent disciplinary jurisdiction.

The professional qualifications of the provider are checked before the first provision of services. In the event of a substantial difference between the provider's qualifications and the training required in France, which would be harmful to public health, the competent authority requires the provider to produce the proof that he has acquired the missing knowledge and skills, specifically by way of compensatory measures.

At the time of the subsequent provision services and at least every year, the provider shall provide evidence of his professional insurance coverage.

In the event that the training qualification from the State of origin (member or party state) is likely to be confused with a qualification requiring supplementary training in France, the competent authority can decide that the person in question will provide a statement of the training qualification from the State of origin (member or party state) in an appropriate form that it will indicate.

The provision of service is performed under the professional title of the State of establishment in a way that avoids any confusion with the French professional title. However, in the event that qualifications have been checked, the provision of services is performed under the French professional title.

Identical provisions have been made for the professional of medical laboratory technician.⁴⁶

Jurisprudence

In *two judgments of 7 July 2010*,⁴⁷ the judges of the Council of State were of the opinion that the Minister for Health is justified in issuing authorisation to practise the profession of doctor to a Community national, without its being accompanied by compensatory measures if he believes that the overall professional experience of the person in question, both in a Member State and in third-party countries, justifies this. The assessment made by the minister of the files submitted to him on a case-by-case basis, following the opinion of the competent practice authorisation committee, took into account both the nature of the qualifications and the experience acquired in the Member State where the recognition of certificates awarded by a third-party State was obtained, as well as the experience acquired in another Member State and in third-party States.

In one of the cases, the situation of the person in question – who held a medical doctor's qualification from the University of Sofia and a qualification as a anaesthetist/recovery spe-

⁴⁶ See new Article L. 4352-6 of the Public Health Code.

⁴⁷ Council of State, 7 July 2010, no. 328656, National Council of the Medical Association versus Ministry of Health and Sports, Council of State, 7 July 2010, no. 329732, National Council of the Medical Association versus Seizov.

cialist from the same University – was examined for the first time by the competent practice authorisation committee for the profession of doctor, which then deferred issuing a ruling in order to obtain more information about the current activity of the person in question and his plans. This committee issued a favourable recommendation after having taken cognisance of the certificate of functions as a doctor of anaesthesiology in France since January 2007 and of an evaluation report from his head of department, emphasising his competences. The minister responsible for health was able to decide, without an obvious error of assessment, in view of the recommendation of the committee and the duly completed file, to issue to this practitioner authorisation to practise the profession of doctor in France.

Two judgments of the Council of State of 29 September 2010⁴⁸ refer to the same problem and the same solutions. Following the recommendation of the competent committee, when the minister makes a decision on an application to practise the profession of doctor from a Community national who holds a qualification from a third-party State, he must take into account the relevant professional experience acquired by the person in question in the Member or party State that recognised the qualification obtained in a third-party State. However, in accordance with the terms of point 5 of Article 14 of Directive 2005/36/EC of the European Parliament and the Council of 7 September 2005, when the examination of the file reveals substantial differences relating to the duration of the training or the subjects taught, leading to provision for requiring the applicant to complete an adaptation course or to take an aptitude test, the minister must first of all check whether the knowledge acquired by the applicant during his professional experience in a Member State or in a third-party country is such that it makes up wholly or partially for these differences. Thus, the minister is justified in issuing authorisation to practise without its being accompanied by compensatory measures if he believes that the overall experience of the person in question, both in a Member State and in third-party countries, justifies this.

1.2 Language requirements

The new Article L. 6213-5⁴⁹ of the Public Health code relating to the profession of medical biologist contains language requirements: a medical biologist, at the time of issue of the authorisation to practise, or of the statement of the provision of services, must possess the linguistic knowledge necessary to practise these functions and knowledge of the system of weights and measures used in France. Equally, the new Article L. 4352-8 relating to the profession of medical laboratory technician stipulates that the medical laboratory technician, at the time of issue of the authorisation to practise or of the statement of the provision of services, must possess the linguistic knowledge necessary to practise the profession and knowledge of the system of weights and measures used in France.

48 Council of State, 29 September 2010, no. 332008 and 332009 (2 judgments), National Council of the Medical Association versus Ministry of Health and Sports.

49 Order no. 2010-49 of 13 January 2010 relating to medical biology, French Official Gazette no. 0012 of 15 January 2010, page 819.

2. ACCESS TO EMPLOYMENT IN THE PUBLIC SECTOR

2.1 *Nationality condition for access to positions in the public sector*

The Circular of 15 April 2011⁵⁰ regarding the methods of recruitment and induction for nationals of Member States of the European Union or of another State party to the European Economic Area agreement into a corps, level of employment or a position in the French public sector applies Decree no. 2010-311 of 22 March 2010 regarding the methods of recruitment and induction of nationals of Member States of the European Union or of another State party to the European Economic Area agreement into a corps, level of employment or a position in the French public sector⁵¹, which recalls the access routes to the French public sector, including internal competition, and the relevant induction methods. This decree brings together all the rules previously established by six distinct decrees relating to secondment induction and to the classification for each of the three public sectors and therefore repeals the latter.

Moreover, it replaces the equivalence committee, created in 2002, with a reception committee for nationals of the European Union or of another State party to the European Economic Area agreement into the public sector, which remains responsible for supporting administrations dealing with an application for induction on secondment of a Community national or an application for consideration of services performed in a Member State of the European Union (or similar) other than France, upon admission to a corps, level of employment or position on secondment or by external competition. This decree breaks new ground in two respects:

- on the one hand, the field of competence of the committee now includes the recruitment of Community nationals by internal competition;
- on the other hand, its referral – previously compulsory, now optional, based on the concern for simplification and deconcentration of administrative procedures.

The present circular is intended to support administrations in the implementation of this reform by reminding them of the rules applicable in the area of recruitment and induction of Community nationals into the French public sector and by stipulating the procedures to be followed, specifically for the assessment of service completed previously in a Member State of the European Union (or similar). This circular also recalls the methods for taking into account services provided by French nationals in a country of the European Union before their entry into the French public sector.

The first part of the circular recalls the general rules applicable with respect to recruitment and induction in terms of secondment, internal competition and classification into the entry corps or level of employment.

The second part of the circular describes the entry methods and the procedure to be followed, describing in particular a ‘six-step process’ for assessing the services performed in a Member State, where the administration has to check: the nationality of the applicant, the place of performance of the services in question, the nature of the tasks of the administration,

50 Circular NOR: BCRF1100667C of 15 April 2010 regarding the methods of recruitment and induction of nationals of Member States of the European Union or of another State party to the European Economic Area agreement into a corps, a level of employment or a position in the French public sector.

51 See 2009 Report.

entity or establishment of the Member State of origin, the legal nature of the commitment that linked the Community national to his employer, the level of the category of corps, the employment or the functions practised with respect to the methods of classification in the entry corps or level of employment and, finally, the duration of the services performed taken into account.

2.2 Recognition of professional experience for access to the public sector

Following the judgment of the Court of Cassation of 11 May 2009,⁵² the *Court of Appeal of Toulouse handed down a judgment on 3 November 2010*⁵³ regarding the dispute between Mr. Denis Demaret and the SNCF.

Mr. Demaret, of Belgian nationality, was recruited on 6 April 1992 by the Belgian National Railways – SNCB – where he fulfilled the functions of steward and then, starting in 1998, of deputy station-master. Since he had been married to a French woman since 1998, on 19 July 2000 he applied to the SNCF for a position equivalent to the one he held within the SNCB. After having taken various steps, on 19 November 2001 he was informed of his recruitment with effect from 7 January 2002. On this date, he was recruited as a contractual traffic technician and posted to Nîmes, in return for a gross monthly salary of 1566.43 euros, with a trial period of 3 months. With effect from 1 April 1994, he was appointed to the position of rolling stock transport technician in Perpignan. On several occasions, he requested integration into the permanent staff of the SNCF, but his request was denied. Since he believed that he was the victim of discriminatory treatment through the restriction of the right to free movement of workers, guaranteed by Article 39 of the Treaty creating the European Community, on 19 April 2006 Mr. Demaret brought his case before the industrial tribunal of Perpignan in order to obtain compensation and back pay. The tribunal dismissed Mr. Demaret's case, a judgment confirmed upon appeal. The Court of Cassation quashed the latter judgment and referred the parties to the Court of Appeal of Toulouse.

In accordance with the provisions of Article 39 of the Treaty creating the European Community, which became Article 45 of the Treaty on the operation of the European Union and Article 7, paragraph 1 of EEC regulation no. 1612/68 of the Council dated 15 October 1968, regarding the free movement of workers within the Community, when a provision of national regulatory articles applicable within a state enterprise envisages, for the employees of this enterprise, promotion that takes into account seniority within a remuneration category determined by these articles, the migrant worker must effectively be able to take advantage of periods of employment in a comparable area of activity, previously completed in the employment of a state enterprise of another Member State.

Annex C of Regulation RH 0254 produced by the SNCF, applicable to Mr. Demaret, stipulates that the monthly salary of officials is increased by 1.5% up to a limit of 33% per complete period of 3 years of service fulfilled since recruitment. This provision of a national regulatory article applicable within a state enterprise, envisaging a salary increase based on seniority, should be applied by the SNCF at the time of recruitment and then during the progress of the career of Mr. Demaret, a Community national, taking into account his seniority

⁵² Cf. 2009 Report.

⁵³ Court of Appeal of Toulouse, 3 November 2010, no. 09/01531, Mr. Denis Demaret versus SNCF.

within the SNCB, a state enterprise of another Member State of the European Union, acquired in positions within a comparable area of activity, the area of rail traffic.

Contrary to what it asserts, the SNCF did not take into account the 9 years and 9 months of seniority of the person in question, acquired in Belgium at the time of his recruitment and then subsequently. In fact, it is evident from the notes in the employment contract of 7 January 2002 that Mr. Demaret's salary was fixed on a flat-rate basis, without reference to seniority. Moreover, in a letter of 13 April 2004, the SNCF wrote to the person in question that he did not benefit from an increase in salary based on seniority. Finally, in a letter of 5 June 2009, it informed him of the adjustment of increases for seniority, but with effect from 1 February 2005, in other words 3 years after he was hired.

The applicant can therefore claim back pay corresponding to increases for seniority assessed over the period of 23 months that he is claiming, assessed at the sum of 1621.25 euros (1566.43 x 4.5% x 23), in addition to the relevant holiday allowances.

Mr. Demaret demonstrates that, after having sent his application for a post within the SNCF on 19 July 2000, he supplemented it on 3 August 2000 with a fax entitled, 'SNCB/SNCF transfer', then with a letter dated 25 September 2000, making reference to the principle of free movement within the European Union, so that he clearly expressed his desire to be integrated within the French state enterprise under conditions that take into consideration his seniority, his experience and his responsibilities within the SNCB, as he explained them in the initial letter. Now, without taking into consideration the career history of the person in question within a public enterprise of another Member State and in a similar area of activity to the post for which he applied, and while, on 5 November 2000, he reached the age limit of 30 years beyond which he could no longer be admitted, according to the by-laws, to the permanent personnel of the SNCF, the latter delayed in processing his application, then hired him not as a permanent official but as a contractual official, and without taking into account his seniority and subjecting him to a trial period of 3 months. The indirect discrimination thus presumed, by restricting Mr. Demaret's right to the free movement of workers within the European Union, is not legitimately justified by the SNCF. The result is that Mr. Demaret has been the subject of discriminatory treatment, which caused him losses linked to his situation as a contractual official, estimated – in view of all the elements in question – at the sum of 15,000 euros, also making good personal and family repercussions, so that there is no reason to add separate compensation.

Chapter IV: Equality of treatment on the basis of nationality

1. WORKING CONDITIONS – DIRECT AND INDIRECT DISCRIMINATION

Specific issue: working conditions in the public sector

A judgment of 14 December 2010⁵⁴ of the Administrative Court of Marseilles is very revealing in terms of the problem of the recognition of vocational qualifications.

Mr. B, born in 1940, of British nationality, acquired French nationality in 1985. He taught literature and sports and physical education in the United Kingdom between 1963 and 1972. He taught sports and physical education in France starting in 1972 at the Saint-François de Carcassonne vocational *lycée*, a private educational establishment under a partnership contract with the State, first as a temporary teacher, then under a permanent teaching contract dated 22 October 1974 as a non-certified teacher. Following an occupational accident on 18 September 1984, he was placed on ordinary medical leave and then on long-term leave until 1991, before being declared permanently unfit for teaching physical and sports education. He was reclassified as a librarian in the same school on 1 July 1993, after having obtained, on 21 July 1986, annulment from the Administrative Court of Montpellier of the reclassification refusal handed down by the Ministry of National Education in 1985. He was permitted to assert his rights to retirement with effect from 3 September 2001.

He believes he suffered abnormal and discriminatory development of his entire career in France, since his appointment, and for which he is requesting compensation.

In terms of the carrying over of the seniority of Mr. B at the time of his permanent appointment in 1974, Mr. B invokes the principle of the free movement of workers. The judges are of the opinion that the person in question is justified in maintaining that the headmaster of the *Académie de Montpellier*, at the time of the reclassification measure applicable to him in his capacity as physical education and sports teacher at a private educational establishment under contract, committed an error in law in refusing to take into account the services that he had previously fulfilled in a British public educational establishment; that, under these conditions, Mr. B is justified in seeking compensation for his material and moral losses following his reclassification in 1974 as a contractual teacher, without taking into account the seniority acquired in the United Kingdom.

In terms of the mutual recognition of qualifications among Member States of the European Community, the judges refer to the provisions of Directive 89/48/EC, as interpreted by the judgments handed down on 9 September 2003 and 7 October 2004 by the European Court of Justice in cases C-285/01 and C-402/02 in terms of the definition of regulated profession.

Regarding the initial level of appointment in 1974 as a category II teacher, teaching sports and physical education, neither a general principle for the mutual recognition of qualifications among Member States of the European Community, nor a standard of derived European law creating a system for the recognition of these qualifications existed. While Mr. B instances, in addition to his years of teaching in the United Kingdom, two qualifications

⁵⁴ Administrative Court of Appeal of Marseilles, 14 December 2010, no. 08MA02017, Minister of National Education versus Stansfield.

entitled Bachelor of Arts and Graduate Certificate of Education, awarded in 1962 and 1963 respectively [French translation follows], it is evident from the investigation, specifically of the translated content of these qualifications and the decisions taken by the equivalence committees meeting on 30 May 1972 and 21 April 1975, that the Minister for National Education did not commit an error of assessment in believing that the level of these qualifications could not be regarded as equivalent to the level required in France to become a certified category I teacher. Consequently Mr. B is not justified in requesting compensation for the negative consequences of his appointment in 1974 as a category II teacher. It is also evident from the investigation, specifically the translated content of the aforementioned qualifications, that the minister did not commit an error in not suggesting reclassification as a teacher of general education to the person in question, whose professional experience was principally that of a teacher of sports and physical education.

Finally, Mr. B refers to clause 7.4 of EC Regulation no. 1612/68. The judges emphasise that no discriminatory provision existed, however, with respect to workers who are nationals of other Member States in the modified decree no. 64-217 of 10 March 1964 regarding the status of contractual and approved teachers in private educational establishments under contract, either at the time of the disputed initial recruitment in 1974 or at the time of the disputed reclassification in 1993.

The judges conclude that Mr. B is only justified in invoking the illegal refusal by the administration to take into account – at the time of his initial appointment – his years of teaching service completed in the United Kingdom.

In *3 judgments of 11 March 2011*,⁵⁵ the Council of State confirmed the requirement, imposed by EU law, that previous professional activities that a national may have fulfilled be taken into account at the time of recruitment into the public sector, even in the capacity as civil servant under private law in another Member State, with a view to establishing his reclassification based on length of service.

The judges of the Council of State state that, ‘the provisions of Article 6 of the Decree of 27 January 1970 have the effect of excluding the consideration of services performed by foreign civil servants employed, under German private law contract, by French forces stationed in Germany and who, contributing to the operation of the French public defence sector, would have practised activities in Germany comparable to civil services of the same kind performed in France, consideration of which is envisaged by these same provisions’. Thus, these provisions are contrary to Article 39 of the EC Treaty.

2. SOCIAL AND TAX ADVANTAGES

2.1 *General situation as laid down in Article 7 (2) Regulation 1612/68*

A Circular CNAF no. 2010-014 of 15 December 2010 concerns the conditions for residence in France and housing occupation for the right to legal allowances and housing benefits.

⁵⁵ Council of State, 11 March 2011, no. 338403, Kaeufling versus Ministry for Ecology, Sustainable Development, Transport and Housing, Council of State, 11 March 2011, no. 338404, Dollinger versus Ministry of Defence and War Veterans, Council of State, 11 March 2011, no. 338405, Auble versus Ministry of Defence and War Veterans.

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The right to legal allowances paid by the Family branch is subject to residence in France by the beneficiaries. Until now, while the condition of residence in France by dependent children for the right to family allowances (FA) was defined in Article R. 512-1⁵⁶ of the Social Security Code (SSC), no text defined the residence in France of the recipient for the right to legal allowances.

The definition of residence in France of the recipient envisaged in Article R. 115-6 is shared with the inspection of various social security allowances subject to a residence condition, which can allow inspection in parallel with other bodies.

The present circular is intended to explain the methods of assessment and inspection of the residence condition. However, the said provisions are ineffective for studying the residence condition of dependent children for family allowances, the conditions of residence in France particular to social minimum wages and the condition of housing occupation for housing benefits (AI/Apl), which remain governed by specific rules.

The residence condition of the recipient for the right to family allowances, independently of the condition of the legality of residence, must be fulfilled regardless of the nationality of the recipient. For foreign nationals, the condition of the legality of residence must also be fulfilled; this concerns the right of residence for nationals of the European Economic Area and of Switzerland. When the residence condition is fulfilled in France, the person in question is regarded as residing in France for the right to family allowances, even if he can simultaneously be regarded as having his habitual residence outside France with respect to rules other than those of Article R. 115-6 SSC, specifically tax rules.

Now, Article R. 512-1 SSC stipulates that the residence in France of the recipient is assessed under the conditions fixed in Article R. 115-6 CSS. The latter envisages two alternative methods for assessing the residence condition in France, opening up the right to various social security benefits (family allowances, supplementary universal health coverage, solidarity allowance for the elderly, etc.). These methods are inspired by two of the criteria imposed by the general tax code for accepting that the tax domicile is in France.

The recipient must have, in France:

- either his permanent home;
- or the place of his main residence.

56 Article R. 512-1 SSC: for application of Article L. 512-1, residence in France by a person responsible for one or more children is assessed under the conditions established in Article R. 115-6.

For the application of Article L 512-1, a resident in France is regarded as any child living permanently in mainland France.

A child is also assumed to be residing in France if, while retaining his family ties on the mainland territory where he lived until then on a permanent basis, he completes, outside this territory:

- 1) either one or more temporary stays of a duration not exceeding three months during the calendar year;
- 2) or a longer stay if it can be demonstrated, under the conditions envisaged by joint order of the minister responsible for health, the minister responsible for social security, the minister responsible for agriculture, the minister responsible for the budget, the minister responsible for national education and the minister responsible for universities, that the stay is necessary to enable him either to pursue his studies or to learn a foreign language, or to complete his vocational training;
- 3) or one or more stays equal at most to the length of the academic year once it has been established, under the conditions envisaged in the order mentioned under 2) above, that the family has its principal residence in France in a border zone, that the child attends a care facility or an educational establishment in the neighbouring country near the border and that he joins his family at frequent intervals.

The bodies paying the family allowances regularly carry out inspections of the effectiveness of residence in France. This inspection is, whenever possible, performed in parallel with the checks performed by another social security body.

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The criterion of the *permanent home* in France is fulfilled when the family has its habitual residence based on French territory. This criterion is assessed within the framework of the inspection based on a range of indices, such as:

- the fact that income is declared in France;
- his main residence is in France;
- his professional activity is practised in France;
- his children attend school or he makes use of individual or shared childcare for the youngest children;
- the recipient's spouse, cohabiting partner or PACS partner (civil union) is present in France.

When this criterion is satisfied, it means that a recipient can continue to be regarded as residing in France if he is called to reside abroad, including for most of the year, specifically for professional or medical reasons.

The criterion of *main residence* in France is fulfilled when the recipient resides there for more than six months consecutively or not (presence in France greater than or equal to 181 days), during the calendar year when the family allowances are paid. Since the criteria of residence in France represent two of the criteria for fiscal domicile in France, this fiscal domicile constitutes an assumption of residence in France by the recipient within the meaning of family allowances, if, that is, non-zero revenues are declared. In practice, the existence of a tax declaration of revenues in France constitutes an assumption of residence in France since the recipient, or at least his spouse, then has taxable income in France (practice of a professional activity in general) and is regarded by the Dgfp as having his tax domicile in France.

The practice of a non-salaried activity that does not generate income cannot be regarded as an element of proof of residence in France. Moreover, fraudulent use of the situation of non-salaried workers is observed on the part of some Community nationals, particularly the self-employed (without declared income) in order to benefit ipso facto from a right of residence and to benefits, including the Workers Solidarity Income (minimum wage), while neither the right of residence nor residence in France have been established. On the contrary, tax domicile outside France constitutes an indication of the absence of residence in France.

The right to the Single Parent Benefit, the right to the Handicapped Adult Benefit, the right to Income Support and the right to Workers Solidarity Income can be opened up to Community nationals and similar provided they can provide evidence of a period of three months of residence in France prior to their application. The three months are assessed from date to date. This condition can be imposed individually on all members of the household. The residence condition must be examined as a priority over the condition associated with the right of residence. If the persons in question meet the residence condition, the condition for the right of residence must be assessed with effect from the fourth month of residence. Opening up of the right then takes effect, subject to all the conditions of allocation, with effect from the month following the month when the condition of three months of residence is fulfilled.

However, this period of three months is not required for:

- persons practising a stated professional activity;
- persons who have practised this type of activity in France and are temporarily unfit for work for medical reasons, or who are pursuing vocational training or registered as a job-seeker;

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- ascendants, descendants and spouses of the persons listed above.

In a *judgment of 21 October 2010*,⁵⁷ the judges of the Court of Appeal of Versailles took cognisance of the benefit of Universal Health Coverage in favour of a Community national. Mr. Abdallah L. is 83 years old, born on 26 December 1926 in Tiznit, Morocco. He acquired Belgian nationality through marriage in 1989 and lives in France with his wife. By decision of 19 November 2002, the local sickness insurance fund of Yvelines accepted Mr. L for basic universal health coverage. His rights were extended until 10 December 2007, the date on which the local sickness insurance fund of Yvelines denied membership to Mr. L on the grounds that the conditions set forth by Community Directive 2004/38 of 29 April 2004, transposed into French law by decree no. 2007-371 of 21 September 2007, to obtain a right of residence were not fulfilled and that, consequently, he could not benefit from universal health coverage. During the case before the social security affairs court, the local sickness insurance fund of Yvelines admitted that basic universal health coverage should have been maintained under the conditions usually envisaged by the provisions of the Social Security Code for Community nationals who entered France as non-workers and were already beneficiaries of basic universal health coverage on the day of the entry into force of the circular of 23 November 2007, which completed the provisions of the decree of 21 September 2007. The local sickness insurance fund of Yvelines and Mr. L should therefore be informed that basic universal health coverage should be maintained for the latter and his beneficiaries under the conditions usually envisaged by the provisions of the Social Security Code.

On the other hand, basic universal health coverage cannot be maintained without a duration condition since an annual re-examination of the situation of the recipient has been undertaken, both in terms of his resources and of his residence. Mr. L and his beneficiaries cannot therefore be awarded universal health coverage without a duration condition.

⁵⁷ Court of Appeal of Versailles, 21 October 2010, no. 08/03196, Local Health Insurance Fund of Yvelines versus Abdallah L.

Chapter V: Other obstacles to the free movement of workers

1. RESIDENCE OF EU CITIZENS PROVIDING SERVICES AND SECONDED SALARIED WORKERS

Regarding service providers and seconded salaried workers, the circular of 10 September 2010⁵⁸ described the right of residence of citizens of the EU providing services or seconded salaried workers.

- *For EU citizens providing services*

Service providers who express a desire to hold a residence permit will be issued with a permit, ‘EC – service provider’, the term of validity of which will be in line with that of the service.

Bulgarian and Romanian nationals who come to France to provide services are obliged to be in possession of this residence permit.

In order to comply with Community law, the circular stipulates that any inspection of the effectiveness of the provision of the service will have to be carried out retrospectively.

- *For salaried EU citizens seconded from a Community enterprise*

Seconded salaried workers come to work temporarily in France at the request of their employer, who is legally established in another European Union State. In application of the provisions of the Labour Code, a salaried worker is seconded:

- either within the context of the provision of services performed by his employer;
- or within the context of a service for his own account, performed by its employer;
- or within the framework of internal group mobility among companies or establishments belonging to the same group;
- or within the context of making a person available for temporary work.

They benefit from the provisions of the Labour Code and extended joint agreements specifically in terms of remuneration and employment conditions. All employers established outside France that second a salaried worker to French territory must declare this in advance to the competent employment inspectorate for the place of activity.

Salaried workers covered by a transitional system as well as salaried workers who are third-country nationals, seconded by a Community service provider, can practise this professional activity without prior work authorisation within the context of the free provision of services envisaged by Article 56 of the Treaty regarding the operation of the EU and in application of Article R. 5221-2 of the Labour Code.

Citizens of the EU who are not subject to a transitional period are not obliged to hold a residence card. If they apply for one, they will receive the residence permit, ‘EC – salaried worker of Community service provider’, with a term of validity that will have to be in line with that of the service.

Nationals of Member States covered by the transitional system as well as third-country nationals who are seconded to France to practise a salaried activity for more than three

⁵⁸ Op. cit.

months will have to hold this same residence permit, the term of validity of which will also have to be in line with that of the service. The persons in question, at the end of their period of working on secondment, will only be able to occupy a salaried position with an employer established in France subject to obtaining work authorisation, which will be investigated as a change of status under general law.

The duration of work as a seconded worker is not posted in the accounts in the period of twelve months beyond which the salaried workers covered by the transitional system are exempted from work authorisation since the seconded workers are not regarded as admitted on to the French labour market.

1.2 The right of residence of students

The circular of 10 September 2010 also describes the conditions of the right of residence of students. Citizens of the EU and similar benefit from application of a right of residence in order chiefly to be able to pursue studies or vocational training. The exercise of this right, which is applicable to all nationals of Member States, including those subject to the transitional system, is conditional upon compliance with conditions relating to resources and social security.

Exercise of the right of residence for studying is subject to the condition that the person in question can provide evidence of health insurance and certify that he possesses resources so that he will not become a burden on the French system of social security. No particular documentary evidence concerning the nature of the resources or their amount has to be required: a statement or any other equivalent means, at the discretion of the persons in question, is sufficient to guarantee that they are in possession of sufficient resources.

The person in question must of course be able to prove his effective registration at a private or public educational establishment. The right of residence is recognised on this basis for the entire duration of the education or the training pursued. It implies that its holder is devoted principally to pursuing his studies; in other words that the majority of his time must be reserved for studying subject to the conditions of the secondary practice of a salaried activity.

The free exercise of the right of residence does not however release the person in question from having to demonstrate in a more detailed way the effectiveness of his right of residence, should an inspection reveal, specifically at the time of an application for social security services, the potential existence of an unreasonable burden on the social security system. The circular then requires the prefectural services to question the existence of such a burden in certain situations, revealing a lack of care in pursuing studies, for example, or a blatant inconsistency in the progress of studies, which could lead, should services be requested in a systematic way, to the belief that the person in question is diverting the purpose of the right of residence and therefore no longer fulfils the conditions for its exercise.

Community students who are pursuing studies are not bound to apply for a residence card. If they request one, they will receive a residence permit bearing the words, 'EC – student – all secondary activities'. The term of validity of the residence permit issued to students is limited in all cases to one year, or the duration of the school or university year. The permit can be extended throughout the duration of the studies.

Chapter VI: Specific issues

1. FRONTIER WORKERS (OTHER THAN SOCIAL SECURITY ISSUES)

The circular of 22 September 2010 recalls that frontier workers who reside in France can gain access to permanent right of residence after three years of legal and continuous residence in France by virtue of Article R. 122-4 of the CESEDA, rather than the five years required for other EU citizens.

2. SPORTSMEN/SPORTSWOMEN

Discussions underway within the French Basketball Federation seek to put into context the evolving number of foreign players in French championships. One table under discussion deals specifically with ‘faithful foreigners’. This table, which is in draft form, makes a distinction between Community nationals and nationals of third-party States.

‘The French Basketball Federation (FFBB) wishes in effect to introduce a modification to its rules concerning the allocation of memberships of French amateur clubs – from Male National 1 to Male National 3. Following a very meticulous colour code (white, orange or red memberships), this new regulation will be defined with respect to the age of the player, the number of years of membership of the FFBB, as well as his membership of the FIBA Europe, the European Federation of Amateur Basketball, which comprises 52 countries. A ‘*non-FIBA Europe*’ player is thus regarded as a ‘*foreigner*’; if he has been a member of a French club for at least seven years, he joins the category of ‘*faithful foreigners*’.’⁵⁹

3. THE MARITIME SECTOR

4. RESEARCHERS/ARTISTS

5. ACCESS TO STUDY GRANTS

6. YOUNG WORKERS

⁵⁹ Basketball: the federation denies wanting ‘fewer foreign players’, T. Heteau, Le Monde.fr, 13 May 2011.

Chapter VII: Application of transitional measures

1. TRANSITIONAL MEASURES IMPOSED ON EU-8 MEMBER STATES BY EU-15 MEMBER STATES AND THE SITUATIONS IN MALTA AND CYPRUS

As recalled in the circular of 10 September 2010, on 1 July 2008 France lifted all the restrictions to access to the labour market for salaried workers who are nationals of the States that joined the EU on 1 May 2004.

2. TRANSITIONAL MEASURES IMPOSED ON WORKERS FROM BULGARIA AND ROMANIA

The first phase of the 2-year transitional period for these countries was renewed for 3 years with effect from 1 January 2009.

2.1 *Circular of 10 September 2010 regarding the conditions for exercising the right of residence by nationals of the EU other States party to the EEA and Switzerland*⁶⁰

This circular recalls that Bulgarian and Romanian nationals are not subject to the obligation to hold a residence card on condition that they do not practise a professional activity or, if they do so, that they have obtained a qualification at least equivalent to a master's at an accredited French higher education establishment. These persons can reside for more than 3 months on the basis of their only identity document, proving their nationality, subject to compliance with the basic conditions of the right of residence.

On the other hand, the obligation to apply for a residence card is maintained with respect to citizens of the EU subject to a transitional system (Bulgarians and Romanians) who wish to practise a salaried or non-salaried professional activity in France, as well as family members of these nationals if they hold the nationality of a third-party State.

- *Practice of a salaried activity*

For these nationals, the general law system applies to access to a salaried activity: this assumes the obligation to hold work authorisation as envisaged in Article L. 5221-2 of the Labour Code. Article L. 5221-3 of the same Code stipulates, moreover, that a foreigner who wishes to enter France in order to practise a salaried activity there and who demonstrates the intention to settle there on a long-term basis must prove adequate knowledge of the French language, marked by ratification of the experience acquired, or must undertake to acquire it following his settlement in France.

However, this system is relaxed for access to certain salaried activities on the list of trades under pressure, established by order and commented on by the circular of 20 Decem-

⁶⁰ Circular no. NOR/IMIM/1000/116/C of 10 September regarding the conditions for exercise of the right of residence by nationals of the European Union, other States party to the European Economic Area (EEA) and the Swiss Confederation, as well as their family members, text not published in the Official Journal.

ber 2007⁶¹. As correctly stated in the circular, this does not concern an exemption from work authorisation, but the elimination of the criterion that is the most difficult to fulfil in order to obtain it.

The department in charge of foreign labour determines whether work authorisation can be issued, based on the criteria of Article R. 5221-20 of the Labour Code. According to the provisions of this Article, the Prefect specifically takes into account the following assessment elements:

- the employment situation in the profession and in the geographical zone for which the application is made, taking into account the specific aspects required for the position under consideration, and the searches already performed by the employer with employment organisations competing with the public employment service to recruit a candidate already present on the labour market;
- the suitability in terms of qualification, experience, the certificates or titles held by the foreigner and the characteristics of the job for which he is applying.

The work authorisation can be limited to certain professional activities or to certain geographical zones.⁶² In the event of a change of employer or of the place where the activity is practised, new work authorisation will have to be applied for by the EU citizen in question if he is the holder of a fixed-term contract that does not by definition allow him access to the labour market. On the other hand, the holder of a permanent contract who is admitted to the labour market and is employed for more than one year is not subject to the obligation to apply for new work authorisation.

In the event of a favourable recommendation on the issue of work authorisation, a Romanian or Bulgarian national will receive a residence permit, 'EC – all professional activities', the validity of which will be in line with that of the employment contract. If the contract is permanent, the residence permit will be for a maximum period of 5 years, ending at the time when permanent right of residence becomes available to the person in question.

Since the persons in question have been admitted to the labour market for an uninterrupted period equal to or longer than twelve months either on the date when their country joined the EU or subsequently, they will have to be regarded as admitted to the French labour market permanently, in accordance with Article R. 121-16 of the CESEDA. Upon expiry of their residence card, they will be able to apply for a residence permit bearing the words, 'EC – all professional activities', without work authorisation being required. The benefit of this exemption from work authorisation remains for as long as the persons in question continue to reside in France, fulfilling the conditions of the right of residence, including if they interrupt their salaried activity and decide to start a new job.

EU nationals covered by the transitional system who have been admitted for residence and for work under general law legislation, although their country did not form part of the Union, must have their situation handled in accordance with the provisions envisaged in Article R. 121-16-11 of the CESEDA. If these nationals have obtained a temporary residence permit, bearing the words, 'salaried worker' or 'private and family life', they are regarded as permanently admitted to the French labour market and do not therefore have to apply for new work authorisation to continue to practise salaried employment. As a consequence, they

61 Circular NOR/IMI/N/07/00011/C of 20 December 2007.

62 Article L. 5221-7 of the Labour Code.

must be given, upon expiry of their former document, the residence permit, 'EC – all professional activities', within the limits of the period granting access to permanent residence. Those who can demonstrate that they fulfil the conditions for the permanent right of residence will also be able to claim the residence permit bearing the words, 'EC – permanent residence – all professional activities'. If the nationals of Member States covered by the transitional system have been holders of a resident's card before their country joined the EU and apply for its extension when it expires, the rules applicable to all citizens of the EU in the same situation must be applied to them.

Citizens of the EU admitted previously for residence, covered by a card that does not authorise them to work (visitor) or only authorises them to work as a secondary activity (student) will have to apply for work authorisation in order to practise salaried employment.

- Practice of a non-salaried activity

Nationals of the EU covered by the transitional system are free to practise any non-salaried activity of their choosing, under the same conditions as nationals. In order to do so, they must fulfil the same formalities and meet the same requirements regarding aptitude or qualifications as nationals.

During the transitional period, these nationals will have to apply for a residence permit before starting their activity. The circular requests the prefectural offices to submit a receipt for application of the permit as soon as possible, in order to facilitate the administrative steps prior to the practice of their activity, for example registration on the trade register and or on the directory of trades.

The card issued must bear the words, 'EC – all professional activities except salaried'. It will be valid for five years provided its holder has been in a position to demonstrate the permanent nature of his activity.

Miscellaneous

It should be recalled that if the duration of the professional activity does not exceed 3 months, no work authorisation or residence permit is required. Equally – and including for residence periods of more than 3 months – no work authorisation is necessary for salaried workers seconded to France.

Bulgarian and Romanian nationals pursuing their studies in France can practise a salaried professional activity for a maximum of 60% of the annual working hours under the same conditions as foreigners under general law. They will then have to apply for the residence permit bearing the words, 'EC – student – all secondary activities'. The validity of the residence permit issued to students is limited under all circumstances to one year, or the duration of the school or university year. The document can be renewed throughout the period of the studies.

It should be pointed out that Bulgarian and Romanian nationals cannot enjoy the right of residence for looking for work granted to citizens of the EU.

- *Holders of a master's degree in France or abroad*

- Nationals of Member States covered by the transitional system who hold a master's awarded in France

Nationals of these States who hold a master's degree or equivalent, awarded by a nationally accredited French institution of higher education will be exempt from the obligation to apply for work authorisation and a residence permit in order to practise any professional activity, in

accordance with Article L. 121-2. In order to do this, they have to provide proof of their qualifications and of their nationality. This exemption is applicable regardless of the date on which the qualification was obtained.

An order of 12 May 2011 of the Ministry of Higher Education⁶³ establishes the list of qualifications at least equivalent to the master's degree for application of the CESEDA. The training establishment must be recognised by the State and only the French qualification ultimately awarded counts, independently of the preceding course.

If the persons in question nevertheless apply for a residence card, they will receive the residence permit, 'EC – all professional activities', the term of validity of which will be in line with that of the employment contract submitted. As is the case for foreign nationals who benefit under general law, they will receive a residence card for six months, during which time they will be authorised to look for employment, regardless of the sector of activity in question.

- Nationals of Member States covered by the transitional system who hold a master's degree awarded abroad

These nationals, who hold a master's or an equivalent qualification awarded by a foreign institution, remain subject to the obligation to hold a residence permit in order to practise a professional activity, including scientific.

However, when they conduct research work or provide education at university level within the context of a host agreement signed with a public or private organisation, they should be exempted from the work authorisation procedure in order to ensure that the persons in question will be granted the same facilities as nationals under general law, who benefit from the specific admission procedure for residence, covered by the 'scientific' residence permit. The circular recalls that this agreement can be issued to holders of a doctorate as well as to students who hold a master's qualification and who are preparing for their doctorate.

Consequently, the prefectural services must issue them with the residence permit, 'EC – all professional activities', upon provision of evidence of the host agreement they hold and once they meet the conditions under general law regarding the issue of this document to scientists.

- Family members

The right to work of a family member of a national of a Member State subject to the transitional system is related to that of the originator of the right, provided this family member is himself a national of an EU country subject to this same system or a third-country national.

The family member in question can thus only gain automatic access to salaried employment if the national of the Union whom he is joining or accompanying has been admitted to the labour market for a period of at least one year. If the latter acquired the right to work for a period of less than one year, the family member must apply for work authorisation – upon presentation of an employment contract – which may be denied because of the employment situation. The family member can however gain access to non-salaried professions.

In all cases where a professional activity is practised, a residence permit must be applied for in advance. If the family member is granted the right of access to salaried activities, he

⁶³ Order of 12 May 2011 establishing the list of qualifications at least equivalent to the master's degree, taken in application of point 2 of Article R. 311-35 and point 2 of Article R. 313-37 of the Code for the Entry and Residence of Foreigners and the Right of Asylum.

will receive the residence permit bearing the words, ‘EC – family member – all professional activities’.

If this right of access to salaried activities is not open to him but he wishes to practise a non-salaried activity, you will issue the person in question with the residence permit, ‘EC – family member – all professional activities except salaried’.

Possession of a residence permit is compulsory in order to practise an economic activity. The term of validity of this permit will have to be in line with the remaining period of the card held by the Community national – or which he can claim – in order for the two permits to expire concomitantly.

Jurisprudence

A judgment of the Administrative Court of Appeal of Bordeaux of 30 November 2010⁶⁴ confirmed a removal order based on the practice of work without authorisation by a Bulgarian national. The applicant, born in 1955, entered France on 7 January 2009 and was questioned on 8 October 2009 following an investigation, revealing the fact that she had worked without having held a residence card authorising her to do so. She stated that she was a widow, with a daughter residing in Bulgaria, that she does not have resources and is residing on the national territory with her sister-in-law, of French nationality. That said, the judges emphasise that she does is not covered by one of the situations for family reunification of Community nationals. Moreover, she is not without family ties in Bulgaria, where her daughter is resident. Although she asserts that she is providing emotional support for her sister-in-law, who holds French nationality, following the deaths of her brother and nephew, this circumstance alone is not sufficient to establish that the Prefect of Haute-Vienne, in refusing to admit her for residence, would have committed an error of assessment – as she maintains – in believing that this refusal did not represent a disproportionate attack on her right to respect for her private and family life, guaranteed by Article 8 of the ECHR.

In several judgments of 28 April 2011,⁶⁵ the judges of the Administrative Court of Appeal of Nantes recall that the provisions of Article L. 121-2 of the CESEDA derogate, by virtue of Appendix VII referred to Article 23 of the act regarding the conditions for membership of the European Union of Bulgaria and Romania, from the provisions of Article 39 of the Treaty creating the European Union; thus Romanian nationals wishing to practise a professional activity in France are subject to possession of a residence card as well as work authorisation.

It is constant that Mr. X resided in France in order to practise a professional activity there. He had an employment contract with Tracus Arte, which has its head office in Romania and which owns the stud farm in Orne where he worked. However, he cannot establish that his employer took the necessary steps with the French authorities with a view to granting him the capacity of seconded salaried worker within the meaning of the provisions of Article L. 1261-3 of the Labour Code. Consequently, by virtue of the provisions of the CESEDA, the applicant was subject to possession of a residence card and work authorisation, which he did not hold. Under these conditions, the Prefect of Orne was able to judge that the person in

64 Administrative Court of Appeal of Bordeaux, 30 November 2010, no. 10BX00993, Grueva versus Prefect of Haute-Vienne.

65 Administrative Court of Appeal of Nantes, 28 April 2011, no. 10NT01756, Prefect of Orne versus Gherman, Administrative Court of Appeal of Nantes, 28 April 2011, no. 10NT01757, Prefect of Orne versus Husu, Administrative Court of Appeal of Nantes, 28 April 2011, 10NT01758, Prefect of Orne versus Schipor.

question could not prove any right of residence within the meaning of Article L. 121-1 of the CESEDA and was covered by the scope of the provisions of point I of Article L. 511-1⁶⁶ of the same Code, which envisages the possibility of issuing an obligation to leave French territory to a Community national who cannot prove any right of residence.

66 Article L. 511-1 of the CESEDA: I – The administrative authority that refuses to issue or renew a residence card for a foreigner or that withdraws his residence card, his acknowledgement of an application for a residence permit or his temporary residence authorisation, on grounds other than the existence of a threat to law and order, can accompany his decision by an obligation to leave French territory, which establishes the country of destination to which the foreigner will be sent if he does not comply with the voluntary departure deadline envisaged in the third paragraph. The obligation to leave French territory does not have to be the subject of justification.

The same authority can, by justified decision, compel a national of a Member State of the European Union, of another State party to the European Economic Area agreement or the Swiss Confederation to leave French territory if it observes that he no longer proves any right of residence as envisaged by Article L. 121-1.

The foreigner has a period of three months from notification in which to comply with the obligation imposed upon him to leave French territory. When this period expires, this obligation can be executed ex officio by the administration.

The provisions of Title V of the present book can be applied to a foreigner who is the subject of an obligation to leave French territory upon expiry of the deadline envisaged in the preceding paragraph.

A foreigner who is the subject of an obligation to leave French territory can apply for return assistance financed by the French Office of Immigration and Integration, unless he has been detained.

Chapter VIII: Miscellaneous

1. RELATIONSHIP BETWEEN REGULATION 1408/71-883/04 AND ARTICLE 45 TFEU AND REGULATION 1612/68

Legislation

Several circulars have described the entry into force of Regulation 883/2004.

Circular CNAV no. 2010/54 of 21 May 2010 concerns the methods of application of the provisions of Community Regulations no. 883/2004 and no. 987/2009 regarding old-age and survivors' allowances, replacing – with effect from 1 May 2010 – Regulations no. 1408/71 and no. 574/72. The circular is composed of technical notes, with the objective of stating and detailing the principles and legal rules of the provisions applicable by retirement insurance funds under the general system.

Circular no. DSS/DACI/2010/363 of 4 October 2010 regarding the entry into force of new regulations (EC) no. 883/2004 and no. 987/2009 for the coordination of social security systems concerns the provisions relating to medical and maternity allowances. It makes contributions to the new regulations and recalls the broad rules and principles of coordination.

Circular no. DSS/DACI/2010/461 of 27 December 2010 regarding the entry into force of new regulations (EC) no. 883/2004 and no. 987/2009 for the coordination of social security systems presents the scope, the main principles and the general provisions of these texts.

Jurisprudence

In its *judgment of 29 October 2010*,⁶⁷ the Court of Appeal of Douai took cognisance of an application of regulations 1408/71 and 1612/68, concerning the Early Childhood Allowance (PAJE). The supplement for childcare of the parents' choice is one of the allowances envisaged by the mechanism for the Early Childhood Allowance (PAJE), introduced by the law of 18 December 2003. It is paid to compensate for the cost of caring for a young child, according to the conditions defined in Articles L. 531-5 to L. 531-9 of the Social Security Code. The Family Allowances Office of Maubeuge maintains that it was justified in denying Mr. Freddy Delacroix receipt of this supplement on the grounds that the person in question lived with his wife and his young child in Belgium and that the allowance is not exportable. The organisation believes that it has correctly applied the provisions of Community Regulation 1408/71 of 14 June 1971. It should be noted that a new European regulation entered into force on 1 May 2010, Regulation 883/2004, ruling out all residence conditions except for special allowances of a non-contributory nature, which do not include the supplement for childcare of the parents' choice, such that this allowance is exportable with effect from this date and without possible dispute.

When the Family Allowances Office of Maubeuge investigated the application from Mr. Freddy Delacroix, the supplement for childcare of the parents' choice was targeted specifically in Appendix VI of the regulation of 14 June 1971 as being a non-exportable allowance. While, in 2005, the supplement for childcare of the parents' choice was registered in Appendix VI, it was only to take account of the fact that the PAJE had replaced various benefits,

⁶⁷ Court of Appeal of Douai, 29 October 2010, no. 365/10, 09/01863, Family Allowances Office of Maubeuge versus Mr. Freddy Delacroix.

including the benefit for childcare at home (AGED) and the benefit for family assistance to employ an approved social worker (AFFAMA), allowances that France had requested be considered non-exportable on the grounds that they were designed as forms of local employment assistance and in order to combat illegal employment. On several occasions, the ECJ had to declare invalid certain articles or appendices to Regulation no. 1408/71 because they involved a violation of the principle of equal treatment. In a judgment of 15 January 1986 (*Pietro Pinna versus Family Allowances Office of Savoie*), the Court judged Article 73 paragraph 2 of this regulation invalid since it ruled out granting French family allowances to workers subject to French legislation for the members of their family residing on the territory of another Member State. The Court, in a judgment of 31 May 2001 (*Ghislain Leclere and Alina Deaconescu versus National Family Allowances Office of Luxembourg*), stated that ‘exclusion (...) from the scope of Regulation no. 1408/71 (...) does not have the effect of exempting Member States from ensuring that no other rule of Community law, in particular drawn from Regulation no. 1612/68, poses an obstacle to the imposition of a residence condition’.

In order to take this jurisprudence into account and to outline the Community rules applicable to the PAJE, an allowance newly introduced by the law of 18 December 2003, the Ministry of Social Affairs, Labour and Solidarity, in a circular of 1 March 2004, emphasised that, when it comes to the supplement for childcare of the parents’ choice, ‘the text in Appendix VI of Regulation no. 1408/71 offers a guarantee against exportation within the context of this regulation’ but that it ‘does not offer a guarantee against exportation based on Regulation no. 1612/68 for a worker who requests it’, adding these stipulations: ‘The supplement for childcare of the parents’ choice must in fact be regarded as a welfare benefit, as were the AGED and the AFFAMA. According to constant jurisprudence of the Court, welfare benefit means all benefits linked or otherwise to an employment contract, which are generally granted to national workers, on the grounds of their objective capacity as a worker or of the simple fact of their residence on the national territory (judgment of 27 May 1993, *Schmidt C-310/91*). It therefore falls within the material field of this regulation and thus Article 7 of this same Regulation should be applied, which envisages equality of treatment in terms of welfare and tax benefits among workers, should the case arise’. Since 1 March 2004, it has therefore been very clearly pointed out to family allowances offices that the supplement for childcare of the parents’ choice, although it is included in Appendix VI, could be granted to a French worker residing in another Member State within the context of Regulation 1612/68 by virtue of the principles of free movement and equality of treatment in terms of welfare and tax benefits. The Family Allowances Office of Maubeuge maintains that it has favoured the Community standard on the application of a simple circular at the correct time. Now, the criticism levelled of the Office is more precisely that it did not apply Regulation 1612/68, the normative value of which is the equivalent of that of Regulation 1408/71.

The Family Allowances Office of Maubeuge claims, moreover, that the Ministerial letter only introduced the simple possibility of paying the supplement based on Regulation 1612/68 and that it therefore remained free to deny the benefit by virtue of Regulation 1408/71. However, as Mr. Freddy Delacroix points out, it was not a question of leaving the choice to the family allowances offices of whether or not to apply the residence condition, but of providing for an exception to the non-exportable nature of the allowance when this was requested by a Community worker. Moreover, the European Commission, considering a complaint from Mr. Freddy Delacroix, recalls these rules in its mail of 14 April 2009: ‘As

we pointed out to you in our mail of 6 February last, we have contacted the French authorities, requesting them to provide explanations concerning the residence condition for the supplement for childcare of the parents' choice. We have received their response, which indicates that the above supplement can be paid based on Regulation 1612/68, as a welfare benefit, to a worker who is a national of a Member State who may apply for it and who complies with the conditions of general law other than the residence condition, for receipt of this allowance. Please find enclosed a copy of the Ministerial enquiry, dated 1 March 2004, which specifically mentions export on the basis of Regulation 1612/68 for any worker who applies for it. We hope that this response and the enclosed document will allow you to assert your rights. However, please do not hesitate to contact us again should this supplement be denied you again solely on the grounds of the residence condition'.

In the light of all of these elements, the Family Allowances Office of Maubeuge should have acceded to the request from Mr. Freddy Delacroix by applying the provisions of Regulation no. 1612/68.

The Family Allowances Office of Maubeuge requests the Court to decide on the question of a complete or differential payment of the allowance. Article 76 of Regulation no. 1408/71 stipulates that, 'if allowances are payable on the basis of the legislation that it applies, without any allowances being envisaged by the legislation of the State of residence for the same family member, the competent institution pays these allowances in their entirety'. It is not disputed by the Family Allowances Office of Maubeuge that the allowance in question did not have an equivalent in Belgium. It can therefore be logically deduced that Mr. Freddy Delacroix has the right to full payment of the supplement for childcare of the parents' choice. The judges add that it must be observed that the Family Allowances Office of Maubeuge is located in a frontier zone and therefore naturally forms part of the offices most affected by the issues of coordination among social security systems. Moreover, since 2004, the Health Ministry had been drawing the attention of the offices to the problem of the supplement for childcare of the parents' choice within the European context and had invited them to entertain the requests made by workers on the basis of Regulation 1612/68. Despite these very clear instructions, the Family Allowances Office of Maubeuge handed down an unjustified refusal to Mr. Freddy Delacroix.

These considerations cause us to maintain that the Family Allowances Office of Maubeuge persisted in its abusive refusal to allow Mr. Freddy Delacroix to benefit from the right to a social security allowance, this refusal having deprived the recipient of not insignificant financial support in order to cover the expenses of caring for his child. This situation therefore gave him access to the right to compensation.

In a judgment of 4 November 2010⁶⁸ the Court of Cassation had cause to describe the rights to family allowances of a Community national. On 16 September 1999, a Spanish national residing in France indicated to the Family Allowances Office of Essonne that his four children had returned to Spain on 1 July 1999. His family allowances benefit was then withdrawn. Following an application from the person in question based on the regulations of the European Economic Community and submitted in May 2005, the office re-established his rights, while not paying the benefits to him until the month of May 2003 in application of the two-yearly prescription of Article L. 553-1 of the Social Security Code. In dismissing the

68 Court of Cassation, 2nd Civil Chamber, 4 November 2010, no. 09-17.149, Eges Navarro versus Family Allowances Fund of Essonne.

claim from the person in question for payment of damages, while Article L. 583-1 of the Social Security Code obliges organisations that pay family allowances and their personnel to ensure that recipients are informed about the nature and scope of their rights, such that – once informed by the recipient of the transfer of the residence of his children to Spain – it is up to the office to inform him of the provisions of EEC regulation no. 1408/71 of 14 June 1971, which envisages, in its Article 73, that a worker subject to the legislation of a Member State has the right – for his family members who reside on the territory of another Member State – to family allowances envisaged by the legislation of the first State, as if they resided on the territory of the latter, the court of appeal infringed Articles 1382 of the Civil Code and L. 583-1 of the Social Security Code.

2. RELATIONSHIP BETWEEN THE RULES OF DIRECTIVE 2004/38 AND REGULATION 1612/68 FOR FRONTIER WORKERS

3. EXISTING POLICIES, LEGISLATION AND PRACTICES OF A GENERAL NATURE THAT HAVE A CLEAR IMPACT ON THE FREE MOVEMENT OF EU WORKERS

3.1 Integration measures

3.2 Immigration policies for third-country nationals and the Union preference principle

- *Circular of 10 September 2010 regarding the conditions for exercise of the right of residence of nationals of the EU, of other States party to the EEA and Switzerland*

The circular of 10 September 2010⁶⁹ recalls that it is vital that nationals of the EU should on no account be treated more unfavourably than nationals of third-party States subject to the general system under general law. The prefectural services have pointed out their difficulties in complying with this fundamental requirement, especially when the grounds for the residence envisaged by the general system have no equivalent in the provisions of the CESEDA relating to Community nationals. This concerns, for example, foreigners who are ill, PACS partners or victims of human slavery. The circular therefore presents the steps to be taken: initially, an assessment is required of whether the citizen of the EU in question could have claimed a right of residence on the basis of the general system applicable to foreigners. In the event of an affirmative answer and secondly, therefore, the prefectural services must issue him with one of the permits envisaged in Article L. 121-1 of the CESEDA for nationals of the EU, equivalent in terms of term of validity and right to work. In effect, it is impossible for a citizen of the EU to benefit from a residence card envisaged for the general system that would not make reference to his capacity as European citizen.

Equally, the circular stipulates that some nationals of the EU and similar will apply to be admitted for residence by citing grounds related to their private and family life, such as those envisaged under general law, although they have no equivalents within the context of the

69 Op cit.

system of Article L. 121-1. Their situation with regard to residence will firstly have to be examined as a function of the categories envisaged for the residence of citizens of the EU. However, in order for the persons in question not to be treated more unfavourably than third-country nationals, application of these provisions should be combined with certain rules under general law.

- *Concerning citizens of the EU married to French nationals*

Citizens of the EU who are spouses of French nationals are no longer listed in the Code for the Entry and Residence of Foreigners and the Right of Asylum as a legal category opening up a right of residence.

Their situation with respect to residence and work will however have to form the subject of a special assessment so that they are not treated more unfavourably than third-country nationals married to French nationals. The option to reside without a residence permit will be left open to European citizens, except where they are subject to the obligation to hold a residence permit in order to practise an economic activity.

Following verification of their marital ties to a French national who has not made use of his right to reside in another Member State, the circular requests the prefectural services to issue to nationals of the EU covered by the transitional system, as well as to other European nationals if the latter so wish, the residence permit, 'EC – all professional activities'. This document will be granted within the limit of the duration granting access to permanent residence, without having to apply for work authorisation or fulfil a condition of length of marriage.

Nationals of the EU whose country of origin is subject to a transitional phase can reside without a residence card, in so far as they do not wish to practise a professional activity.

The same line of action will be transposed to the parents of French children, after verification of their family ties and of the condition of effective contribution to the maintenance and upbringing of the child described in Article L. 313-11 (6) of the CESEDA.

- *Signatory of a PACS with a French national*

The reasoning developed above will equally be applied to citizens of the EU who have entered into a PACS with a French national. The prefectural services will have to verify, in this situation, the conditions of general law pertaining specifically to the length of the shared life of a minimum of one year. They should be issued with a permit, 'EC – all professional activities', valid for one year. If the persons in question present a letter of recruitment for a job with a term of more than one year, the duration of the card should then be adjusted as a result.

- *Case of citizens of the EU citing a pathology*

Citizens of the EU who apply for admission for residence in order to receive medical treatment in France must have their situation examined with respect to the categories of the right of residence of citizens of the EU. They must therefore prove either sufficient means of existence or a professional activity (and the corresponding work authorisation for those covered by the transitional system).

Those who do not meet the conditions for the right of residence will be notified of an obligation to leave France since the prefectural services do not have the elements to establish

that they must urgently be given medical treatment in France that they cannot receive in their country of origin. To this end, the services in question will have to seek the opinion of the doctor of the Regional Health Agency, following the procedure under general law.

If a favourable opinion is given by the medical authority, the person in question will be granted the right to remain for the duration of the treatment. Citizens of the EU who had obtained, within the context of the regulations under general law, a ‘private and family life’ residence permit on the basis of point 11 of Article L. 313-11 must be regarded as having been admitted to the labour market and will receive the residence permit, ‘EC – all professional activities’.

Jurisprudence

In a judgment of 10 May 2010,⁷⁰ the Council of State rejected the appeal lodged by the CIMADE (Ecumenical Aid Service) and the GISTI (Group Providing Information and Support to Immigrants) against decree no. 2008-1115 of 30 October 2008 regarding the preparation for integration into France of foreigners wishing to settle permanently and implementing the integration path introduced by the law on the control of immigration of 20 November 2007.

The judges emphasise first of all that Article L. 211-2-1 of the Code for the Entry and Residence of Foreigners and the Right of Asylum and the provisions of Articles 4 and 5 of the contested decree envisage, for the spouses of French nationals, an evaluation and training procedure similar to that envisaged for applicants for family reunification. They then refer to Article 5-2 of Directive no. 2004/38/EC of the European Parliament and the Council of 29 April 2004 regarding the right of citizens of the Union and their family members to move and reside freely on the territory of Member States.

The applicant associations maintain that the procedure envisaged by the decree introduces discrimination between the spouses of French nationals and the spouses of Community nationals, in so far as the latter, who are not covered by Directive 2004/38, can obtain a visa without being bound to following the evaluation and training operations.

The judges state that, with respect to the objective of learning the French language and integration into French society, established by the disputed provisions, and to the calling of those in question to become French, the spouses of French nationals are not in the same situation as the spouses of Community nationals who have made use of their freedom of movement. The introduction of a specific evaluation and training mechanism in favour of French spouses, envisaged by the law, does not therefore in any event ignore either Articles 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, or the general principles of Community law, or the principle of equality, or the stipulations of the international convention for the elimination of all forms of racial discrimination.

In two identical judgments of 7 October 2010,⁷¹ the Administrative Court of Appeal of Lyons refused to apply the more favourable provisions of the CESEDA to a Community national.

In a decision of 9 January, the Prefect of Rhône refused to apply the provisions of point 11 of Article L. 313-11 of the CESEDA to Mr. A, a Romanian national, which he referred to in support of his application for issue of a residence card. In a judgment of 20 October 2009,

⁷⁰ EC, 10 May 2010, CIMADE and GISTI, req. 323758.

⁷¹ Administrative Court of Appeal of Lyons, 7 October 2010, no. 10LY00348, Prefecture of Rhône versus Muntean; Administrative Court of Appeal of Lyons, 7 October 2010, no. 09LY02896, Prefecture of Rhône versus Covaci.

the Administrative Court of Lyons believed that the Prefect had committed an error in law in refusing to apply to him, as a Community national, the more favourable provisions of the CESEDA applicable to non-Community nationals.

The judges of the Administrative Court of Appeal of Lyons believe that the conditions for the entry and residence into France of nationals of the European Union are governed by the provisions of Title II of Book 1 of the Code for the Entry and Residence of Foreigners and the Right of Asylum; that, consequently, Mr. A, Article L. 313-11 of the CESEDA [text missing] are applicable to non-Community nationals. For these judges, Article 37 of Directive 2004/38/EC, according to which, ‘The provisions of the present directive do not represent an attack on the legislative, regulatory or administrative provisions of a Member State that would be more favourable for the persons targeted by the present directive’, does not imply that a Community national who does not fulfil the conditions established in Title II of Book 1 of the Code for the Entry and Residence of Foreigners and the Right of Asylum must have other provisions of this Code applied to him, which are applicable to non-Community nationals, although they would be more favourable. Thus, the judgment of the Administrative Court of Lyons is repealed.

The Administrative Court of Appeal of Nancy, in several judgments⁷² of 16 December 2010, recalled the need for a right of residence before obtaining work authorisation. For example, in one of these cases⁷³, the applicant, of Romanian nationality, entered France to practise a professional activity there at Palettes Services Center based on a contract signed on 15 October 2008 between this company and his employer, the company CM B, a company under Italian law with its registered offices in Romania. He did not hold a residence card and did therefore not meet the condition imposed by the aforementioned provisions of Article L. 121-2 of the CESEDA.⁷⁴ Consequently, since he was not authorised to reside in France, he ignored Article L. 5221-5 of the Labour Code, without the need for him to find out whether he could be exempted from work authorisation. As a result and although it is not disputed that he was in France for less than three months on the date of the contested decision, he could legally be the subject of a repatriation order.

72 Administrative Court of Appeal of Nancy, 16 December 2010, no. 10NC00704, Saracin versus Prefecture of Haut-Rhin; Administrative Court of Appeal of Nancy, 16 December 2010, no. 10NC00705, Corbei versus Prefecture of Haut-Rhin; Administrative Court of Appeal of Nancy, 16 December 2010, no. 10NC00707, Chiritoi versus Prefecture of Haut-Rhin; Administrative Court of Appeal of Nancy, 16 December 2010, no. 10NC00709, Halasz versus Prefecture of Haut-Rhin; Administrative Court of Appeal of Nancy, 16 December 2010, no. 10NC00710, Bordan versus Prefecture of Haut-Rhin; Administrative Court of Appeal of Nancy, 16 December 2010, no. 10NC00711, Frumusanu versus Prefecture of Haut-Rhin; Administrative Court of Appeal of Nancy, 16 December 2010, no. 10NC00712, Sarbu versus Prefecture of Haut-Rhin; Administrative Court of Appeal of Nancy, 16 December 2010, no. 10NC00714, Bordan versus Prefecture of Haut-Rhin.

73 Administrative Court of Appeal of Nancy, 16 December 2010, no. 10NC00713, Coca versus Prefecture of Haut-Rhin.

74 However, citizens of the European Union wishing to practise a professional activity in France remain subject to possession of a residence card during the term of validity of the transitional measures that may have been envisaged in this respect by the treaty of accession of the country of which they are nationals and unless stipulated otherwise in this treaty.

3.3 Return of nationals to new EU Member States

The vast majority of cases relating to the removal of a community national have involved Romanian nationals, most often Roma, even if they are not always explicitly described as such.

The Administrative Court of Appeal of Versailles specifically took cognisance of many cases⁷⁵ of the removal of Romanian nationals. A constant jurisprudence has been formulated

75 Administrative Court of Appeal of Versailles, 21 June 2011, no. 09VE02167, Zamfir versus Prefecture of Val d'Oise, Administrative Court of Appeal of Versailles, 21 June 2011, no. 09VE02168, Vlad versus Prefecture of Val d'Oise, Administrative Court of Appeal of Versailles, 21 June 2011, no. 09VE02169, Segarcianu versus Prefecture of Val d'Oise, Administrative Court of Appeal of Versailles, 24 May 2011, no. 10VE01299, Radu versus Prefecture of Seine-Saint-Denis, Administrative Court of Appeal of Versailles, 24 May 2011, no. 10VE01303, Stanciu versus Prefecture of Seine-Saint-Denis, Administrative Court of Appeal of Versailles, 24 May 2011, no. 10VE01313, Ichim versus Prefecture of Seine-Saint-Denis, Administrative Court of Appeal of Versailles, 10 May 2011, no. 10VE01289, Bahrin versus Prefecture of Seine-Saint-Denis, Administrative Court of Appeal of Versailles, 10 May 2011, no. 10VE01292, Ciobotaru versus Prefecture of Seine-Saint-Denis, Administrative Court of Appeal of Versailles, 10 May 2011, no. 10VE01294, Radu versus Prefecture of Seine-Saint-Denis, Administrative Court of Appeal of Versailles, 28 April 2011, no. 09VE01938, Caldaras versus Prefecture of Val d'Oise, Administrative Court of Appeal of Versailles, 8 February 2011, no. 09VE01501, Barbu versus Prefecture of Seine-Saint-Denis, Administrative Court of Appeal of Versailles, 8 February 2011, no. 10VE00626, Iorgu versus Prefecture of Seine-Saint-Denis, Administrative Court of Appeal of Versailles, 8 February 2011, no. 10VE00656, Stefan versus Prefecture of Seine-Saint-Denis, Administrative Court of Appeal of Versailles, 8 February 2011, no. 10VE00667, Ciobotaru versus Prefecture of Seine-Saint-Denis, Administrative Court of Appeal of Versailles, 30 December 2010, no. 09VE01450, Pandelica versus Prefecture of Val d'Oise, Administrative Court of Appeal of Versailles, 30 December 2010, no. 09VE01515, Silidor versus Prefecture of Val d'Oise, Administrative Court of Appeal of Versailles, 2 November 2010, no. 09VE00947, Dragoi versus Prefecture of Val d'Oise, Administrative Court of Appeal of Versailles, 28 September 2010, no. 09VE00932, Constantin versus Prefecture of Val d'Oise, Administrative Court of Appeal of Versailles, 22 June 2010, no. 09VE03407, Grecu versus Prefecture of Seine-Saint-Denis, Administrative Court of Appeal of Versailles, 22 June 2010, no. 09VE03976, Zisu versus Prefecture of Seine-Saint-Denis, Administrative Court of Appeal of Versailles, 22 June 2010, no. 09VE03977, Panghita versus Prefecture of Seine-Saint-Denis, Administrative Court of Appeal of Versailles, 22 June 2010, no. 09VE03978, Radu versus Prefecture of Seine-Saint-Denis, Administrative Court of Appeal of Versailles, 22 June 2010, no. 09VE03979, Radu versus Prefecture of Seine-Saint-Denis, Administrative Court of Appeal of Versailles, 22 June 2010, no. 09VE03980, Bercaru versus Prefecture of Seine-Saint-Denis, Administrative Court of Appeal of Versailles, 22 June 2010, no. 09VE03982, Cristea versus Prefecture of Seine-Saint-Denis, Administrative Court of Appeal of Versailles, 22 June 2010, no. 09VE03983, Radu versus Prefecture of Seine-Saint-Denis, Administrative Court of Appeal of Versailles, 22 June 2010, no. 09VE03984, Radu versus Prefecture of Seine-Saint-Denis, Administrative Court of Appeal of Versailles, 22 June 2010, no. 09VE03985, Marin versus Prefecture of Seine-Saint-Denis, Administrative Court of Appeal of Versailles, 22 June 2010, no. 09VE00713, Prefecture of Seine-Saint-Denis versus Apostol, Administrative Court of Appeal of Versailles, 8 June 2010, no. 09VE00942, Constantin versus Prefecture of Val d'Oise, Administrative Court of Appeal of Versailles, 8 June 2010, no. 09VE00943, Constantin versus Prefecture of Val d'Oise, Administrative Court of Appeal of Versailles, 8 June 2010, no. 09VE00944, Constantin versus Prefecture of Val d'Oise, Administrative Court of Appeal of Versailles, 8 June 2010, no. 09VE01876, Tudor versus Prefecture of Val d'Oise, Administrative Court of Appeal of Versailles, 8 June 2010, no. 09VE01890, Vasile versus Prefecture of Seine-Saint-Denis, Administrative Court of Appeal of Versailles, 8 June 2010, no. 09VE02024, Vaduva versus Prefecture of Seine-Saint-Denis, Administrative Court of Appeal of Versailles, 8 June 2010, no. 09VE02034, Grecu versus Prefecture of Val d'Oise, Administrative Court of Appeal of Versailles, 8 June 2010, no. 09VE02035, Paun versus Prefecture of Seine-Saint-Denis, Administrative Court of Appeal of Versailles, 8 June 2010, no. 09VE02036, Kovacs versus Prefecture of Val d'Oise, Administrative Court of Appeal of Versailles, 8 June 2010, no. 09VE02037, Cordoan versus Prefecture of Val d'Oise, Administrative Court of Appeal of Versailles, 8 June 2010, no. 09VE02146, Barbu versus Prefecture of Val d'Oise, Administrative Court of Appeal of Versailles, 8 June 2010, no. 09VE02147, Ghelmegeanu versus Prefecture of Val d'Oise, Administrative Court of Appeal of Versailles, 8 June 2010, no. 09VE02148, Dumitru versus Prefecture of Val d'Oise, Administrative Court of Appeal of Versailles, 8 June 2010, no. 09VE02149, Iancu versus Prefecture of Val d'Oise, Administrative Court of Appeal of Versailles, 8 June 2010, no. 09VE02150, Moise versus Prefecture of Val d'Oise, Administrative Court of Appeal of Versailles,

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from the judgments of 8 June 2010 to the judgments of 21 June 2011. After having observed that the applicant, of Romanian nationality, did not meet any of the conditions envisaged in Article L. 121-1 of the CESEDA authorising him to reside on French territory for more than three months, the Prefect pronounces an obligation to leave French territory with respect to the applicant, a decision disputed in law.

In the more detailed version of these judgments, the Court first examines the conformity of French law with Directive 2004/38. Its conclusions are essentially as follows:

- *Regarding point 2 of Article 14 of Directive 2004/38*

None of the provisions of the CESEDA, transposing into French law Directive 2004/38/EC of 29 April 2004, nor any other provision in force, instructs the administration to carry out a systematic inspection of the right of residence of citizens of the European Union, who are not bound by the obligation to possess a residence card. Moreover, it is up to the Prefectural authority, before making a decision to deny residence to a citizen of the European Union, to carry out a detailed examination of the situation of the person in question. Under these conditions, the applicant is not justified in maintaining that the applicable provisions of the CESEDA are in contravention of the provisions of the Directive.

- *Regarding point 1 of Article 28 of Directive 2004/38*

It emerges from the aforementioned provisions of Article L. 121-4 of the CESEDA and from the second paragraph of Article L. 511-1-1 of this Code that the administration is not bound either to terminate the residence of a citizen of the European Union who cannot prove the right to reside in France, which is assessed taking into account the personal situation of the person in question when it is based on the requirement of sufficient resources, or to issue an obligation to leave French territory with respect to that person. Under these conditions, the Prefect must, before making a decision to deny residence or issue a removal measure, assess whether the planned measure is such that it will involve, for the personal situation of the person in question, exceptionally serious consequences, or moreover whether it represents an excessive attack on his right to respect for his private and family life with respect to the re-

8 June 2010, no. 09VE02151, Ghelmegeanu versus Prefecture of Val d'Oise, Administrative Court of Appeal of Versailles, 8 June 2010, no. 09VE02152, Lapadat versus Prefecture of Val d'Oise, Administrative Court of Appeal of Versailles, 8 June 2010, no. 09VE02153, Margel versus Prefecture of Val d'Oise, Administrative Court of Appeal of Versailles, 8 June 2010, no. 09VE02154, Filan versus Prefecture of Val d'Oise, Administrative Court of Appeal of Versailles, 8 June 2010, no. 09VE02155, Filan versus Prefecture of Val d'Oise, Administrative Court of Appeal of Versailles, 8 June 2010, no. 09VE02156, Dutescu versus Prefecture of Val d'Oise, Administrative Court of Appeal of Versailles, 8 June 2010, no. 09VE02157, Ciliban versus Prefecture of Val d'Oise, Administrative Court of Appeal of Versailles, 8 June 2010, no. 09VE02158, Barbu versus Prefecture of Val d'Oise, Administrative Court of Appeal of Versailles, 8 June 2010, no. 09VE02159, Ghelmegeanu versus Prefecture of Val d'Oise, Administrative Court of Appeal of Versailles, 8 June 2010, no. 09VE02160, Iosif versus Prefecture of Val d'Oise, Administrative Court of Appeal of Versailles, 8 June 2010, no. 09VE02161, Piui versus Prefecture of Val d'Oise, Administrative Court of Appeal of Versailles, 8 June 2010, no. 09VE02162, Moise versus Prefecture of Val d'Oise, Administrative Court of Appeal of Versailles, 8 June 2010, no. 09VE03264, Bugner versus Prefecture of Seine-Saint-Denis, Administrative Court of Appeal of Versailles, 8 June 2010, no. 09VE03266, Dabrowska versus Prefecture of Seine-Saint-Denis, Administrative Court of Appeal of Versailles, 8 June 2010, no. 09VE03267, Istfan versus Prefecture of Seine-Saint-Denis

In the same sense, Administrative Court of Appeal of Nantes, 20 December 2010, no. 10NT00801, Stanciu versus Prefect of Loire-Atlantique, Administrative Court of Appeal of Nantes, 3 March 2011, no. 10NT02214, Bica versus Prefect of Loire-Atlantique, Administrative Court of Appeal of Nantes, 3 March 2011, no. 10NT02216, Lazar versus Prefect of Loire-Atlantique.

quirements of Article 8 of the European Convention on the Protection of Human Rights and Fundamental Freedoms. As a result, the applicant is not justified in maintaining that the applicable provisions of the CESEDA would be incompatible with the objectives of the aforementioned Article 28 of the Directive.

- *Regarding Article 30 of Directive 2004/38*

Considering that, in application of Article 1 of the law of 11 July 1979 regarding the justification for administrative acts and the improvement of relations between the administration and the general public and the second paragraph of Article L. 511-1 of the CESEDA, the decision to deny residence taken with respect to a national of a Member State of the European Union and the decision imposing an obligation on this national to leave French territory must be justified. Under the terms of Article 3 of the law of 11 July 1979: the justification required by the present law must (...) include a list of the considerations in law and in fact that form the basis for the decision. Contrary to what the applicant maintains, the provisions of Article 30 of the Directive of 29 April 2004, which do not refer to those of Article 28 of the same Directive, do not include justification requirements that are stricter than those ensuing from the law of 11 July 1979. Specifically, they do not envisage that the administrative authority would be bound to explain in what way the particular situation of the person in question would not pose an obstacle to the implementation of a decision restricting his freedom of movement.

- *On the substance*

It emerges from an examination of the reasons for the contested order that these include a list of the considerations in law and in fact, based on which the obligation to leave French territory with respect to the applicant was pronounced. Thus, even though the disputed decision includes pre-printed wording, this decision meets the motivation requirements imposed by French law. It emerges from the very terms of the contested order that the Prefect [of] carried out an individual examination of the personal situation of the applicant before taking the disputed decision.

In this case, the Prefect, who found that the applicant did not demonstrate a right of residence based on Article L. 121-1 of the CESEDA, restricted himself to drawing the consequences of this situation by issuing him with an obligation to leave French territory.

The administrative authority can in effect pronounce an obligation to leave French territory with respect to a national of a Member State of the European Union when it observes that he can prove no right of residence.

In application of the aforementioned provisions of Article L. 121-1 of the CESEDA, which has the objective of ensuring the accurate transposition into internal law of the provisions of Article 7 of Directive 2004/38/EC of 29 April 2004, any citizen of the European Union has the right to reside in France for a period of longer than three months, specifically when he possesses, for himself and for his family members, sufficient resources so as not to become a burden on the social security system, as well as health insurance. In order to assess the sufficient nature of the resources, the Prefect must take into account all the resources effectively at the foreigner's disposal, regardless of their origin.

The applicant is not justified in maintaining that, in mentioning in the contested order that he could not prove sufficient resources or personal means of existence, the Prefect of

[...] added a condition not envisaged by Article L. 121-1 of the CESEDA. Since the person in question did not possess resources of any kind whatsoever and was not a member of a health insurance scheme, he did not fulfil the conditions imposed by the aforementioned provisions of Article L. 121-1 of the CESEDA to reside in France for more than three months.

In a judgment of 21 December 2010,⁷⁶ the judges of the Administrative Court of appeal of Lyons recalled the right of residence of less than 3 months for Community nationals, in this case in favour of a Romanian national. In an order of 3 February 2010, the Prefect of Côte d'Or refused Mr. A, a Romanian national, the right of residence in France, accompanying this refusal with an obligation to leave French territory within a period of one month and designated Romania as the country of destination. The Prefect asserts that Mr. A admitted, during his interview by police officers on 3 February 2010, that he entered France in August 2009. It is evident from the documents of the file that the person in question also mentioned in the same statements that he returned to Romania in October 2009 and re-entered France on 6 January 2010, where this latter circumstance has to be regarded as adequately established by the presentation, by Mr. A, of a coach ticket in his name departing from Deva, in Romania, on 6 January 2010, destined for Dijon, while the Prefect of Côte d'Or does not add any items to the file that would contradict the statements made by the person in question, together with his travel document. Moreover, and even supposing that, as the Prefectural authority maintains, Mr. A intended, by his various periods of residence in France, to establish his residence there, this circumstance alone would not pose an obstacle to the prerogative – granted to the person in question in his capacity as European national – to reside legally in France for a period less than or equal to three months from the date of his last entry. Under these conditions, Mr. A cannot be regarded as residing in France for more than three months on the date of the disputed order, which must therefore be repealed.

4. NATIONAL ORGANISATIONS OR NON-JUDICIAL BODIES TO WHICH COMPLAINTS FOR VIOLATION OF COMMUNITY LAW CAN BE ADDRESSED

5. SEMINARS, REPORTS AND ARTICLES

⁷⁶ Administrative Court of Appeal of Lyons, 21 December 2010, no. 10LY01164, Ciurar versus Prefecture of Côte d'Or.