

Problem one:

“Comprehensive sickness insurance” condition

According to Directive 2004/38/EC, students and economically inactive EU citizens must have comprehensive sickness insurance cover. As this requirement is not clearly defined in the Directive, national authorities often apply different, more or less strict, interpretations.

This leads to problems especially for citizens who cannot provide evidence of coverage by their home Member State, e.g. self-sufficient persons in pre-retirement, students who transferred their residence to the host Member State, unemployed people who no longer receive unemployment benefits, homeless people without any link to their home country, etc.

In the Member States with contribution-based healthcare, citizens can voluntarily contribute to the system in order to be covered. However, in case of countries with a residence based national health system, such as Sweden, or those with a hybrid system, such as France and Spain, citizens may be unable to get access to the national health system. In addition, if no private insurance policy is available on the market that can satisfy the “comprehensive sickness insurance” criterion, as is the case in Sweden, EU citizens lose their right of residence.

In Sweden, EU citizens face additional problems. If they are unable to prove that they satisfy the “comprehensive sickness insurance” requirement, they cannot receive their *personnummer*, which is indispensable for all basic life situations, such as opening a bank account, signing employment contract, collecting mail at a post office, registering children at school, etc.¹ This problem was frequently reported to the EC and the EP², but no effective solution has yet been found by Sweden.

Recommendation

The Member States should take appropriate measures to allow economically inactive EU citizens to either rely on their national health systems or to voluntarily contribute into it in a proportionate manner.

Problem two:

The right of non-EU family members to stay in the host MS beyond the expiry of their entry visa term, if a residence application is pending

¹ A. Nicolaou, Freedom of Movement in the EU: A Look Behind the Curtain, ECAS, 2018

² For instance, [complaint](#) and [petition](#) against Sweden regarding the systematic refusal of the Swedish tax authorities to issue personal identification numbers (personnummer) to EU mobile citizens by Anthony Valcke, on behalf of EU Rights Clinic, a joint venture of ECAS and the University of Kent in Brussels.

Residence formalities are particularly problematic for third-country family members of EU citizens who present marriage or birth certificates issued by non-EU countries in order to prove their family link³. This problem has been frequently identified in France⁴, Italy, Portugal and Spain⁵. The authorities in those Member States do not recognize such documents and require that the certificates are apostilled or legalised, registered in the Member State of the EU citizen's nationality and not dated longer than 90 days. All these requirements imply significant costs and are time-consuming, while citizens are often given just several days to provide all the necessary documents.

Without fulfilling these conditions, non-EU family members are unable to receive their residence documents. If they entered on a short-term visa, they often fear they must leave the country or bear the consequences of overstaying. As a result, they are often unable to stay in a chosen Member State, cannot work or have a normal life with their EU family member. This in turn goes against the Article 33 of the EU Charter of Fundamental Rights which states that "the family shall enjoy legal, economic and social protection".

Recommendation

Clear guidance is needed that confirms that non-EU family members are not required to leave the host Member State and re-apply for an entry visa simply because the residence card application process is taking too long. Indeed, a best practice would be to ensure that a certificate of application confirms the family member's right to remain while their application for a residence card is pending.

Problem three

Requirement to prove possession of sufficient resources

Directive 2004/38/EC gives the right of residence for more than three months to all EU citizens who "have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence⁶" and "comprehensive sickness insurance cover"⁷. At the same time, it clarifies that "Member States may not lay down a fixed amount which they regard as "sufficient resources", but they must take into account individual situation of each person concerned"⁸.

However, according to several YEA enquiries, some Member States tend to impose arbitrary thresholds. This has been reported in Italy, where the authorities have decided that retired EU nationals and students should possess around €5,800 in order to be able to register⁹. In addition to the proof of sufficient financial resources, students have reported that they had been asked

³ A. Nicolaou, Freedom of Movement in the EU: A Look Behind the Curtain, ECAS, 2018

⁴ For example, Quarterly Feedback Report No. 11, Your Europe Advice, Quarter 1/2015 (January-March)

⁵ Quarterly Feedback Report No.6, Your Europe Advice, Quarter 4/2013 (October-December)

⁶ Art. 7 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158

⁷ Ibid

⁸ Art. 7 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158

⁹ A. Nicolaou, Freedom of Movement in the EU: A Look Behind the Curtain, ECAS, 2018

for a proof of accommodation, or other excessive documents such as birth certificates, police records and fiscal numbers.

Belgium has also set a fixed minimum amount of sufficient resources, referring to the threshold applicable to social assistance (currently €892,70 per month) as the correspondent level of minimum resources which a person needs to possess in order to be considered as self-sufficient¹⁰.

Another problem which often comes up in relation to the concept of sufficient resources regards the origin of such resources. The Court judgement¹¹ and the Commission's Communication on guidance for better transposition and application of Directive 2004/38/EC clearly state that "it is sufficient for the nationals of Member States to 'have' the necessary resources, and that provision lays down no requirement whatsoever as to their origin". Despite that, several Member States do not accept the income of non-EU spouses as a proof for residence purposes, leading to a situation in which an EU citizen cannot receive residence documents and his/her non-EU spouse cannot work because the employer requires a residence card as a prerequisite for employment.

Recommendation

The EC should emphasize that the Member States cannot impose arbitrary thresholds as regards the amount they consider sufficient, and they should take into account non-EU spouse's resources or evidence of current or potential employment for the purposes of establishing the right to reside.

Problem four:

Application of the Surinder Singh case law

Citizens in several Member States have reported to YEA that they have encountered problems and difficulties when returning to their home country with their non-EU family members. According to the Surinder Singh ruling¹², an EU citizen who has gone to another Member State in order to work there and then decides to return to his home country has the right to benefit from the rules on free movement of persons. This also apply to his/her spouse and children whatever their nationality.

It appears, however, that some Member States do not apply this rule correctly. This was particularly problematic in the UK, before Brexit, but nationals of several other EU Member States have also reported this issue, including Germany¹³, Ireland¹⁴, Finland¹⁵ and Austria¹⁶.

Recommendation

¹⁰ Valcke A., Fitness Check Report for Belgium, A review of the state of compliance of Belgium's implementation of Directive 2004/38 on residence rights of EU citizens and their family members, 2018

¹¹ Judgment of 23 March 2006, Commission v Belgium, C-408/03, EU:C:2006:192, paragraph 40 et seq.

¹² Cases C-370/90 Singh

¹³ YEA: A returning German national's non-EU spouse was only granted a 1 year residence card instead of a 5 year one on the basis of Surinder Singh rules.

¹⁴ YEA: A returning Irish citizen, whose non-EU wife held a residence card from Spain was asked to present evidence of the fact that he was working in Spain during their residence there and also evidence of their integration into Spanish life.

¹⁵ YEA: The Finnish authorities are disregarding the Surinder Singh rules in the case of a returning Finnish national and her husband who holds a family member's card from Austria.

¹⁶ YEA: Austrian authorities insist on applying national immigration rules to the residence application of the Indian spouse of a returning Austrian national.

According to the Surinder Singh ruling¹⁷, an EU citizen who has gone to another Member State in order to work there and then decides to return to his home country has the right to benefit from the rules on free movement of persons. This also apply to his/her spouse and children whatever their nationality. The Commission provided further explanation of the ruling in its 2009 Guidance. It seems though that this was not enough for certain Member States, so an updated guidance on the application of Surinder Singh case law is necessary to make sure that the rights of EU citizens returning to their home country and their family members are fully respected.

Problem five:

How dual nationals should be treated

According to the Court, when an EU national falls within the scope of EU law as a result of exercising their free movement rights, then the fact that they also happen to be a national of the other Member State involved, does not “remove” the EU law connection and does not make their situation “wholly internal”

This means that when an EU national exercises their Treaty rights by moving to another Member State and then acquires the nationality of that state, their situation remains within the scope of EU law. Thus, their non-EU family members should benefit from EU law when it comes to obtaining a right of residence in that country.

In some Member States, e.g. Sweden and Cyprus, the national authorities cease to apply EU law to EU nationals as soon as they become nationals of these countries.

Recommendation

European Commissions’ guidance and clarity on this issue is necessary in order to make sure that the rights of EU citizens and their family members are not wrongfully undermined.

Problem six:

Situation of dependent non-EU children after they cease being dependent

According to Article 2(2)(c) of Directive 2004/38/EC, non-EU children of EU nationals or of their spouse have the right to reside with the EU national in another EU country if they are under the age of 21, or, if they are over 21, but are still dependent on their EU relative.

However, for some Member States, the situation becomes unclear the moment the children stopped being dependent. Some national authorities, e.g. in Bulgaria, decide to apply their national immigration law in such a situation and even threaten the children with deportation if they are unable to meet the rules.

Recommendation

The European Commission should provide a guidance to Member States explaining that such children and their parents do not end up in an illogical situation where they essentially lose the rights they had been enjoying for years or, in the worst case, are forced to leave a country.

¹⁷ Cases C-370/90 Singh

Problem seven:

When the “continuous period of five years” begins for the purposes of permanent residence

Article 16 of Directive 2004/38/EC states that after five years of lawful, uninterrupted residence in their host Member State, EU nationals and their family members have the right to remain there indefinitely and unconditionally. Articles 19 and 21 of Directive 2004/38/EC provide that upon receiving an application for permanent residence national authorities can check the duration of residence and that continuity of residence “may be attested by any means of proof in use in the host Member State”.

However, certain Member States, e.g. France, Belgium and Italy, require that the relevant period should immediately precede the date of application, when there is no such requirement in the Directive. For example, in Spain, a Croatian national who had completed such a five-year period was told to wait until the end of the five years from the date of Croatia’s EU accession before being eligible to apply for permanent residence.

Recommendation

It is therefore necessary to clarify that the five years can start at any time, even prior to the EU accession of the citizen’s country of origin, and that such a period does not necessarily have to precede the date of application.

Problem eight:

The beginning and the end of the initial three months of unconditional residence

Directive 2004/38/EC provides that EU citizens can reside unconditionally in another Member States for the first three months and after that they may be required to register. Non-EU family members must register if they intend to stay for longer than three months.

However, the situation becomes problematic for citizens who do not stay for continuous 3 months after they first arrive, but they come and go, e.g. long-distance truck drivers or persons who work on rotation contracts. While this atypical form of employment does not create issues for EU citizens, it is problematic for their non-EU family members, whose residence rights are conditional on their spouses’ intention to stay longer than 3 months in the host Member State

Recommendation

This three-month period should not re-start every time an EU citizen leaves the territory of the Member State, with the effect that in the absence of an official system of registration, come-and-go residents struggle to establish residence-based rights.

Problem nine:

The right of permanent EU residents to have their family members join them if they are no longer self sufficient

According to Article 7(1)(d) of Directive 2004/38/EC, EU citizens, who either work or have sufficient resources and comprehensive sickness insurance, have a right to be accompanied by their non-EU family members in a host Member State.

After five years of continuous residence in another EU Member State, an EU citizen can apply for permanent residence without needing to satisfy the residence conditions. However, the situation gets complicated for non-EU family members if the EU citizen stops being self-sufficient, especially if they did not enter the host country together with the citizen and, as a result, they cannot apply for a permanent residence themselves¹⁸. It is also unclear what the rights of non-EU family members are when the EU citizen stops being self-sufficient.

Evidence collected by YEA suggests that Member States do not allow family reunification unless the EU permanent resident provides evidence that they still satisfy the residence conditions of Article 7(1), even if they are not claiming financial assistance from the host country.

Recommendation

The Commission should provide guidance and emphasize that EU permanent residents should have the right to family reunification even if the Article 7(1) conditions are no longer satisfied. This is particularly important in the context of guaranteeing EU citizens' fundamental right to family life (Article 7 of the Charter of Fundamental Rights of the European Union).

Problem ten:

The “envisaged period of residence”

Once citizens receive their residence documents, they are not always what they expected them to be. EU citizens and their family members have reported being issued residence documents with limited validity or being issued with temporary documents when they applied for, and were entitled to, a permanent one.

This seems to be of particular concern to non-EU family members. According to Article 11 of Directive 2004/38/EC, residence cards of family members should be valid for five years from the date of issue or “for the envisaged period of residence of the Union citizen, if this is less than five years”. Permanent residence cards must be valid for 10 years and renewable automatically. Despite these rules, non-EU family members of mobile EU citizens have reported to YEA that their documents had limited validity.

Recommendation

The “envisaged period of residence”: the EC should emphasize that Member States cannot unilaterally limit the validity of family member's residence cards, which according to Article 11 of Directive 2004/38/EC “shall be valid for five years from the date of issue or for the envisaged period of residence of the Union citizen, if this period is less than five years”.

¹⁸ Article 16(2) of Directive 2004/38/EC states that non-EU family members also acquire the right to permanent residence only once they have “resided with the Union citizen in the host Member for a continuous period of five years”.