



## **EMN Ad-Hoc Query on Misuse of family reunification rights by Third Country nationals granted under Directive 2004/38/EC**

Requested by Adolfo SOMMARRIBAS on 14th June 2018

### **Family Reunification**

Responses from Austria, Cyprus, Czech Republic, France, Germany, Hungary, Italy, Latvia, Lithuania, Malta, Netherlands, Sweden (12 in total)

#### *Disclaimer:*

*The following responses have been provided primarily for the purpose of information exchange among EMN NCPs in the framework of the EMN. The contributing EMN NCPs have provided, to the best of their knowledge, information that is up-to-date, objective and reliable. Note, however, that the information provided does not necessarily represent the official policy of an EMN NCPs' Member State.*

## **Background information:**

Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States should have originally applied to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members who accompany or join them (this rule is covered by both the Directive and the Communication from the EC to the EP and the Council on guidance for better transposition and application of the Directive 2004/38/EC). However, the Court of Justice of the EU and its following case law extended the scope of the Directive significantly.

According to case law the Directive also applies to a family member of a Union citizen who applies for a residence permit in the same Member State of which the Union citizen is a national. It is, for instance, a situation in which a Union citizen decides to return to his country of origin after having used the right of persons to move and reside freely within the territory of the Member States.

In the Czech Republic, the scope of the above-mentioned Directive was extended also to family members of the Czech citizens (without any limits). But, we have been facing a huge problem over the last few years. Third-country national whose residence permit expired or who has been issued by the return decision from various reasons and who are therefore obliged to leave the Czech Republic, declare him/herself to be a family member of the Czech citizen and applies for residence card of a family member of a Union citizen provided for in the Directive. The main aim of those third country nationals is to circumvent the law, and thus to delay or even to avoid the obligation to leave the territory of the CR.

When dealing with this abuse we are limited by the case-law of the Court of Justice of the EU. According to the case-law we cannot exclude Czech citizens or their family members from the scope of this Directive.

The general aim of this Ad-Hoc Query is to get an overview on the situation in other Member States which will serve the basis for preparation of the CZ EMN conference focusing on this topic. The conference is going to take place in Prague (Czech Republic) at the end of September 2018 or at the beginning of October 2018 (date TBC). More information on agenda, place etc. will follow soon.

## **Questions**

1. Does your national legislation distinguish family members of your own citizens from family members of the Union citizens as defined in the Directive?
2. If so, what conditions for filling an application is a family member of a national of your Member State required to meet when applying for a residence permit?

## **Responses**

	Country	Wider Dissemination	Response
	Austria	Yes	<p><b>1.</b> Yes. When making the distinction it is necessary to determine whether the Austrian citizen has utilised their right to freedom of movement in accordance with EU law of at least three months (Art. 47 para 1 Settlement and Residence Act). In the case Austrian citizens - did not use their harmonised right to freedom of movement, family members are (Art. 47 para 2 in conjunction with Art. 2 para 1 subpara 9 Settlement and Residence Act):</p> <ul style="list-style-type: none"> <li>o Spouses or registered partners – the 21st year of life must be completed at the time of filling the application in both cases</li> <li>o Unwed minors (including adopted- and stepchildren.) These persons are granted the residence permit “family members” if the general requirements are met (see answer No. 2; Art. 47 para 2 Settlement and Residence Act).</li> </ul> <p>- did use their harmonised right to freedom of movement, the following groups are entitled to join the person (Art. 54 para 1 and 2 in conjunction with 52 para 1 subpara Z 1-3 Settlement and Residence Act ):</p> <ul style="list-style-type: none"> <li>o Spouses or registered partners (no age limit applies),</li> <li>o Relatives of the EEA citizen or registered partners in a direct, descending line until completion of the 21st year of life and beyond that as long as they are as a matter of fact granted a necessary maintenance (biological children, adopted children, stepchildren, grandchildren) and</li> <li>o relatives of the EEA citizens respectively of their spouses or registered partners in a direct and ascending order (parents or grandparents) as long as they are as a matter of fact granted a necessary maintenance.</li> </ul> <p>Additionally, the following persons are counted as dependants of a citizen of the Union entitled to the right to freedom of movement if the in-migrating person is an EEA citizen (and not a third country national) in accordance with Art. 52 para 1 Settlement and Residence Act:</p> <ul style="list-style-type: none"> <li>o if they prove the existence of an enduring civil partnership, or</li> <li>o if they are other dependants of the EEA citizen if * they have already received a necessary maintenance by the EEA citizen in the country of origin * they have already lived in the same household as the EEA-citizen in the country of origin, or * in cases where serious health grounds strictly require the personal care of the family member.</li> </ul> <p><b>2.</b> The Settlement and Residence Act contains the general requirements for issuing a residence permit (e.g. Arts. 11, 21a Settlement and Residence Act). The following is required for filling an application:</p> <ul style="list-style-type: none"> <li>• A valid travel document</li> <li>• a birth certificate or a corresponding certificate</li> <li>• a recent photography (not older than six month)</li> <li>• marriage certificate, partnership certificate, adoption certificate, certificates or other documents evidencing a next of kin relationship</li> <li>• evidence of entitlement to accommodation fulfilling local standards</li> <li>• evidence of adequate health insurance cover</li> <li>• evidence of adequate means of subsistence</li> <li>• proof of a</li> </ul>

			sufficient proficiency in German
	Cyprus	Yes	<p><b>1.</b> Currently there is a lack of legislation which regulates specifically the issues regarding the family members of Cypriot Citizens. The matter is expected to be resolved in the near future with the adoption of new legislation. Nevertheless, in anticipation of the adoption of the new legislation regulating the aforementioned issues and in order to preserve the equal treatment between the family members of European and of Cypriot citizens, the Ministry of Interior of Cyprus has currently formed a policy which equates the treatment of family members, in consistence with the relevant European directive.</p> <p><b>2.</b> N/A</p>
	Czech Republic	Yes	<p><b>1.</b> The Czech law does not distinguish family members of our own citizens from the family members of the Union citizens.</p> <p><b>2.</b> See above</p>
	France	Yes	<p><b>1.</b> Yes.</p> <p><b>2.</b> A French national may be joined by third-country family members. This procedure is codified in book III of the CESEDA. It includes common items to family reunification, as it stipulates common criteria (effective shared life, issue of a long-stay visa) and a shared restriction on polygamy. However, the criteria are different as the accommodation and resource conditions are not required. As it is a residence permit in accordance with article L.313-11, 4° and 6° of the CESEDA, the following people may benefit from this procedure and obtain a VPF residence permit, unless their presence constitutes a threat to public policy:</p> <ul style="list-style-type: none"> <li>• the foreign national, not living in a polygamous relationship, married to a French nationality spouse if he/she meets the following conditions: <ul style="list-style-type: none"> <li>o has obtained a long-stay visa;</li> <li>o continued relationship;</li> <li>o the spouse has retained his/her French nationality and;</li> <li>o in the event of a marriage celebrated abroad, that it has been transcribed on the registers of the French civil authorities.</li> </ul> </li> <li>• the foreign national, who is not living in a polygamous relationship, and who is father or mother of a minor child living in France, provided he/she establishes that he/she has effectively contributed to the child's upkeep and education as stipulated in article 371-2 of the French Civil Code since the child's birth or for at least two years. In application of article</li> </ul>

			<p>L.314-11 of the CESEDA, a residence permit is issued to the following persons, subject to lawful stay and that their presence does not constitute a threat for public order: • the foreign children of French nationals if the children are aged from 18 to 21 years or under the conditions stipulated in article L.311-3 of the CESEDA, or if they are dependent on their parents (if they are aged over 21); • the dependent first-degree relatives in the direct ascending line of French nationals and their spouses, as long as they have a visa for a stay over three months. With regard to dependent children or parents of French nationals, the French authorities verify that the financial and material means really exist (income and accommodation requirement). There are no minimum resources, but the SMIC may be used as a reference. The applicants must prove that they are unable to meet their own needs and that they are dependent on their parents, that they do not receive benefits or that they are looking for work. The dependent parent must also prove that he/she is dependent on his/her French child and that he/she cannot exercise a professional activity. The proof of isolation in the country of origin - e.g., there are no other children or family members in the country of origin - may also be taken into account.</p>
	Germany	Yes	<p><b>1.</b> Yes, but with the following exception: In cases in which the German has previously exercised his or her right to freedom of movement and returned to Germany (“returnee cases”), his or her third-country-national family members have equivalent status to Union citizens in the sense that they are also eligible for freedom of movement in derived form.</p> <p><b>2.</b> A third-country-national spouse or minor, unmarried child of a German is entitled to receive a residence permit in order to maintain the family community if the general preconditions for issuing a residence title are met. Their identity must be established, and the passport obligation must be complied with. There may also not be any interest in expulsion vis-à-vis the individual. Unlike when it comes to family reunification to join third-country foreigners, it is not required for their livelihood and sufficient living space to be proven as a matter of principle. Both spouses must have reached the age of 18, and the foreign spouse must on principle demonstrate a simple knowledge of German. Family reunification is ruled out if it is established that the marriage or the family relationship (established through adoption) is only to be used to obtain a right of residence for the third-country foreigner, or there are any de facto indications of a forced marriage.</p>
	Hungary	Yes	<p><b>1.</b> Hungarian legislation does not distinguish between own citizens and citizens of other European Economic Area (EEA) countries when it comes to family unification. This issue is governed by Act I of</p>

			<p>2007 on the Admission and Residence of Persons with the Right of Free Movement and Residence an unofficial translation of Act I of 2007 can be accessed here: <a href="http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=country&amp;category=LEGAL&amp;coi=HUN&amp;skip=0&amp;querysi=2007&amp;searchin=title&amp;sort=date">http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=country&amp;category=LEGAL&amp;coi=HUN&amp;skip=0&amp;querysi=2007&amp;searchin=title&amp;sort=date</a></p> <p><b>2.</b> According to Paragraph (1-2) of Article 6 the family member of an EEA national has the right of long-term residence (exceeding 90 days in 3 months) in Hungary if they do not pose an undue burden to the social welfare system, and have comprehensive sickness insurance for health-care services or possess sufficient financial resources to cover the eventual medical treatments themselves. (Paragraph 3 of above Article limits the scope of being a family member to the spouse and dependent children, in case the EEA-national resides in Hungary for study purposes.) Later on, the very same requirements are laid down for family members of Hungarian citizens in Article 7, but it is worth mentioning that the parents (or other persons exercising parental custody) of Hungarian minors are exempted from the above criteria.</p>
	Italy	Yes	<p><b>1.</b> No. The personal scope of the implementing regulation of Directive 2004/38 (D.lgs 30/2007) is provided for by art. 3 which states the applicability of the provisions only to European citizens, and their family members, who have exercised the right to move to another Member State. However, the scope of the Directive has been broadened also to family members of Italian nationals by art. 23 of the abovementioned regulation. This article allows for the application of the same procedure also to family members of Italians if the provisions are more favourable.</p> <p><b>2.</b> N/a</p>
	Latvia	Yes	<p><b>1.</b> Yes</p> <p><b>2.</b> It applies to a family member of a citizen of Latvia if the citizen of Latvia has exercised the right to free movement of persons and has resided in another Member State. This fact has to be proved with documents and if it is done, then his/her family member submits the same documents to the family member of any other Member State when applying for a residence permit. If the right to free movement of persons and residence in another Member State cannot be proved, the spouse of a citizen of Latvia requests a temporary</p>

			residence permit in accordance with national law - the Immigration Law.
	Lithuania	Yes	<p><b>1.</b> Yes</p> <p><b>2.</b> If a citizen of Lithuania has exercised the right to free movement and has resided in another Member State, Directive 2004/38/EC would apply to his/her family members (this needs to be proved with documents). In such a case his/her family member applies for a residence card of an EU national family member and submits the same documents as family members of any other Member State when applying for such Card. The foreigner has to provide his/her travel document and a document proving that he is a family member of a Lithuanian national. The Lithuanian national has to provide documents proving that he has exercised the right to free movement. The application must be considered within one month. The Card is issued for 5 years. If the Lithuanian citizen has not exercised this right or cannot prove it, his/her family member has to apply for a temporary residence permit in accordance with general procedure of family reunification. A foreigner's application for the issuance of the TRP must be considered not later than within four months. The foreigner needs to provide much more documents for the TRP than for the EU family member card. The TRP is issued for 1 year.</p>
	Malta	Yes	<p><b>1.</b> The immigration position of family members of Maltese nationals are regulated by national legislation which is not based on the provisions of Directive 2004/38.</p> <p><b>2.</b> The spouse or partner (including same-sex) of a Maltese national, joined together by means of civil marriage or civil union respectively enjoys automatically the right of free movement in Malta. The foreign spouse or partner of the said citizen of Malta shall enjoy such right as from the date of marriage or registration of civil union and will continue to enjoy it as long as the couple are living together. Their dependent children who are under the age of 21 years will also enjoy such right. Such persons are granted a residence permit to reflect such status. The request for a residence permit by other family members of such persons are considered on the merits of the case in accordance with national legislation.</p>
	Netherlands	Yes	<p><b>1.</b> Yes. In order to distinguish it is determined whether the Dutch citizen has lived together with the third-country national in another EU/EER Member State or Switzerland for at least 3 months before returning to the Netherlands. The residence must have been lawful based on EU Community law, thus the Dutch citizen</p>

			<p>must have used EU Community law (right to free movement). Directive 2004/38 is also applied in this situation if the third country national applies for EU residence with the Dutch citizen in the Netherlands.</p> <p><b>2.</b> The family member (also third country national) has to comply with the following requirements: *The provision of a valid passport or other accepted travel document. *The provision of documents proving that the third country national and the Dutch citizen have a lasting relationship and lived together for at least three months in another EU/EER member state. *The family member or relative does not pose a threat to public order or national safety. *The family member or relative must register in the Municipal Personal Records. *The family member or relative must be insured in the Netherlands for healthcare costs.</p>
	Sweden	Yes	<p><b>1.</b> No</p> <p><b>2.</b> Na</p>