

RESEARCH ARTICLE

# National Courts in the Frontline: Abuse of Rights under the Citizens' Rights Directive

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The free movement and residence of Union citizens and their third country national family members may be restricted under Article 35 of Directive 2004/38/EC on the grounds of abuse of rights. Although the Court of Justice of the European Union (CJEU) had the opportunity to address abuse of rights cases, so far there have been no cases where it has established that abuse of rights took place. For this reason, the legal literature has tended to downplay the significance of the abuse of rights exception. The analysis of national case law, however, demonstrates that the courts of the Member States do apply Article 35 in its implemented form and have established abuse of rights on several occasions. Moreover, national courts have decided legal questions related to the abuse of rights which were not answered previously by the CJEU.

**Keywords:** Abuse of rights; Directive 2004/38; Court of Justice of the European Union and national courts; limited judicial dialogue

## I. Introduction

Directive 2004/38/EC, also known as the Citizens' Rights Directive (the Directive), provides detailed rules on the rights of free movement and residence of Union citizens and their third country national family members in other Member States.<sup>1</sup> Union citizens and their non-EU citizen family members may travel to and reside in another Member State for up to three months with a valid identification card or passport.<sup>2</sup> Workers and self-employed persons can stay in another Member State for longer than three months, as can students and anyone else having sufficient resources, if they do not burden the host country's social system and if they have comprehensive health insurance cover.<sup>3</sup> Their family members also have derivative rights of residence. If Union citizens have lived legally in another Member State for a continuous period of five years, they and their family members are entitled to permanent residence.<sup>4</sup>

The rights guaranteed by the Directive may be restricted only on the grounds specified in the Directive, such as public policy, public security and public health. A further reason for restricting the free movement and residence of Union citizens and their third country family members is abuse of rights, as laid down by Article 35 of the Directive.

In some cases, the Court of Justice of the European Union (the CJEU) has had the opportunity to examine abuse of rights under the Directive, but has not found abuse of rights in any case so far. The relevant decisions of the CJEU have been discussed widely in the legal literature. However, the courts of the Member States also apply Article 35 in its implemented form. This facet of the application of Article 35 is often ignored and has received very little attention so far. Therefore, this article attempts to bring this case law to the fore exhibiting its creative force. Sometimes, the relevance of the prohibition of abuse of rights has been

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<sup>1</sup> 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) N° 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 [2004] OJ L158/77.

<sup>2</sup> Directive, arts 4–6.

<sup>3</sup> Directive, art 7.

<sup>4</sup> Directive, art 16.

called into question in the area of the free movement of persons. While the CJEU indeed seems reluctant to limit individuals' rights based on abuse of rights in its case law concerning the free movement and residence of Union citizens and their third country family members, national courts have found cases involving such abuses of rights based on the facts.

The CJEU provides only very loose guidance in its case law on the concept and application of abuse of rights under the Directive. National courts are therefore often left to fill in the blanks. The aim of this paper is to demonstrate that a) national courts have had to ascertain several times the applicability of the prohibition of abuse of rights provided by the Directive against Union citizens and their third country national family members, and b) certain questions not settled by the CJEU were answered by the courts of the Member States without a preliminary ruling from the CJEU being requested. These questions concern the conduct covered by Article 35, the application of the proportionality principle in this field and burden of proof as well as evidence. It will be argued that the substantive application of Article 35 seems to have shifted to a certain extent from the CJEU to the national courts. The judicial dialogue between the CJEU and national courts is accordingly limited.

First, Article 35 of the Directive on abuse of rights and fraud and its antecedents will be put under scrutiny (Section II). The relevant judgments of the CJEU will then be analysed (Section III). However, the argument on abuse of rights appears not only in the proceedings before the CJEU, but also before national courts. It is therefore vital to examine where and how the courts of the Member States apply Article 35 of the Directive (Section IV). It will also be discussed how the national case law on abuse of rights influences the judicial dialogue between the national courts and the CJEU in the framework of the preliminary ruling procedure (Section V). The article ends with some concluding remarks.

## II. Article 35 of the Directive

The prohibition of abuse of rights pervades EU law. Article 35 of the Directive is a specific manifestation of this prohibition. Therefore, I briefly discuss first the role of the prohibition of abuse of rights in EU law, before examining Article 35 in more detail.

### *Antecedents to the Directive*

The prohibition of abuse of rights may be traced back to the *van Binsbergen* judgment of the CJEU in 1974.<sup>5</sup> The CJEU later developed considerable case law regarding abuse of rights in various fields, including most notably the free movement of companies<sup>6</sup> and tax law.<sup>7</sup> In addition, there are several secondary legal sources in diverse areas of EU law that refer to the prohibition of abuse.<sup>8</sup>

In its remarkable *Halifax* judgment, the CJEU recognised the prohibition of abusive practices as a principle and, in *Kofoed*, the prohibition of abuse of rights was deemed to constitute a 'general Community law principle'.<sup>9</sup> The exact nature of the prohibition of abuse of rights is still debated. Disagreement exists on whether the prohibition is merely a principle of interpretation or a fully-fledged general principle of EU

<sup>5</sup> Case 33/74 *Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299, paras 12–13.

<sup>6</sup> Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459; Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd*. [2003] ECR I-10155.

<sup>7</sup> See in particular Case C-255/02 *Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise* [2006] ECR I-1609; Case C-196/04 *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue* [2006] ECR I-7995; Case C-321/05 *Hans Markus Kofoed v Skatteministeriet* [2007] ECR I-5795; Case C-425/06 *Ministero dell'Economia e delle Finanze v Part Service Srl*. [2008] ECR I-897.

<sup>8</sup> See in particular Regulation 596/2014/EU of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC [2014] OJ L173/1; Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L94/375; Regulation 2015/848/EU of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings [2015] OJ L141/19; Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer [2014] OJ L157/1; Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work [2008] OJ L327/9.

<sup>9</sup> *Halifax* (n 7) para 70; *Kofoed* (n 7) para 38.

law.<sup>10</sup> Interestingly, even before the aforementioned judgments, secondary EU legislation referred to ‘the general principle of forbidding the abuse of rights’.<sup>11</sup>

Some representatives of the legal literature interpret abuse of rights in the context of the horizontal relation between private persons,<sup>12</sup> while others construe it in the context of the vertical relationship between the individual and the State.<sup>13</sup> This distinction may have some basis, taking the differing concepts of abuse of rights in national laws into account, but abuse is to be attributed an autonomous EU law meaning that is independent from any national interpretation.<sup>14</sup> The terminological differences in the CJEU’s judgments suggest a more pragmatic and broader concept of abuse, embracing abuses in both vertical and horizontal relationships.

In *Emsland-Stärke*, the CJEU devised a test to ascertain whether a particular instance of conduct constitutes abuse. The test is built upon the combination of an objective and a subjective element. The objective criterion is that ‘despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved’, while the subjective element consists of ‘the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it’.<sup>15</sup> When both of the above conditions have been met, the advantage stemming from EU law should not be conferred upon the person claiming it.

This development also progressively left its imprint on the free movement of persons. The earlier rules on the free movement of different groups of people contained in various secondary legal sources did not provide explicitly for the prohibition of abuse of rights. Nevertheless, Member States could in principle restrict the free movement and residence of Union citizens and their third country national family members on the grounds of preventing abuse of rights, based on the case law of the CJEU.<sup>16</sup> It must be noted that, in relation to the free movement of Union citizens and their third country family members, the CJEU does not tend to refer to the (general) principle of prohibition of abuse of rights.<sup>17</sup> The reason for this may be the existence of a specific provision prohibiting the abuse of rights in the Directive. Where there is a specific provision prohibiting abuse, there is no need for recourse to the (general) principle of the prohibition of abuse of rights.<sup>18</sup>

### Impact of the Directive

The earlier secondary legal sources on the free movement of persons were repealed and consolidated by the Directive. As an innovation, the Directive introduced an article on abuse of rights and fraud. Article 35 of the Directive may be considered to be the codification of the general principle of the prohibition of abuse of rights.<sup>19</sup> The Commission intended to facilitate the application of this provision by issuing a communication on guidance for better transposition and application of the Directive<sup>20</sup> and also adopted a communication

<sup>10</sup> On the issue of the nature of abuse of rights see Paul Farmer, ‘Prohibition of Abuse of (European) Law: The Creation of a New General Principle of EU Law through Tax: A Response’ In: de la Feria, R, Vogenauer, S (eds), *Prohibition of Abuse of Law – A New General Principle of EU Law?* (Hart 2011) 4; Anthony Arnall, ‘What is a General Principle of EU Law?’ In: de la Feria, R, Vogenauer, S (eds), *Prohibition of Abuse of Law – A New General Principle of EU Law?* (Hart 2011), 22–23; Horst Eidenmüller, ‘Abuse of Law in the Context of European Insolvency Law’ In: de la Feria, R, Vogenauer, S (eds), *Prohibition of Abuse of Law – A New General Principle of EU Law?* (Hart 2011) 142 who consider the prohibition of abuse as a principle of interpretation, while Luca Cerioni, ‘The “Abuse of Rights” in EU Company Law and EU Tax Law: A Re-reading of the ECJ Case Law and the Quest for a Unitary Notion’ (2010) 21 EBLR 783, 807–813; Karsten Engsig Sorensen, ‘What is a General Principle of EU Law? A Response’ In: de la Feria, R, Vogenauer, S (eds), *Prohibition of Abuse of Law – A New General Principle of EU Law?* (Hart 2011) 25; Stefan Vogenauer, ‘The Prohibition of Abuse of Law: An Emerging General Principle of EU Law’, In: de la Feria, R, Vogenauer, S (eds), *Prohibition of Abuse of Law – A New General Principle of EU Law?* (Hart 2011) 563–571 consider the prohibition of abuse as a general principle of EU law.

<sup>11</sup> Commission Regulation 3887/92/EEC of 23 December 1992 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes [1992] OJ L 391/36, Preamble.

<sup>12</sup> Alexandre Saydé, *Abuse of EU Law and Regulation of the Internal Market* (Hart 2014) 30.

<sup>13</sup> Katja S Ziegler, ‘“Abuse of Law” in the Context of the Free Movement of Workers’ In: de la Feria, R, Vogenauer, S (eds), *Prohibition of Abuse of Law – A New General Principle of EU Law?* (Hart 2011) 296.

<sup>14</sup> See Case C-202/13 *The Queen, on the application of Sean Ambrose McCarthy and Others v Secretary of State for the Home Department*, ECR nyr., Opinion of AG Szpunar, para 112; Vogenauer (n 10) 556–557.

<sup>15</sup> Case C-110/99 *Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas* [2000] ECR I-11569 paras 52–53.

<sup>16</sup> See Case C-370/90 *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department* [1992] ECR I-4265 para 24; Case C-109/01 *Secretary of State for the Home Department v Hacene Akrich* [2003] ECR I-9607 para 57.

<sup>17</sup> Ziegler (n 13) 306.

<sup>18</sup> Sorensen (n 10) 31; Vogenauer (n 10) 551.

<sup>19</sup> Karsten Engsig Sorensen, ‘Abuse of Rights in Community Law: A Principle of Substance or Merely Rhetoric?’ (2006) 43 CMLR 423, 437–438.

<sup>20</sup> Communication from the Commission to the European Parliament and the Council of 2 July 2009 on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside

titled 'Helping national authorities fight abuses of the right to free movement',<sup>21</sup> together with a Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on the free movement of EU citizens.

According to Article 35 of the Directive, which bears the title 'Abuse of Rights',

Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31.

The preamble of the Directive adds that:

To guard against abuse of rights or fraud, notably marriages of convenience or any other form of relationships contracted for the sole purpose of enjoying the right of free movement and residence, Member States should have the possibility to adopt the necessary measures.<sup>22</sup>

The concepts of abuse of rights and fraud must be distinguished. Abuse of rights involves conduct the sole purpose of which is benefiting from free movement and residence in the EU and which formally respects the provisions of EU law, but does not comply with the purposes of these provisions. Fraud means the use of fraudulent documentation or making a false representation in administrative and court proceedings to benefit from free movement and residence rights. This article focuses primarily on abuse of rights.

The wording of Article 35 suggests that the Directive is applicable to any situation where a person intends to benefit from the provisions of the Directive contrary to its purposes. However, in such an event, Member States are entitled to take 'the necessary measures to refuse, terminate or withdraw any right'. This implies that abuse of rights and fraud fall within the scope of application of the Directive and any abuse of rights must be addressed in its context. In the author's opinion, this solution seems to confirm that the prohibition of abuse of rights is not simply a principle of interpretation, applied in order to exclude abuses as falling out of the scope of application of an economic freedom or another EU legal source. Article 35 demonstrates that the prohibition of abuse of law is a general principle to be applied within the scope of application of EU law.

While the *Emsland-Stärke* test contains the subjective element of the intention to obtain an advantage from the rules of EU law in addition to the objective element, Article 35 does not refer to the motives of the person concerned. Sometimes, the CJEU applies Article 35 and the *Emsland-Stärke* test together, in this way also alluding to the subjective element.<sup>23</sup> The CJEU had previously objectified the subjective element in some of its judgments:<sup>24</sup> the intention may be determined on the basis of the objective circumstances.<sup>25</sup> This approach, which focuses on the objective circumstances, may be reflected in Article 35.

It is sometimes asserted in the legal literature that abuse is irrelevant in the field of the free movement of persons.<sup>26</sup> This statement is justifiable, considering that the decisions passed by the CJEU so far have not found abuse of rights regarding the free movement of Union citizens. The application by the CJEU of the prohibition of abuse varies between the different fields of EU law.<sup>27</sup> It might be true that abuse of rights may be harder to establish in relation to the free movement of persons than in relation to other freedoms.<sup>28</sup>

freely within the territory of the Member States COM (2009) 313 final.

<sup>21</sup> Commission, Communication from the Commission to the European Parliament and the Council – Helping national authorities fight abuses of the right to free movement: Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens COM (2014) 604 final.

<sup>22</sup> Directive, Preamble (28).

<sup>23</sup> *McCarthy* (n 14) para 54; see also *McCarthy* (n 14), Opinion of AG Szpunar para 112.

<sup>24</sup> *Halifax* (n 7) para 86 following *Halifax*, Opinion of AG Maduro para 71.

<sup>25</sup> See Jukka Snell, 'The Notion of and General Test for Abuse of Rights: Some Normative Reflections' In: de la FERIA, R, Vogenauer, S (eds), *Prohibition of Abuse of Law – A New General Principle of EU Law?* (Hart 2011) 226; Dennis Weber, 'Abuse of Law in the Context of Indirect Taxation: Why We Need the Subjective Intention Test, When is Combating Abuse an Obligation and Other Comments' In: de la FERIA, R, Vogenauer, S (eds), *Prohibition of Abuse of Law – A New General Principle of EU Law?* (Hart 2011) 397; Vogenauer (n 10) 538–539.

<sup>26</sup> Eleanor Spaventa, 'Comments on Abuse of Law and the Free Movement of Workers' In: de la FERIA, R, Vogenauer, S (eds), *Prohibition of Abuse of Law – A New General Principle of EU Law?* (2011 Hart) 315–317.

<sup>27</sup> Rita de la FERIA, 'Prohibition of Abuse of (Community) Law: The Creation of a New General Principle of EC Law through Tax' (2008) 45 CMLR 395, 398–399; Vogenauer (n 10) 566.

<sup>28</sup> Rita De la FERIA, 'Introducing the Principle of Prohibition of Abuse of Law' In: de la FERIA, R, Vogenauer, S (eds), *Prohibition of Abuse of Law – A New General Principle of EU Law?* (Hart 2011) xviii–xx; Vogenauer (n 10) 565.

However, a qualification must be made. It cannot be concluded that such cases do not exist just because the CJEU has been reluctant so far to establish abuse of rights in its case law.<sup>29</sup> First, the CJEU consistently acknowledges in its case law that Member States may restrict the free movement of workers<sup>30</sup> or, more broadly, that of Union citizens,<sup>31</sup> on the grounds of fraud or abuse. For instance, in the *Kol* judgment, the CJEU accepted that the right of residence may be denied, taking the fraudulent conduct of the person concerned into account.<sup>32</sup> Second, this approach overlooks the fact that the CJEU's practice is only one of the layers of the application of EU law. The other, often ignored, layer of EU law is the practice of national courts and authorities: as Section IV demonstrates, a number of abuse of rights cases have been addressed by national courts without requesting a preliminary ruling from the CJEU. In some of these cases, abuse of rights has been established.

In the following Sections, I discuss the interpretive practice relating to Article 35, as developed by the CJEU and by the courts of the Member States. It will be seen that the terseness of Article 35 does not provide much guidance for its application. Section III demonstrates the CJEU's concerns about applying Article 35 where there is a lack of concrete proof of abuse. Section IV then explores the application of the Directive by the national courts and their greater preparedness to apply Article 35.

### III. The case law of the CJEU

In order to be able to assess the judicial practice of the courts of Member States, we first have to examine the relevant case law of the CJEU. So far, the CJEU has not had many opportunities to interpret Article 35 of the Directive. There are slightly more cases where the Advocates General referred to abuse of rights, but these have not been finally addressed by the CJEU.<sup>33</sup>

In the context of the Directive, the issue of abuse of rights appeared before the CJEU in two forms. The first situation is where the abuse arose regarding an individual, while in the second case a Member State was alleged to have committed an abuse of rights.

#### ***Abuse of rights by individuals***

Abuse of rights may be committed by individuals who intend to take advantage of favourable EU law provisions, such as the rules ensuring the right of free movement and residence in the territory of Member States under the Directive.

In *Metock*, the first case interpreting Article 35, the CJEU stated that no prior lawful residence in another Member State may be required for non-EU national family members of Union citizens to reside in a given Member State.<sup>34</sup> From this perspective, the CJEU reconsidered its previous *Akrich* judgment, decided before the adoption of the Directive. In *Akrich*, a Moroccan national, Mr Akrich, married a British citizen during one of his illegal stays in the UK. Later, Mr Akrich was deported to Dublin. After some time spent together with his wife in Ireland, they wanted to return to the UK in order to live and work there. The Secretary of State refused to revoke the deportation order as he found that the couple's stay in Ireland served only as an artificial basis for their return together to the UK and that they were evading national immigration legislation. The CJEU laid down that the derived right of a third country national spouse of a citizen of a Member State to move to and reside in another Member State together with their spouse may be relied on only where the

<sup>29</sup> Rita de la Feria, 'Prohibition of Abuse of (Community) Law: The Creation of a New General Principle of EC Law through Tax' (n 27) 414.

<sup>30</sup> See Case 39/86 *Sylvie Lair v Universität Hannover* [1988] ECR 3161 para 43; Case C-413/01 *Franca Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst* [2003] ECR I-13187 para 36; *Akrich* (n 16) para 57.

<sup>31</sup> *McCarthy* (n 14) paras 45 and 47; Case C-127/08 *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform* [2008] ECR I-6241 para 95; Case C-551/07 *Deniz Sahin v Bundesminister für Inneres* [2008] ECR I-10453 para 29.

<sup>32</sup> Case C-285/95 *Suat Kol v Land Berlin* [1997] ECR I-3069 para 26 and para 28.

<sup>33</sup> Case C-161/15 *Abdelhafid Bensada Benallal v État belge* ECR nyr., Opinion of AG Mengozzi, paras 19–24; Case C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* ECR nyr., Opinion of AG Wathelet para 131; Case C423/12 *Flora May Reyes v Migrationsverket*, Opinion of AG Mengozzi, para 47; Case C480/08 *Maria Teixeira v London Borough of Lambeth and Secretary of State for the Home Department* [2010] ECR I-1107, Opinion of AG Kokott, paras 83–84.

<sup>34</sup> *Metock* (n 31) para 58. Samantha Currie, 'Accelerated Justice or a Step Too Far? Residence Rights of Non-EU Family Members and the Court's Ruling in *Metock*' (2009) 34 ELR 310; Saïd Hammamoun and Nanette Neuwahl, 'Le droit de séjour du conjoint non communautaire d'un citoyen de l'Union dans le cadre de la directive 2004/38 (CJCE, affaire *Metock*, C-127/08)' (2009) 1 *Revue trimestrielle de droit européen* 91; D Martin, 'Comments on Förster (Case C-158/07 of 18 November 2008), *Metock* (Case C-127/08 of 25 July 2008) and Huber (Case C-524/06 of 16 December 2008)' (2009) 11 *EJML* 100; Hubert Alcaraz, 'Droit d'entrée et de séjour d'un ressortissant tiers ayant des liens de parenté avec un citoyen de l'Union' (2009) 6 *L'actualité juridique; droit administratif* 323; Astrid Epiney, 'Von *Akrich* über *Jia* bis *Metock*: zur Anwendbarkeit der gemeinschaftlichen Regeln über den Familiennachzug' (2008) 43 *Europarecht* 840.



third country national lawfully resides in a Member State.<sup>35</sup> From this statement, it followed that the couple could be denied return to the UK due to Mr Akrich's absence of prior lawful residence there. The Court added, however, that even in such a case regard must be paid to the right to respect for family life under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>36</sup>

In *Metock*, the CJEU had the opportunity to reconsider the prior lawful residence requirement under the Directive. The Irish Minister for Justice refused to grant the right of residence to four persons who were all third country national spouses of citizens of other Member States residing in Ireland. These decisions were justified by the fact that those persons did not satisfy the prior lawful residence requirement imposed by Irish law.

In the *Metock* case, AG Poiares Maduro invoked the *Jia* judgment where the CJEU limited the findings of *Akrich* to the facts of that case only. Accordingly, the prior lawful residence requirement was linked in *Akrich* to the specific circumstances of the case, where a third country national who was the spouse of a Union citizen resided unlawfully in a Member State and intended to evade national immigration rules.<sup>37</sup> AG Poiares Maduro made reference to Article 35 as a limitation to entry: in his interpretation, it covers not only marriages of convenience, but also situations like the *Akrich* case where persons concerned intend to evade national immigration rules illicitly.<sup>38</sup>

As indicated above, in *Metock*, the CJEU concluded that a national of a non-member country who is a family member of a Union citizen and accompanies or joins him or her in a Member State other than that of which the Union citizen is a national has the right of entry and residence in that host Member State, irrespective of the prior lawful residence of the third country national in another Member State.<sup>39</sup> The Irish Minister of Justice and some of the governments that made observations argued that the surrender of the requirement on the prior lawful residence in another Member State would increase the number of people entitled to reside in the territory of the EU and would in parallel undermine the effective control of immigration.<sup>40</sup> The CJEU only briefly noted that, based on Article 35, Member States may prohibit family Members of Union citizens from entry to and residence in their territory in the event of abuse of rights.<sup>41</sup>

In the *Sahin* case, the CJEU in essence reiterated the findings of the *Metock* judgment. Mr Sahin, a Turkish national, enjoyed a temporary right of residence under Austrian asylum law in Austria and later married a German national (also living in Austria). However, his permanent residence card application was denied on the grounds that he was not a family member accompanying or joining a Union citizen exercising the right to free movement, as the couple met in Austria. In this judgment, the CJEU only hinted at Article 35 being a potential legal basis for restricting the right of entry and residence of third country family members of Union citizens.<sup>42</sup>

In the *O and B* case, two third country nationals, Mr O and Mr B, married Dutch citizens, who exercised their right to move and reside in another Member State and then returned to the Netherlands.<sup>43</sup> The stay of the Union citizens abroad was limited. Mr O's spouse spent two months in Spain without finding a job there and then spent time in Spain regularly with her husband in the form of holidays. Mr B's wife spent her weekends in Belgium while her husband stayed there. In both cases, right of residence was not granted to the third country national spouses of the Dutch citizens subsequent to their return to the Netherlands. The CJEU found that only sufficiently genuine residence of the Union citizen in another Member State (which may enable the Union citizen to create and strengthen family life in that Member State) ensures the derived right of residence for his or her third country national family member upon their return to the Member State of which the Union citizen is a national. Pursuant to the judgment, the residence is genuine

<sup>35</sup> *Akrich* (n 16) para 50.

<sup>36</sup> *ibid* paras 58–60.

<sup>37</sup> View of AG Poiares Maduro in *Metock* (n 31) para 12.

<sup>38</sup> *ibid* para 14.

<sup>39</sup> *Metock* (n 31) para 70.

<sup>40</sup> *ibid* para 71.

<sup>41</sup> *ibid* paras 74–75.

<sup>42</sup> *Sahin* (n 31) para 29.

<sup>43</sup> Case C-456/12 *O. v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B* (O. and B.) EU:C:2014:135; Andreas Pfersich, 'Aufenthaltsrecht, Drittstaatsangehöriger, Familienangehöriger eines Unionsbürgers, Rückkehr des Unionsbürgers nach Kurzaufenthalt' (2014) 34 Zeitschrift für Ausländerrecht und Ausländerpolitik 382; Elspeth Guild and Kingsley Napley, 'Case Notes and Comments. S v Minister voor Immigratie, Integratie en Asiel and G v Minister voor Immigratie, Integratie en Asiel' (2014) Journal of Immigration Asylum and Nationality Law 284; Sarah Ponterlitschek and Neil Weaver, 'Freizügigkeit: Abgeleitetes Aufenthaltsrecht des drittstaatsangehörigen Familienangehörigen eines EU-Bürgers in dessen Herkunftsmitgliedstaat' (2014) 25 EuZW 399.

if the Union citizen and his or her third country national family member reside in the host Member State in accordance with Article 7 (right of residence for more than three months) or Article 16 of the Directive (right of permanent residence). Article 6 of the Directive (right of residence for up to three months) covers shorter periods, such as weekends or holidays. Nevertheless, adding together such shorter periods does not give rise to a derived right of residence for the third country national family member of the Union citizen in the Member State of citizenship of their spouse. AG Sharpston noted that there was no evidence in the case regarding marriages of convenience or abuse of rights,<sup>44</sup> while the CJEU simply stated that EU law does not cover abuses in relation to the residence right of third country national family members of Union citizens, although it did not mention Article 35 explicitly.<sup>45</sup> Interestingly, the CJEU referred here to some of its previous decisions instead of Article 35, although any eventual abuse of rights could have been addressed under Article 35.

The single case so far where the CJEU has discussed abuse of rights in depth is the *McCarthy* case.<sup>46</sup> Here, the Colombian wife of a British and Irish national living in Spain was not allowed to board flights to the UK and thus to enter the territory of that country with her residence card issued by the Spanish authorities. Entry was refused because the wife did not possess an EEA family permit as required by UK immigration rules. Pursuant to Article 5(2) of the Directive, possession of a valid residence card exempts third country national family members of Union citizens from the requirement to have an entry visa while moving in the EU. The EEA family permit amounted in essence to an entry visa. The UK Secretary of State for the Home Department intended to justify the additional entry requirement by reference to Article 35 of the Directive, among others. The Secretary of State argued that there is a systemic problem of abuse of rights and fraud by third country nationals. It was argued that the residence cards issued by the majority of Member States were open to forgery; therefore, the UK authorities did not accept them. AG Szpunar applied the *Emsland-Stärke* test and concluded that neither the objective (residence in Spain and the trips to the UK were not artificial)<sup>47</sup> nor the subjective (the couple had a genuine family life and their marriage was not one of convenience)<sup>48</sup> preconditions of abuse were present in the case. The CJEU made only a brief and indirect reference to the *Emsland-Stärke* test,<sup>49</sup> but it put more emphasis on the lack of the assessment of the individual position of the person concerned, which was also stressed by the Advocate General.<sup>50</sup> The CJEU pointed out that a residence card issued in another Member State should have been recognised in the UK without a visa, unless the authenticity of the residence card was doubtful.<sup>51</sup> In the absence of an EEA family permit, denial was automatic and any specific assessment of the conduct of the person concerned was excluded. Such an automatic measure would 'disregard the very substance of the primary and individual right of Union citizens to move and reside freely within the territory of the Member States and of the derived rights enjoyed by those citizens' family members who are not nationals of a Member State.'<sup>52</sup>

The CJEU therefore concluded that, as a measure of general prevention, a Member State cannot require third country family members of Union citizens to be in possession of an entry permit, such as the EEA family permit, in addition to a residence card for entry to its territory.<sup>53</sup> Subsequent to the *McCarthy* judgment, the Immigration (European Economic Area) Regulations 2006 implementing the Directive into UK law were amended to accept residence cards issued by any EEA Member State (except Switzerland – *sic!*).<sup>54</sup>

All the cases analysed above involve situations where a Member State intended to rely on the prohibition of abuse of rights, in the form of marriage of convenience, against individuals. In its scant jurisprudence on abuse of rights under the Directive, the approach of the CJEU has not been entirely consistent. Sometimes, the CJEU cites Article 35; other times, though we would expect it to, it does not (eg. *O. and B.*). However, this does not change the fact that we cannot find any judgment where abuse of rights under Article 35 was found by the CJEU. The CJEU has consistently not found the abuse of rights to be occurring, whilst it

<sup>44</sup> Opinion of AG Sharpston in *O. and B.* (n 43) para 42.

<sup>45</sup> *O. v B.* (n 43) para 58.

<sup>46</sup> *McCarthy* (n 14) paras 43–58.

<sup>47</sup> *McCarthy* (n 14) Opinion of AG Szpunar paras 121–122.

<sup>48</sup> *ibid* Opinion of AG Szpunar paras 123–124.

<sup>49</sup> *McCarthy* (n 14) para 54 where the CJEU formally referred to the Case C364/10 *Hungary v Slovak Republic* [2012] and to the *O. and B.* judgment.

<sup>50</sup> *ibid* paras 48–53; *McCarthy* (n 14), Opinion of AG Szpunar para 126.

<sup>51</sup> *ibid* para 53.

<sup>52</sup> *ibid* para 57.

<sup>53</sup> *ibid* para 58.

<sup>54</sup> Immigration (European Economic Area) (Amendment) Regulations 2015, SI 2015/694 Sch.1 para 1(b)(ii).

continues to construe the free movement and residence rights of Union citizens and their third country family members broadly.

There is a single case in the jurisprudence of the CJEU, the *Hungary v Slovak Republic* case, where abuse of rights was invoked against another Member State in the context of the Directive.<sup>55</sup> In order to give a complete picture of the abuse of rights under the Directive, the next Subsection scrutinises this judgment.

### ***Abuse of rights by a Member State***

In the case law of the CJEU, Article 35 has mostly been invoked by Member States against individuals seeking to enter or reside in their territory. Abuse of rights has, however, appeared in a different and (so far) unique form in the *Hungary v Slovak Republic* case. This judgment has been analysed mostly from the perspective of the relationship between EU law and public international law,<sup>56</sup> but the case raises interesting questions also in terms of abuse of rights.<sup>57</sup>

Here, the Slovak Ministry of Foreign Affairs prohibited the entry of the President of the Hungarian Republic into Slovakia in a *note verbale*, relying on the Directive. To challenge this, one of the arguments of the Hungarian government was the abuse of rights by the Slovak Republic: that the Directive was used for political purposes, namely to impede the entry of the Hungarian Head of State into Slovakia. The peculiarity of the *Hungary v Slovak Republic* case is that abuse of rights was not relied upon in relation to the conduct of an individual intending to benefit from the provisions of the Directive, but against a Member State. The CJEU rejected this, based on quite formal grounds. Although the CJEU held 'that the Slovak Republic was wrong to refer' to the Directive (since the visit was in his capacity as President, not as a private figure), this was not found sufficient to establish an abuse of rights.<sup>58</sup> First, the CJEU recalled the objective and subjective preconditions of abuse known from *Emsland-Stärke*.<sup>59</sup> It stated that Slovakia referred to the Directive in the *note verbale*, but that no formal decision had been passed by the Slovak authorities on the grounds of Article 27 (the protection of public policy, public security and public health). Second, nothing was done by Slovakia to create the conditions required for the application of the Directive artificially.<sup>60</sup> The mere reference to the Directive did not render it applicable to a factual situation to which it did not apply.

It must be noted that the Hungarian government did not rely on Article 35 of the Directive, but instead on the case law of the CJEU.<sup>61</sup> Although the CJEU rejected the Hungarian argument, it did not contend the possibility of an abuse of rights by Member States. Whether a Member State can commit an abuse of rights under the Directive to the detriment of an individual is questionable. It may be open to debate whether, in view of the existence of a specific provision on abuse of rights in a secondary legal source, the recourse to the case law of the CJEU without referring to Article 35 was right. First, although the wording of the Directive does not exclude an abuse on the part of a Member State, it seems to be drawn up to address the conduct of individuals intending to benefit illicitly and in a private capacity from the provisions of the Directive. Second, the practice of the CJEU shows that abuse of rights is not established even if the CJEU does find a violation of a Directive by a Member State. In relation to the other exceptions to the free movement and residence (public policy, public security and public health), when a Member State had used any of the exceptions set out in the Directive in a way held incompatible with the Directive, the CJEU only noted its incompatibility, but did not qualify it as an abuse.<sup>62</sup> The treatment of abuse of rights is similar to these exceptions. Therefore, it would seem odd if the CJEU would establish an abuse by a Member State, where the Member State relies on the Directive in a manner contrary to an interpretation given by the CJEU. It follows

<sup>55</sup> *Hungary v Slovak Republic* (n 49) paras 53–61.

<sup>56</sup> M Filippin, 'A change for future intra-European diplomatic relations? Case C-364/10 Hungary v. Slovakia, Judgment of 16 October 2012, not yet reported' (2013) 20 MJEC 120; Dominique Berlin, 'Le Président d'un État membre, un citoyen de l'Union un peu particulier' (2012) 43 La Semaine Juridique – édition générale 1142; Béatrice Delzangles 'Les affaires hongroises ou la disparition de la valeur « intégration » dans la jurisprudence de la Cour de justice' (2013) 49 Revue trimestrielle de droit européen 201.

<sup>57</sup> The issue of abuse of rights was, however, analysed by Lucia Serena Rossi, 'EU Citizenship and the Free Movement of Heads of State: Hungary v. Slovak Republic' (2013) 50 CMLR 1461.

<sup>58</sup> *Hungary v Slovak Republic* (n 49) paras 56–57.

<sup>59</sup> *ibid* paras 58–59.

<sup>60</sup> *ibid* para 60.

<sup>61</sup> *ibid* para 53.

<sup>62</sup> Case C434/10 *Petar Aladzhov v Zamestnik director na Stolichna direksia na vatreshnite raboti kam Ministerstvo na vatreshnite raboti* [2011] ECR I-11659. Similarly regarding Directive 64/221/EEC: Case C-503/03 *Commission of the European Communities v Kingdom of Spain* [2006] ECR I-1097; Case C-136/03 *Georg Dörr v Sicherheitsdirektion für das Bundesland Kärnten and Ibrahim Ünal v Sicherheitsdirektion für das Bundesland Vorarlberg* [2005] ECR I-4759; Joined Cases *Georgios Orfanopoulos and Others* (C-482/01) and *Raffaele Oliveri* (C-493/01) *v Land Baden-Württemberg* (C-482/01 and C-493/01) [2004] ECR I-5257.



that, in such cases, the CJEU should establish incompatibility with the Directive or the violation of the provisions on the free movement of persons, but not an abuse.<sup>63</sup> For instance, in the *McCarthy* case, the CJEU interpreted the Directive so that it does not permit a Member State to require, in pursuit of an objective of general prevention, third country family members of Union citizens who hold a valid residence card issued by the authorities of another Member State to be in possession, pursuant to national law, of an entry permit such as the EEA (European Economic Area) family permit in order to be able to enter its territory.<sup>64</sup> Based on the position of the Hungarian government, it may seem that the right to rely on the exceptions to the economic freedoms, including the exception of abuse, is a right conferred by the Treaty on the Functioning of the European Union<sup>65</sup> (TFEU) and the CJEU's case law to the Member States, which itself may be abused.<sup>66</sup> However, this approach is contrary to the practice of the CJEU, which has found a violation of the Directive or the free movement provisions in such cases instead of abuse of rights.

#### IV. The case law of the courts of the Member States

We have seen that the CJEU has not accepted so far in its practice any reliance on Article 35 by a Member State. However, with increased international personal mobility the appeal for the Member States to have recourse to the prohibition of abuse of rights under the Directive may be even bigger. The CJEU had to decide certain cases where abuse of rights arose in the context of the Directive. However, in these cases the Court has only superficially touched upon the issue of abuse and did not go beyond the statements of the CJEU made in relation to other legal sources. Sørensen put that 'it must be expected that [Article 35] will be interpreted to comply with how the principle has been interpreted previously'.<sup>67</sup> Nevertheless, many questions were not answered by the CJEU in its previous practice. Hence, in the absence of preliminary rulings, national courts had to deal with such questions. In the case law of the courts of the Member States, in particular, the following questions, which were not addressed previously by the CJEU, appeared:

- What kinds of conduct constitute abuse of rights under Article 35 of the Directive?
- What is the role of proportionality in relation to the abuse of rights under Article 35?
- Who bears the burden of proof and what must be proven?

The result of answering these questions is that the courts of the Member States have created autonomous solutions. The creativity of national courts can undoubtedly be traced back to the fact that the CJEU case law on Article 35 is scant and does not provide guidance on many questions. The cause (the absence of orientation on the part of the CJEU) and the outcome (the creativity of national judicial practice) may be elucidated by selecting cases which may be considered as typical and which can prove that without the assistance of the CJEU national courts perform a significant interpretative function concerning abuse of rights. The cases analysed below are typical due to certain characteristics: these are decisions made by national courts, requiring an interpretation of Article 35 but not being referred to the CJEU. Most of the cases concern the judicial practice of the UK, France or Ireland. These are countries concerned more strongly by immigration and most probably this is the reason why we find a rich case law regarding the application of Article 35 in these jurisdictions.

In addition to the case law of the Member States, cases from other jurisdictions are discussed. Overall, the focus of this piece is on the cases that confirm that national courts substantially add to the case law of the CJEU in questions not settled by the CJEU in applying Article 35. The analysis here of national judicial practice is by necessity somewhat limited by some pragmatic reasons. The accessibility of the relevant case law varies across the different Member States; in addition, linguistic barriers also make it difficult to get to know national judicial practice throughout.

The following Subsections discuss the answers put forward by the national courts to the questions listed above in light of EU law. Each Subsection first identifies a gap related to the application of Article 35, and how national courts have approached these issues in their practice. The responses given by national courts illustrate the dynamic nature of the judicial practice of the courts of the Member States in applying Article 35.

<sup>63</sup> See Farmer (n 10) 3.

<sup>64</sup> *McCarthy* (n 14) para 66.

<sup>65</sup> Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47.

<sup>66</sup> Sørensen (n 19) 441–442.

<sup>67</sup> *ibid* 438.

### ***Marriage of convenience and other forms of abuse of rights***

To apply Article 35, abusive conduct must be present. Article 35 refers explicitly to marriages of convenience, but abuse of rights may also take other forms. This Subsection will show that national courts have dealt with diverse forms of abuse. In deciding whether abuse of rights can be established and in which cases, they refrained from requesting a preliminary ruling from the CJEU.

Marriages of convenience are expressly mentioned in the Directive; the CJEU has also pointed out that the provisions of EU law may not be relied on to circumvent the national rules on entry and residence through marriages of convenience.<sup>68</sup> From the wording of the Directive, it can be inferred that a marriage of convenience is a marriage contracted for the sole purpose of enjoying the right of free movement and residence. The Commission's communication on guidance for better transposition and application of the Directive adds that 'A marriage cannot be considered as a marriage of convenience simply because it brings an immigration advantage, or indeed any other advantage'.<sup>69</sup>

Some courts have warned of the dangers and societal consequences of marriages of convenience. On behalf of the Irish High Court, Hogan J. asserted:

[T]he problem of marriages of convenience is a serious one. If citizens of other European Union states are being induced on a systematic basis to come to this State to enter into such marriages of convenience for monetary gain, then the shadow of organised crime, people trafficking and prostitution probably cannot be far behind.<sup>70</sup>

Several times, national court decisions have only indicated the possibility of withdrawing the right of residence from individuals who enter into a marriage of convenience or commit an abuse of rights without having recourse to this means in the given case.<sup>71</sup> In other cases, whether the marriage is one of convenience has needed to be proved.

In *PM v The Secretary of State for the Home Department*, the UK Upper Tribunal did not ask for a preliminary ruling from the CJEU.<sup>72</sup> Here, the authorities refused to issue a permanent residence card for a Turkish national wife of an Italian citizen. The Turkish applicant married the Italian national in the UK in 2004; they lived together and had a son. The couple did not cohabit after 2007, but remained married and kept in contact. In 2009, the permanent residence card was refused as it was held that the applicant had not resided in the UK with her Union citizen husband for five years as set out in section 15 (1)(b) of the Immigration (European Economic Area) Regulations 2006.<sup>73</sup> Interpreting the Directive and the Regulations, the Upper Tribunal found that the applicant was entitled to a permanent residence card, as the parties had resided in the UK for five years since their marriage in a marital relationship, even though their cohabitation ended in the meantime. The Upper Tribunal stated that a marriage of convenience 'is a term strictly limited to relationships "contracted for the sole purpose" of enjoying free movement rights and with no effective social nexus between the parties' and added that 'an inference of marriage of convenience cannot arise solely because a married couple are not living in the same household'.<sup>74</sup>

Article 35 and the related case law do not give an answer as to when a marriage should be assessed as one of convenience. In the *Izmailovic* case in the Irish High Court, an Egyptian national residing illegally in Ireland apparently became acquainted with a Lithuanian woman over the Internet.<sup>75</sup> The Lithuanian moved

<sup>68</sup> *Akrich* (n 16) para 57.

<sup>69</sup> Communication from the Commission to the European Parliament and the Council of 2 July 2009 on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States 15.

<sup>70</sup> *Justinia Izmailovic and Mahmoud Elmorsy Ads v Commissioner of An Garda Síochána, Minister for Justice, Equality and Law Reform, Ireland and the Attorney General* [2011] IEHC 32 (High Court of Ireland) para 23.

<sup>71</sup> See for example *Parry Igunma v Governor of Wheatfield Prison, Minister for Justice and Equality, Ireland and the Attorney General* [2014] IEHC 218 (High Court of Ireland) paras 20–21; *Zuzana Gogolova and Edilberto Santiago Valcarcel Nina and Barbara Amoatong and Peter Ennim v Minister for Justice, Equality and Law Reform* [2008] IEHC 131 (High Court of Ireland) para 22; *El Mokhtar el Menkari and Simone Krivickaite v The Minister for Justice, Equality and Law Reform, the Attorney General and Ireland* [2011] IEHC 29 (High Court of Ireland) para 7.

<sup>72</sup> *PM v The Secretary of State for the Home Department* [2011] UKUT 89 (IAC).

<sup>73</sup> The Immigration (European Economic Area) Regulations 2006, SI 2006/1003.

<sup>74</sup> *PM v The Secretary of State for the Home Department* (n 72) para 36. Similarly, see *Re Mbebe's application for Judicial Review* [2008] NIQB 108 para 54.

<sup>75</sup> *Justinia Izmailovic and Mahmoud Elmorsy Ads v Commissioner of An Garda Síochána, Minister for Justice, Equality and Law Reform, Ireland and the Attorney General* (n 70).

to Ireland only after becoming acquainted with the man. Although a deportation order was issued in the meantime against the Egyptian national, the couple intended to get married. Shortly before concluding the marriage, two officers of the Irish immigration authorities arrived on the scene. They tried to prevent the proposed marriage on the grounds that it was a marriage of convenience and arrested the groom. The Irish High Court pointed out that the abusive nature of a marriage cannot be taken into account before the conclusion of the marriage and that the solemnisation of the marriage may not be hindered by national authorities, even if there is suspicion that the marriage would be one of convenience.<sup>76</sup> Such a marriage was considered a valid marriage under Irish law for all purposes other than the later exercise of the right of free movement and residence under the Directive and the implementing national legislation. From the perspective of the Directive, the examination of the nature of the marriage may take place only after and not before the conclusion of the marriage, when the third country national spouse came to rely on that marriage in the context of the free movement and residence in the EU.

The above decisions prove that national courts approach abuse of rights cases carefully. Finding abuse of rights turns largely upon the meticulous assessment of the facts. However, it must be noted that the courts do establish from time to time that a particular marriage is of convenience. In *TC (Kenya) v Secretary of State for the Home Department*, a Kenyan national's residence document was revoked on the grounds that his marriage to his Portuguese wife was one of convenience.<sup>77</sup> The English Court of Appeal accepted this finding, taking into account the absence of evidence of any development of the relationship between the partners between their first meeting and their marriage, the limited time spent together by the spouses and the lack of financial support provided by the wealthy husband to his wife.

The Czech Supreme Administrative Court confirmed the refusal to give a residence permit to a Vietnamese national and, based on the facts, upheld the qualification of the marriage concluded by the Vietnamese lady with a Czech citizen shortly before the submission of the application for the residence permit as a marriage of convenience.<sup>78</sup> In this case, the applicant argued that, despite the language barrier, the little time spent together with her husband and insufficient knowledge of her husband's health condition, their marriage corresponded to the modern idea of marriage. She took the view that founding a family and raising children no longer constitute the basis of a modern marriage. However, the Supreme Administrative Court, taking the circumstances of the case into consideration, did not accept these arguments.

Marriages of convenience are explicitly mentioned in the text of the Directive, but the wording ('such as marriages of convenience') suggests that other cases of abuse of rights are also conceivable. The Commission's communication on guidance for better transposition and application of the Directive highlights such instances, such as (registered) partnerships of convenience, fake adoptions or false declarations of paternity.<sup>79</sup>

Sham marriages are sometimes treated together with marriages of convenience in national judicial practice, although strictly speaking they are different. As Gillen J put in *Re Mbebe*:

An allegation of a 'sham' marriage is a very serious one and not to be dealt with lightly. It is complex and requires very careful analysis since it strikes at the heart of an EC right if proved.<sup>80</sup>

In *Re Mbebe*, a South African national with an adverse immigration history married a Portuguese national and thus she obtained right of residence in the UK. However, the UK Immigration Service declared her an unlawful entrant and held that her residence card was invalid as she entered into a 'sham marriage of convenience'.<sup>81</sup> The court used in parallel the notions of marriages of convenience and sham marriages in its decision.<sup>82</sup> This might be because some national legal instruments treated these two as identical in

<sup>76</sup> *ibid* paras 63–69.

<sup>77</sup> *TC (Kenya) v Secretary of State for the Home Department* [2008] EWCA Civ 543.

<sup>78</sup> Nejvyšší správní soud (Supreme Administrative Court of the Czech Republic) Judgment No. 1 As 58/2013 – 43 of 2 October 2013 based on the English language summary of the judgment, JuriFast database of the Association of the Councils of State and Supreme Administrative Jurisdictions. <[http://www.aca-europe.eu/WWJURIFAST\\_WEB/DOCS/CZ01/CZ01000232.pdf](http://www.aca-europe.eu/WWJURIFAST_WEB/DOCS/CZ01/CZ01000232.pdf)> accessed 17 October 2017.

<sup>79</sup> Communication from the Commission to the European Parliament and the Council of 2 July 2009 on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, 15.

<sup>80</sup> *Re Mbebe* (n 74) para 54.

<sup>81</sup> *ibid* para 2.

<sup>82</sup> For example, *ibid* para 56.

essence.<sup>83</sup> Moreover, the suspicion of fraudulent conduct also arose in this case: the person concerned had used various names before. However, a distinction may be made between a marriage of convenience and a sham marriage as this is set out in the Handbook of the Commission: 'Unlike marriages of convenience, which are formally valid, bogus or sham marriages are invalid or entirely fictitious. Bogus marriages may involve forgery or the misuse of documents relating to another person'.<sup>84</sup> Notwithstanding their difference, both conducts trigger the application of Article 35.

In addition to the marital relationship, the artificial creation of dependent family member status was also touched upon as a potential instance of abuse of rights. In the *SM (India) v Entry Clearance Officer (Mumbai); OQ (India) and another v Entry Clearance Officer (Mumbai)* case, the dependency status of adult relatives of a Union citizen under the Directive was assessed by the English Court of Appeal in terms of granting an EEA family permit. The right of residence in the UK was requested, among others, on behalf of a Portuguese national's Indian adult daughters who resided in India. It was suggested that the sisters still lived in the family home and their father (who was working in the UK) supported them financially. Here, the interesting question of whether the right of residence may be refused from 'a person who artificially placed himself in a position of dependency of a Union citizen' by giving up his job or selling his assets in order to secure for himself the right of residence was raised.<sup>85</sup> The Court of Appeal did not answer this question, as these issues were not raised in a previous stage of the procedure.<sup>86</sup> Such a case would probably fall under Article 35. Such a conclusion is in line with the interpretation of British courts, which state that dependency must be of necessity, not of choice.<sup>87</sup> However, the difficulties of proof from the perspective of national authorities seem to be even more apparent in such a situation.

In France, the abuse of rights exception has been applied as one of the means to expel Romanian and Bulgarian citizens of Roma origin from France.<sup>88</sup> In French court practice, the question arose as to whether the repetition of the three months' residence in one Member State constituted an abuse of rights.<sup>89</sup> The French Code on the entry and residence of foreigners and the right of asylum (Code de l'entrée et du séjour des étrangers et du droit d'asile) contained an express provision on this question. According to article L. 511-3-1 of the Code:

The competent administrative authority can, by reasoned decision, oblige a national of a Member State of the European Union or that of another state party to the Agreement on the European

<sup>83</sup> See in particular the European Casework Instructions First Chapter 5 at para 3.2 'A marriage of convenience is a sham marriage entered into solely for immigration purposes' referred to by *Re Mbebe* (n 74) para 30.

<sup>84</sup> Commission, Communication from the Commission to the European Parliament and the Council – Helping national authorities fight abuses of the right to free movement: Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens 14.

<sup>85</sup> *SM (India) v Entry Clearance Officer (Mumbai); OQ (India) and another v Entry Clearance Officer (Mumbai)* [2009] EWCA Civ 1426 para 26.

<sup>86</sup> *ibid* para 27.

<sup>87</sup> *AP and FP (Citizens Directive Article 3(2); discretion; dependence) India* [2007] UKAIT 00048 paras 27–28.

<sup>88</sup> Solange Maslowski, 'The Expulsion of European Union Citizens from the Host Member State: Legal Grounds and Practice, Central and Eastern European Migration Review' <<http://www.ceemr.uw.edu.pl/vol-4-no-2-december-2015/articles/expulsion-european-union-citizens-host-member-state-legal-grounds>> accessed 17 April 2017.

<sup>89</sup> Cour administrative d'appel de Douai 3ème chambre, N° 12DA00772, 29 novembre 2012; Cour administrative d'appel de Douai 3ème chambre, N° 12DA00773, 29 novembre 2012; Cour administrative d'appel de Douai 3ème chambre, N° 12DA00774, 29 novembre 2012; Cour administrative d'appel de Bordeaux 3ème chambre, N° 12BX00601 30 octobre 2012; Cour administrative d'appel de Bordeaux 3ème chambre, N° 12BX00602, 30 octobre 2012; Cour administrative d'appel de Bordeaux 3ème chambre, N° 12BX00603, 30 octobre 2012; Cour administrative d'appel de Bordeaux 3ème chambre, N° 12BX00604, 30 octobre 2012; Cour administrative d'appel de Bordeaux 3ème chambre, N° 12BX00605, 30 octobre 2012; Cour administrative d'appel de Bordeaux 6ème chambre, N° 12BX00493, 13 novembre 2012; Cour administrative d'appel de Douai 2e chambre, N° 14DA00779, 3 février 2015; Cour administrative d'appel de Douai 2e chambre, N° 13DA0072 2e chambre, 28 mai 2013; Cour administrative d'appel de Douai 2e chambre, N° 13DA0073 2e chambre, 28 mai 2013; Cour administrative d'appel de Douai 2e chambre, N° 13DA0074 2e chambre, 28 mai 2013; Cour administrative d'appel de Douai 2e chambre, N° 13DA0076 2e chambre, 28 mai 2013; Cour administrative d'appel de Douai 2e chambre, N° 13DA0077 2e chambre, 28 mai 2013; Cour administrative d'appel de Douai 2e chambre, N° 13DA0078 2e chambre, 28 mai 2013; Cour administrative d'appel de Douai 2e chambre, N° 13DA0080 2e chambre, 28 mai 2013. However, abuse of rights was not established regarding returns to France of citizens of other Member States: Cour administrative d'appel de Douai 1re chambre, N° 12DA01093, 14 décembre 2012; Cour administrative d'appel de Douai 1re chambre, N° 12DA01095, 14 décembre 2012; Cour administrative d'appel de Douai 1re chambre, N° 12DA01097, 14 décembre 2012; Cour administrative d'appel de Douai 1re chambre, N° 12DA01094, 16 mai 2013; Cour administrative d'appel de Douai 1re chambre, N° 12DA01096, 16 mai 2013; Cour administrative d'appel de Douai 1re chambre, N° 12DA01099, 16 mai 2013; Cour administrative d'appel de Douai 2e chambre, N° 13DA0075 2e chambre, 28 mai 2013; Cour administrative d'appel de Douai 2e chambre, N° 13DA0079 2e chambre, 28 mai 2013.

Economic Area or that of the Swiss Confederation, or his family member to leave the French territory once it establishes that: ... 2° His residence constitutes an abuse of rights. The fact of the renewal of a residence of less than three months for the purpose of remaining in that territory constitutes an abuse of rights if the conditions for residence for a period of more than three months are not satisfied. Residence in France for the essential purpose of benefiting from the social assistance system constitutes equally an abuse of rights.<sup>90</sup>

In some cases, the right of residence of EU nationals was refused by French courts in situations where (in certain cases, after having benefitted from aid in France) the persons concerned returned periodically to France, relying on the three month residence right without fulfilling the prerequisites for the right of residence in another Member State for more than three months as set out by the Directive.<sup>91</sup> The French courts interpreted Article 6 of the Directive in light of Article 35, since the right to reside for up to three months in another Member State was considered as one of the rights that may be refused, terminated or withdrawn under the Directive. The courts pointed out that the sole fact that the three months' residence right was renewed does not constitute an abuse, but only if the person concerned does not satisfy the requirements laid down for a longer stay or where the purpose of the renewed residence is to benefit from the advantages provided for residents staying for more than three months. In several cases, it was held that the persons concerned did not meet the requirements laid down for a right of residence of more than three months and they represented a burden on the social assistance system.<sup>92</sup> In other cases, the court only referred to the fact that the purpose of the residence of the person was to benefit from the French welfare services, and this was a valid ground to require a Union citizen to leave France.<sup>93</sup>

The Directive does not provide much assistance on the question of whether Union citizens and their family members can return to the same host State periodically. It might seem that the right of residence for up to three months is only subject to the possession of a valid passport or identity card with no other conditions or formalities,<sup>94</sup> and their return cannot be impeded by national authorities.<sup>95</sup> The preamble of the Directive acknowledges that:

Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore, the right of residence for Union citizens and their family members for periods in excess of three months should be subject to conditions.<sup>96</sup>

From this statement, it may also be inferred that only residence exceeding three months may be subject to conditions, while residence for a period of up to three months is unconditional. From another perspective, however, as the French courts pointed out, the right of residence for a period of up to three months is a right that can be conferred by the Directive or that may be refused, terminated or withdrawn under Article 35. Although Article 24 of the Directive ensures in principle the equal treatment of Union citizens

<sup>90</sup> Translated by the author.

<sup>91</sup> See in particular: Cour administrative d'appel de Bordeaux 3ème chambre, N° 12BX00601 30 octobre 2012; Cour administrative d'appel de Bordeaux 3ème chambre, N° 12BX00602, 30 octobre 2012; Cour administrative d'appel de Bordeaux 3ème chambre, N° 12BX00603, 30 octobre 2012; Cour administrative d'appel de Bordeaux 3ème chambre, N° 12BX00604, 30 octobre 2012; Cour administrative d'appel de Bordeaux 3ème chambre, N° 12BX00605, 30 octobre 2012; Cour administrative d'appel de Douai 2e chambre, N° 14DA00779, 3 février 2015.

<sup>92</sup> See in particular: Cour administrative d'appel de Bordeaux 6ème chambre, N° 12BX00493, 13 novembre 2012; Cour administrative d'appel de Douai 3ème chambre, N° 12DA00772, 29 novembre 2012, para 6; Cour administrative d'appel de Douai 3ème chambre, N° 12DA00773, 29 novembre 2012, para 6; Cour administrative d'appel de Douai 3ème chambre, N° 12DA00774, 29 novembre 2012, para 6; Cour administrative d'appel de Douai 2e chambre, N° 13DA0072 2e chambre, 28 mai 2013; Cour administrative d'appel de Douai 2e chambre, N° 13DA0073 2e chambre, 28 mai 2013; Cour administrative d'appel de Douai 2e chambre, N° 13DA0074 2e chambre, 28 mai 2013; Cour administrative d'appel de Douai 2e chambre, N° 13DA0076 2e chambre, 28 mai 2013; Cour administrative d'appel de Douai 2e chambre, N° 13DA0077 2e chambre, 28 mai 2013; Cour administrative d'appel de Douai 2e chambre, N° 13DA0078 2e chambre, 28 mai 2013; Cour administrative d'appel de Douai 2e chambre, N° 13DA0080 2e chambre, 28 mai 2013.

<sup>93</sup> Cour administrative d'appel de Douai, N° 14DA00776, 13 novembre 2014 para 3.

<sup>94</sup> Directive, Preamble (9) and art 6(1).

<sup>95</sup> Jo Shaw, Nina Miller, Maria Fletcher, *Getting to grips with EU citizenship: Understanding the friction between UK immigration law and EU free movement law* (Edinburgh Law School Citizenship Studies 2013) 30.

<sup>96</sup> Directive, Preamble (10).



and their third country national family members,<sup>97</sup> the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence.<sup>98</sup> Interestingly, the French courts have not relied on the latter provision of the Directive. Instead, in their decisions, they have referred to the non-compliance with conditions for residence for a period of more than three months and the objective of benefiting from the social assistance system. In principle, the French courts could have held that the immigrants concerned are not entitled to take advantage of the French social assistance system during any of their stays not exceeding three months under Article 24(2). From this, it could be inferred that there was no need to rely on the prohibition of abuse of rights. However, these cases were concerned with the revocation of the right of residence and the deportation of persons who did not fulfil the requirements for residence of more than three months. This might have been the reason for referring to the prohibition of abuse of rights as set out in article L. 511-3-1.

EU law does not define the concept of abuse of rights. Therefore, national courts have had to circumscribe the notion of abuse of rights within the meaning of Article 35. There are, of course, certain differences regarding the case law of the courts of the Member States. National courts have faced various types of abusive conduct (marriages of convenience, sham marriages, creating dependency statuses artificially and repetitively seeking to enforce the three months' residence right to gain from the social assistance system). On many occasions, they have shared the reluctance of the CJEU to conclude that abuse has occurred. While abuse of rights has been established on occasion, the outcome of the cases has turned mostly upon the assessment of the facts. One common feature of this body of case law is, however, that national courts have not asked for the CJEU's help in deciding whether particular instances of conduct constitute abuse. This does not mean that national courts would have gone against the jurisprudence of the CJEU; indeed, national courts have often analysed Article 35 and the related case law of the CJEU in depth. The same phenomenon may be noticed regarding the application of the proportionality principle and the procedural safeguards enshrined in Article 35 as indicated by two decisions described below.

### ***Proportionality and procedural safeguards***

A question not answered so far by the CJEU is how the proportionality requirement and procedural safeguards referred to in Article 35 are to be interpreted.<sup>99</sup> The English Court of Appeal had to address this question in *TC (Kenya) v Secretary of State for the Home Department*. Here, the right of residence of a Kenyan national was removed and on appeal he argued that the proportionality requirement contained in Article 35 incorporates the safeguards laid down in Articles 27 (General principles in relation to the restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health) and 28 (Protection against expulsion), although the wording of Article 35 refers only to Articles 30 (Notification of decisions) and 31 (Procedural safeguards). In addition, according to the appellant the reference to public policy and public security in Article 30 (2) leads to the application of the whole of Articles 27 and 28. It was submitted that the application of these Articles imposes limitations upon the power of the Member State to revoke the rights of residence under Article 35. Pill LJ rejected this approach, distinguishing between the procedural safeguards set out in Articles 30 and 31 and the substantive rights contained in Articles 27 and 28. However, he acknowledged that some of the principles found in Article 28 may arise in assessing the proportionality of a decision under Article 35.<sup>100</sup> Arden LJ added that limiting the application of Article 35 to grounds of public security and public health would amount to a substantive restriction of Article 35, contrary to the procedural safeguards mentioned in the same Article.<sup>101</sup> Moreover, people whose rights were restricted under Articles 27 and 28 enjoy a higher level of protection in comparison to those who acquired a right of residence through abuse of rights.<sup>102</sup>

The administrative court of Darmstadt had to decide the case of a person who had obtained a right of residence in Germany on the basis of a UK passport that was not issued to him. It was highly probable that he was a Pakistani national who had obtained his right of residence by fraud. As a consequence, the German authorities found the German law implementing the Directive inapplicable and ordered the deportation of the person. The administrative court of Darmstadt held that, in making their decisions, the authorities

<sup>97</sup> Directive, art 24(1).

<sup>98</sup> Directive, art 24(2).

<sup>99</sup> See Sorensen (n 19) 434.

<sup>100</sup> *TC (Kenya)* (n 77) para 18.

<sup>101</sup> *ibid* 41.

<sup>102</sup> *ibid* para 42.

failed to exercise their margin of appreciation provided by law. It was established that the observance of the proportionality requirement must be ensured and the person concerned could not be deprived of the procedural safeguards set out in Article 35 during the examination of his case.<sup>103</sup> An allegedly fraudulent act, even if it related to the means by which he obtained his right of residence, cannot lead to the loss of procedural safeguards. By the time the status of that person had been clarified, the German law implementing the Directive was held to be applicable to him. The court pointed out that this approach must be applied not only in cases of fraud, but also to the finding of a marriage of convenience (and presumably to any other form of abuse of rights) or the establishment of an individual's nationality. Until the legal status of the person concerned is clarified, the domestic rules implementing the Directive must be applied in favour of that person, including the rights laid down by the Directive.

The CJEU has so far not dealt with the application of the proportionality requirement and the procedural safeguards mentioned in Article 35. Both decisions discussed the content of the proportionality requirement under Article 35. The *TC (Kenya)* decision made it clear that Article 35 and Articles 27 and 28 must be treated separately. In *TC (Kenya)*, the national court would clearly have had an opportunity to request a preliminary ruling, but it failed to do this. The same tendency will be revealed in relation to the issue of burden of proof in the next Subsection.

### **Burden of proof**

As demonstrated above, findings of abuse of rights are primarily based on the facts of the case. Therefore, who bears the burden of proof and what is to be proven are of paramount significance. The Directive does not contain any provision on proving abuses of rights. The CJEU did not have to examine questions of burden of proof and evidence in detail in its judgments related to the application of Article 35. The CJEU held that the establishment of abuse must be based on objective evidence.<sup>104</sup> As indicated above, the CJEU also stated that the proof of an abuse requires the combination of objective and subjective circumstances as set out in *Emsland-Stärke*.<sup>105</sup> Regarding preliminary references, the CJEU stated that 'it is for the national court to establish the existence of those two elements.'<sup>106</sup> The proof takes place in accordance with national rules, but the effectiveness of EU law must be observed.<sup>107</sup> However, immigration cases are mostly initiated before the national immigration authorities, and not before the courts of the Member States. The CJEU did not provide guidelines for such cases concerning the abuse of rights provision of the Directive, but the CJEU's statements apply equally to them.

In relation to marriages of convenience, the Commission's communication on guidance for better transposition and application of the Directive states that the burden of proof lies on the authorities of the Member States intending to restrict the rights of EU citizens and their family members under the Directive.<sup>108</sup> The Commission's communication, 'Helping national authorities fight abuses of the right to free movement', adds that, in principle, spouses cannot be obliged to submit evidence that their marriage is not abusive; however, if there is well-founded suspicion relating to the genuineness of the marriage then national authorities may ask the couple to produce evidence to the contrary.<sup>109</sup>

The High Court of Ireland confirmed that the mere suspicion of a marriage of convenience (based on the short duration of the marriage and the information furnished by the former wife) without the further investigation of the veracity of this suspicion by national authorities does not suffice to establish abuse of rights under the Irish provision implementing Article 35 of the Directive.<sup>110</sup>

<sup>103</sup> VG Darmstadt, Urteil vom 03.03.2011 – 5 K 9/10. DA.

<sup>104</sup> Sorensen (n 19) 454. Regarding the free movement of persons: Case C-206/94 *Brennet AG v Vittorio Paletta* [1996] ECR I-2357 para 25.

<sup>105</sup> *Emsland-Stärke* (n 15) paras 52–53. See also *McCarthy* (n 14) para 54; *Hungary v Slovak Republic* (n 49), para 58; *O. and B.* (n 43) para 58.

<sup>106</sup> *Emsland-Stärke* (n 15) para 54.

<sup>107</sup> *id.*

<sup>108</sup> Commission, Communication from the Commission to the European Parliament and the Council of 2 July 2009 on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States 17.

<sup>109</sup> Commission, Communication from the Commission to the European Parliament and the Council – Helping national authorities fight abuses of the right to free movement: Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens 6.

<sup>110</sup> *Khalid Lahyani v The Minister for Justice and Equality, Ireland and the Attorney General* [2013] IEHC 176 (High Court of Ireland) para 78. The Irish rule implementing Article 35 of the Directive is reg 24 of European Communities (Free Movement of Persons) (No. 2) Regulations 2006, S.I. N° 656 of 2006.

In *IS (marriages of convenience) Serbia*, a person from Kosovo arrived and resided in the UK illegally after his claim for asylum was refused.<sup>111</sup> He nevertheless stayed in the UK, where he married a Lithuanian national. After the celebration of the marriage, he requested an EEA family permit, but this was rejected. The UK Asylum and Immigration Tribunal stated that the burden of proof that the marriage does not constitute a marriage of convenience rests on the applicant in any case where suspicion arises that the marriage is one of convenience. To reach this conclusion, the Tribunal interpreted Article 35 of the Directive together with a Council Resolution which stated that if there is such suspicion then Member States shall issue a residence permit to a third country national only if they have established that the marriage is not one of convenience.<sup>112</sup> From this, the Tribunal inferred that no residence permit may be issued until suspicions have been resolved in the applicant's favour, placing the burden of proof on him or her. The UK Asylum and Immigration Tribunal found that informal photographs of the couple together and the trips of the Union citizen to Kosovo were not sufficient in themselves for the applicant to discharge his burden of proof, thereby confirming the view that the marriage was one of convenience.

This approach was reconsidered in the *Papajorgji* case, where the Albanian national wife of a Greek husband was denied entry to the UK for a short visit, because suspicions arose that the marriage was one of convenience, although the couple lived together for 14 years and they had two children.<sup>113</sup> Here, the entry clearance officer took as a point of departure that the burden of proof is on the applicant to establish that the marriage is not one of convenience. The Tribunal refined the approach followed in *IS (marriages of convenience) Serbia* and ordered a family permit to be issued. It stated that there is no burden on the applicant to establish that the marriage is not one of convenience, unless there are reasonable grounds for suspecting that it is one. However, the decision-maker must prove these reasonable grounds exist. As such, a general policy to require proof of the genuine nature of a marriage contradicts this. Similarly, the suspicion cannot be based on the fact that the applicant did not submit photographs, which was not even requested in the application form. The Tribunal finally attached an extract from the Commission's communication on guidance for better transposition and application of the Directive regarding abuse and fraud to its decision as an appendix. In *Miah*, the application for a right of residence of a Bangladeshi national was rejected on the grounds that this person entered into a marriage of convenience with an EEA national in order to acquire the right of residence in the UK. The UK Upper Tribunal made it clear that 'the suspicions ... must be fully ventilated' and the person affected by the investigation must be alerted to the essential elements of the case against him or her.<sup>114</sup> The underlying evidence must be disclosed to the subject of the proceedings, together with all information and explanation necessary to ensure his or her right to defence.<sup>115</sup>

The issue of the burden of proof demonstrates again the tendency of not referring abuse of rights cases to the CJEU. However, the risks of such an attitude became obvious here. In *IS (marriages of convenience) Serbia*, the UK Asylum and Immigration Tribunal decided the case without requesting guidance from the CJEU as to the burden of proof. The decision delivered by the court was not consistent with EU law, which led to the reconsideration of the decision in *Papajorgji*. These instances raise the question of which factors influence the national courts' attitude in deciding whether to refer a case to the CJEU. The next Section is devoted to the relation between the national courts and the CJEU in a broader context. This analysis may also help to better understand the relation between them regarding the issue of abuse of rights.

## V. Abuse of rights – A Dialogue between the CJEU and national courts?

Based on the previous Section, it is clear that the courts of the Member States do apply their rules implementing Article 35. Although the cases before the national courts sometimes raise questions not addressed so far by the CJEU, national courts only rarely have recourse to the preliminary reference procedure regarding abuse of rights. It is therefore worth examining briefly how this attitude of the national courts corresponds to understandings about the preliminary ruling procedure.

If a national court faces a question that requires the interpretation of Article 35 of the Directive, it may request the CJEU to give a preliminary ruling under Article 267 of the TFEU. However, the number of preliminary references in this field is scant. This is surprising in light of the increasing number of preliminary references generally<sup>116</sup> and growth in international mobility. The legal literature mostly explains the reasons

<sup>111</sup> *IS (marriages of convenience) Serbia* [2008] UKAIT 31.

<sup>112</sup> Referred to as Council Resolution 12337/97. Council Resolution of 4 December 1997 on measures to be adopted on the combating of marriages of convenience [1997] OJ C 382/1.

<sup>113</sup> *Papajorgji (EEA spouse – marriage of convenience) Greece* [2012] UKUT 38 (IAC).

<sup>114</sup> *Miah (interviewer's comments: disclosure: fairness)* [2014] UKUT 515 (IAC) para 13.

<sup>115</sup> *id.*

<sup>116</sup> Court of Justice of the European Union, *Annual report 2016 – Judicial Activity* (European Union 2017) 105–106.

for the cooperation between national courts and the CJEU in the framework of the preliminary ruling procedure.<sup>117</sup> The reasons for the lack of references on a particular issue, however, are more obscure.

Why do national courts not request a preliminary ruling from the CJEU regarding the application of Article 35 more often? There may be numerous reasons why they are reticent to do so. First, the courts of the Member States usually decide on abuse of rights cases as a result of appeals against administrative decisions rendered by national authorities. If no abuse is found by the national authorities or no decision is made, the person concerned does not have to have recourse to a court. If the case does not reach the courts of the Member States, the necessity of a preliminary ruling does not come into question. Second, national courts are obliged to request a preliminary ruling only if they are judicial fora against whose decisions no judicial remedy is available under national law or when the validity of an act of an institution, body, office or agency of the Union is in doubt. Third, in the allocation of tasks between the CJEU and national courts in the framework of the preliminary reference procedure, the ultimate decision rests with the referring national courts. In the judgments analysed in Section 3, the CJEU gave only very general guidance as to the application of Article 35. National courts have to decide ultimately whether abuse of rights may be established or not. Finding an instance of abuse of rights requires an assessment of the facts, which is the task of national courts. Consequently, even if there is a preliminary reference, the case comes back to the national court, which then has to make the final decision on the basis of the facts. Thus, national courts may save time and resources if they do not refer these cases to the CJEU. Fourth, a national judge can deem himself competent to decide the case in *acte claire* and *acte éclairé* situations.<sup>118</sup> The improving experience and skill of national judges in EU law may contribute to the increase in the number of cases relating to the application of the Directive where they decide not to refer a case.<sup>119</sup> This may happen where the correct application of EU law seems to be so obvious to them that they can apply EU law without a preliminary ruling reference<sup>120</sup> or when they recognise that the CJEU has already settled the issue.<sup>121</sup> Finally, national courts do not refer cases to the CJEU in a field because they wish to promote certain substantive policy objectives.<sup>122</sup> Regarding abuse of rights under the Directive, the courts of the Member States are reticent to refer cases to the CJEU, perhaps in order to ensure that they have more room to manoeuvre in shaping migration policy. The apparent reluctance of the CJEU to establish abuse of rights under Article 35 may be an important factor that leads national courts not to refer cases.

Whatever the reason may be, the application and interpretation of Article 35 has been shifted from the CJEU to the courts of the Member States. National courts decide many questions not previously answered by the CJEU in an innovative way. The peculiarity of the national judicial practice analysed above is that although national courts tend to decide abuse of rights cases themselves without a preliminary reference, this does not imply that they are directly at odds with the CJEU. National courts are even ready to reconsider previous decisions which were potentially incompatible with EU law, as the *Papajorgji* decision proves. In this field, it seems that the courts of the Member States do not seek to defy the CJEU; instead, the relationship between the CJEU and national courts on abuse of rights issues is characterised by a limited judicial dialogue.

## VI. Conclusion

The Directive grants the right of free movement and residence to Union citizens and their third country national family members in the territories of the Member States of the EU. The limits of these rights are explicitly determined by the Directive and are construed narrowly by the CJEU. Abuse of rights is one of the potential grounds that enable Member States to restrict free movement and residence under Article 35 of the Directive.

<sup>117</sup> The conduct of national courts in the judicial system of the EU is described along several theories, see Karen Alter, 'Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration' In: Slaughter, A, Sweet, A, Weiler, J (eds), *The European Court and National Courts—Doctrine and Jurisprudence* (Hart 1998) 229–246; Anthony Arnall, *The European Union and its Court of Justice* (OUP 2006) 98–100; Anthony Arnall, 'Judicial Dialogue in the European Union' In: Dickson, J, and Eleftheriadis, P, (eds), *Philosophical Foundations of European Union Law* (OUP 2012) 109–133.

<sup>118</sup> See Marlene Wind, 'The Nordics, the EU and the Reluctance Towards Supranational Judicial Review' (2010) 48 *Journal of Common Market Studies* 1039, 1055–1056.

<sup>119</sup> Arnall, *Judicial Dialogue in the European Union* (n 117) 131.

<sup>120</sup> Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415 para 16.

<sup>121</sup> Joined cases 28–30/62 *Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v Netherlands Inland Revenue Administration*, English Special Edition 1963/31, 38.

<sup>122</sup> Walter Mattli and Anne-Marie Slaughter, 'The Role of National Courts in the Process of European Integration: Accounting for Judicial Preferences and Constraints' In: Slaughter, A, Sweet, A, Weiler, J (eds), *The European Court and National Courts—Doctrine and Jurisprudence* (Hart 1998) 262–263.

The CJEU has only had to address Article 35 in a few cases, and often only marginally. The above analysis, however, demonstrates that there are many abuse of rights cases decided by national courts independently, without requesting a preliminary ruling from the CJEU. This conclusion is obvious when comparing the number of decisions rendered by the CJEU and by national courts. National courts have recourse to Article 35 and the domestic law provisions implementing it more often than the CJEU. The courts of the Member States are sometimes characterised as ‘key interlocutors’ in the judicial dialogue with the CJEU.<sup>123</sup> However, national courts are not simply interlocutors in this field. As a matter of fact, national judicial practice has overtaken the CJEU and on many occasions applied Article 35 in an innovative way. In this way, national judicial practice enriches the development of EU law in this field. First, national courts have decided issues which were not addressed previously by the CJEU. These include the determination of specific abuse of rights cases and the application of the principle of proportionality and procedural safeguards as set out by the Directive, as well as evidence. Second, in spite of the CJEU’s consistent findings that there was no proof of abuse and the marginalisation of the role of the abuse of rights regarding the free movement of persons in the literature, there are cases in national judicial practice where instances of abuse have been established.

As a consequence, the substantive application of Article 35 is left to a large extent to the courts of the Member States, which have built up significant case law on abuse of rights. The solutions developed by the national courts will primarily be instructive for subsequent cases to be decided by the courts in the same Member State. However, in the future they might have a broader impact on the case law of other Member States or even on the jurisprudence of the CJEU.

## Competing Interests

The author has no competing interests to declare.

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<sup>123</sup> Karen J Alter, *Establishing the Supremacy of European Law* (OUP 2001) 34; Takis Tridimas, ‘The ECJ and the National Courts’ In: Arnulf, A, Chalmers, D, (eds), *The Oxford Handbook of European Union Law* (OUP 2015) 404.



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