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CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



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Obstacles to the right of free movement and residence for EU citizens and their families: Country report for Spain

Study for the LIBE and PETI Committees

DIRECTORATE GENERAL FOR INTERNAL POLICIES

**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS**

**CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS
PETITIONS**

**Obstacles to the right of free movement
and residence for EU citizens and their
families:
Country report for Spain**

STUDY

Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE and PETI Committees, analyses the current status of transposition of selected provisions of Directive 2004/38/EC in Spain and identifies the main persisting barriers to free movement for EU citizens and their family members in Spanish law and practice. The study also examines discriminatory restrictions to free movement, measures to counter abuse of rights and refusals of entry and residence rights, in addition to expulsions.

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LIST OF ABBREVIATIONS

CJEU Court of Justice of the European Union

EHIC European Health Insurance Card

NIE Número de Identificación de Extranjero (Foreigner Identity Number)

RD Royal Decree 240/2007

TCN Third Country National

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TABLE 1

Transposition overview

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EXECUTIVE SUMMARY

Spain **transposed Directive 2004/38/EC** one year and 11 months **after the expiry** of the transposition **period**, through a single measure, **Royal Decree 240/2007 (RD)**.

Transposition has not been without its issues, particularly following the economic crisis, which saw Spain **change** its **liberal transposition** of the Directive. It has inserted the wording of Article 7 (the right of residence for more than three months) verbatim into the RD. **Some provisions** of the **RD** were found to be **contrary to the Directive** and were consequently declared void by the Spanish Supreme Court, **enhancing the rights of EU citizens** and their third country national (TCN) **family members**.

Some **obstacles** to the right of free movement and residence **persist**, e.g. the obligation for Union citizens and their TCN family members to obtain a **Foreigner Identity Number (Número de Identificación de Extranjero or NIE)**, in addition to a registration certificate. This could be a breach of Article 25 of the Directive (general provisions concerning residence documents) since the NIE is a precondition for the exercise of rights (e.g. access to employment) and the completion of administrative formalities. There is no harmonisation of the requirements to obtain an NIE from the Spanish administration (e.g. in some cases, the applicant is required to have a job in order to get an NIE).

With regard to entry, the procedure by which a TCN family member obtains an **entry visa** is **not an accelerated procedure** and is **not free of charge**. As far as residence is concerned, the requirement to have **'sufficient resources'** is also **highly arbitrary**, with **excessive formalities**.

Although in 2008 every EU citizen had access to public healthcare regardless of their circumstances, this has now changed. Since 2012, **EU citizens and their family members** have *de facto* **not been entitled to public healthcare** if they are not workers, or unemployed workers receiving unemployment benefits (or members of their families), or do not hold a European Health Insurance Card (EHIC) (with the exception of children under 18, pregnant women or cases of emergency care). Although this is not in breach of EU law, it can be considered a backwards step in the rights of EU citizens.

There are no public statistics or data on cases of **discriminatory restrictions to free movement**. However, **certain cases** have been found to include some restrictions, *inter alia* regarding the **payment of traffic fines** for vehicles with **Romanian national plates**, or opportunities for EU citizens to participate in individual **national championships** where the aim is to select national champions.

Spain has established **measures** to counter abuse of the rights conferred by the Directive. In the past five or so years, a robust system has been established to combat the registration of **marriages of convenience**. Some measures have also been implemented to avoid **fraud** in **false declarations of parenthood** and **family reunification cases**, which could affect EU citizens in exercising their free movement and residence rights, i.e. there are delays in marriage registrations.

Finally, regarding the **refusal of entry or residence** and **expulsions** of EU citizens and their TCN family members, there is a possibility to refuse the right of entry or residence on grounds of **public policy, public security or public health**. In accordance with the

Directive, expulsion of EU citizens is also possible on these grounds, even if they have been legally resident in Spain for over 10 years, but only in extreme and rare circumstances.

1. OVERVIEW OF THE TRANSPOSITION OF DIRECTIVE 2004/38/EC AND RECENT DEVELOPMENTS

KEY FINDINGS

- Spain transposed Directive 2004/38/EC one year and 11 months after the expiry of the deadline for transposition, in a single measure: Royal Decree 240/2007 (RD).
- The 2008 Commission Report highlighted some issues with transposition of some of the Directive's provisions. In general, Spain had taken a liberal approach to transposing the Directive.
- In 2010, a Spanish Supreme Court judgment corrected some of these transposition issues and made some small changes.
- Mainly due to the economic crisis, since 2011 Spain has changed its more liberal transposition of the Directive in favour of including the literal wording of Article 7.
- Some provisions of the RD have been found to be contrary to the Directive and were declared void by the Spanish Supreme Court, enhancing the rights of the EU citizens and their families.
- Transposition can be considered 90% complete, with only minor issues related to its practical implementation.

1.1. Transposition context

1.1.1. Transposition overview as assessed by the European Parliament and the Commission in 2008

Spain was late in transposing the Directive and was one of the 19 Member States against which the Commission initiated infringement proceedings under Article 258 of the Treaty on the Functioning of the European Union (TFEU). According to the 2008 Commission Report¹, transposition issues in Spain related only to certain provisions of the Directive, with some Articles transposed more favourably, others ambiguously transposed and some incorrectly or incompletely transposed. One of the issues highlighted, among others, was the incorrect transposition of Article 3(2) (family members and partners entitled to free movement and residence rights). In addition, Spain did not correctly transpose Article 5(2) (right of entry) as it failed to include the visa exemption for family members holding a residence card issued by another Member State.

Spain is one of the Member States to transpose the Directive in a single measure: Royal Decree 240/2007 on the entry, free movement and residence in Spain of Union citizens and of citizens within the European Economic Area (RD)². The RD was adopted by the

¹European Commission, Report on the 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, COM(2008) 840 final..

² Royal Decree 240/2007 on the entry, free movement and residence in Spain of Union citizens and of citizens within the European Economic Area. (*Real Decreto 240/2007, de 16 de febrero, sobre entrada, libre circulación y residencia en España de ciudadanos de los Estados miembros de la Unión Europea y de otros Estados parte en el Acuerdo sobre el Espacio Económico Europeo*) Spanish Official Journal n. 51 of 28 February 2007.

Government (Council of Ministers) and entered into force on 2 April 2008. The Directive was thus transposed in Spain one year and 11 months after the transposition deadline.

In 2008, the RD was generally quite liberal, going beyond the Directive³ and reflecting the values underpinning the 1978 Spanish Constitution. Between 1937 and 1975 more than 1 million emigrants left Spain⁴. This is the context explaining the liberal attitude during the early stages of Spanish democracy when the entry of immigrants was accepted without specific requirements. Union citizens were free to reside in the country for an unlimited period, without any conditions on their registration as residents. EU citizens and their families were entitled to permanent residence once they had resided legally for a continuous period of three years (instead of the prescribed period of five years in the Directive).

The main obstacle in 2008 was procedural, with a catch-22 situation existing with respect to administrative formalities. Union citizens in Spain were required to obtain a Foreigner Identity Number (Número de Identificación de Extranjero or NIE), in addition to their registration certificate. Without an NIE, Union citizens were unable to work, open a bank account or register with the Spanish social security authorities. The number, however, could take up to six weeks to be issued. The requirement breaches Article 25 of Directive 2004/38 that forbids requiring residence documents as a precondition for the exercise of the right of residence. This issue is described further in Section 2.1.2 below.

1.1.2. What has changed since

Since 2008, some of the more liberal features of the RD have been restricted. In addition, some minor transposition problems were corrected through a judgment on 1 June 2010, where the Spanish Supreme Court partially annulled Royal Decree 240/2007⁵. A subsequent amendment brought the RD into line with the Directive and the case law of the Court of Justice of the European Union (CJEU)⁶.

(i) *New conditions that are detrimental to EU citizens*

In 2008, under the RD, European Union citizens could remain in Spain for an unlimited period without the need to provide evidence of sufficient resources or comprehensive sickness insurance covering their time in Spain. They were also not required to prove that they were students, employees, self-employed or jobseekers, or to have sufficient resources so as not to become a burden on the Spanish National Health Service.

³ Blázquez Peinado, M.D. 'Transposition into Spanish law of Community legislation on free movement and residence of Union citizens and their family members: Royal Decree 240/2007 of 16 February' (*La transposición en Derecho español de la normativa comunitaria sobre libre circulación y residencia de ciudadanos de la Unión y miembros de su familia: el Real Decreto 240/2007 de 16 de febrero*) [2007] Review of European Community Law 27, 595-622

⁴ [Encyclopedia.com website, available at: http://www.encyclopedia.com/topic/Spain.aspx](http://www.encyclopedia.com/topic/Spain.aspx).

⁵ Spanish Supreme Court Judgment of 1 June 2010, annulling several points of Royal Decree 240/2007, published in the Spanish official Journal n. 266, of 3 November 2010.

⁶ Royal Decree 1710/2011 dealt with the provisions annulled by the Spanish Supreme Court (*Real Decreto 1710/2011, de 18 de noviembre, por el que se modifica el Real Decreto 240/2007, de 16 de febrero, sobre entrada, libre circulación y residencia en España de ciudadanos de los Estados miembros de la Unión Europea y de otros Estados parte en el Acuerdo sobre el Espacio Económico Europeo*)..

However, as a result of the economic crisis, the RD was amended in 2012 by Royal Decree-Act 16/2012⁷, with the wording of Article 7 of the Directive (the right of residence for more than three months) inserted verbatim⁸. This amendment was justified by, among other reasons, the economic damage caused by the previous legislation, in particular the growing difficulties in guaranteeing reimbursement of health and social service costs incurred by EU citizens during their residence in Spain⁹. Moreover, the RD was amended¹⁰ in order to permit the national authorities to verify and control ongoing fulfilment of the conditions of residence set out in Article 7 of the Directive by EU citizens in certain circumstances. Finally, the amendment to the RD introduced a three-month deadline for the issuing of a residence permit for family members, in line with Article 10 of the Directive (issuing of residence cards).

(ii) New conditions that benefit EU citizens

Since 2008, some provisions of the RD have been found to be contrary to the Directive and declared void by the Spanish Supreme Court¹¹, thereby enhancing the rights of EU citizens and their family members.

- Under the first version of the RD, legal separation was considered equivalent to divorce or annulment of a marriage (Article 2(a) of the RD). In line with the CJEU, the Supreme Court stated that a separation is different from a divorce or annulment as, unlike the other two, it does not entail the legal dissolution of a marriage. Separation cannot, therefore, entail a restriction of the free movement rights of the spouse according to the RD.
- The Supreme Court also annulled the restriction of the right to work for relatives of EU citizens over the age of 21 who are dependent on a Union citizen (Article 3(2) of the RD).
- The Supreme Court annulled the provision of the RD stating that, in order to recognise registered partnerships from other EU Member States, those states must have had a system rendering it impossible to have two registered partnerships at the same time in that EU Member State.
- The Supreme Court annulled the provision of the RD stating that a residence permit for the Schengen Area was required in order to exercise entry and exit rights for family members.

⁷ Royal Decree-Act 16/2012 on urgent measures to guarantee the National Health System and improve the quality and safety of its services. (*Real Decreto-ley 16/2012, de 20 de abril, de medidas urgentes para garantizar la sostenibilidad del Sistema Nacional de Salud y mejorar la calidad y seguridad de las prestaciones*) Spanish Official Journal n. 98, of 24 April 2012.

⁸ Calvo Cádiz, E., 'Free movement and residence of citizens of the Union: Ten years after Directive 2004/38 and seven after Royal Decree 240/2007' [2014] Journal of the Ministry of Employment and Social Security, (*Libre circulación y residencia de los ciudadanos de la Unión: diez años después de la Directiva 2004/38 y siete después del Real Decreto 240/2007*) [2014] *Revista del Ministerio de Empleo y Seguridad Social*, 223-255, p. 246.

⁹ Royal Decree 1192/2012 added Article 9 Bis to the RD, and Article 9(5) was included by Royal Decree 1710/2011 (*Real Decreto 1710/2011, de 18 de noviembre, por el que se modifica el Real Decreto 240/2007, de 16 de febrero, sobre entrada, libre circulación y residencia en España de ciudadanos de los Estados miembros de la Unión Europea y de otros Estados parte en el Acuerdo sobre el Espacio Económico Europeo*) Spanish Official Journal n. 285 of 26 November 2011.

¹⁰ Royal Decree 1192/2012, 3 August, that regulates the status of insured persons and beneficiaries of healthcare in Spain, through the National Healthcare System (*Real Decreto 1192/2012, de 3 de agosto, por el que se regula la condición de asegurado y de beneficiario a efectos de la asistencia sanitaria en España, con cargo a fondos públicos, a través del Sistema Nacional de Salud.*) Spanish Official Journal n. 186 of 4 August 2012

¹¹ Spanish Supreme Court Judgment of June 1 2010, annulling several points of Royal Decree 240/2007.

Finally, the obligation for the family members of a Union citizen to apply for a residence permit in the case of the death of the EU citizen was declared null and void. The Supreme Court considered this formality contrary to the right to remain resident after the death of the EU citizen provided by Article 12 of the Directive.

1.2. Current transposition status

1.2.1. Overall assessment of the current transposition status in Spain

Since 2008, the transposition has been improved and may be considered, in the authors' opinion, to be **90% complete**, with some inconsistencies and elements of incorrect transposition persisting. There have been no changes to the transposition of Articles 24, 27 and 35 of the Directive. The transposition of **Article 24** (equal treatment) is almost literal in the national legislation, except for its reference to 'on the basis of the RD' instead of 'on the basis of the Directive'. This could have created problems where the RD has not fully or correctly transposed the Directive with regard to its *ratione personae* scope. In addition, certain requirements of the Directive are not reflected in the RD but in other legislation (i.e. abuse of rights), which results in a different scope. Therefore, it cannot be considered transposed correctly.

The transposition of **Article 27** (general principles) is still incomplete. Firstly, the transposing legislation **does not mention the principle of proportionality** required by Article 27(2) of the Directive when taking decisions to restrict the freedom of movement or residence of EU citizens and their families on grounds of public policy, public security or public health. Secondly, paragraph (4) of Article 27 of the Directive is not mentioned in the transposing legislation, meaning that, in theory, the requirement to allow the holder of a document issued by Spain to re-enter the territory without any formality even if the document is no longer valid may not be applied. This remains a theoretical problem, with no cases identified in which this lack of transposition has been a problem in practice for EU citizens.

Article 35 of the Directive requiring measures to be adopted in case of abuse of rights or fraud is not mentioned in the transposing legislation. As described in Section 4 below, this lack of explicit transposition in the RD has not created specific problems, as the general mechanisms in Spanish legislation for the prevention of fraud and abuse of rights apply and can be considered to be in line with the Directive.

1.2.2. Additional conditions in law or practice for family members (especially third country national family members) to exercise their free movement rights

With regard to **Article 3 (2)** of the Directive (beneficiaries entitled to free movement and residence rights)¹², the necessary documents required to attest the existence of a durable relationship were loosely regulated in 2008. The RD was recently amended¹³, and the individual circumstances of durable relationships must now be extensively examined by the Administration. In particular, one year of cohabitation or the existence of common

¹² Article 2 bis of the RD transposes Article 3(2) of the Directive.

¹³ Royal Decree 987/2015, (*Real Decreto 987/2015, de 30 de octubre, por el que se modifica el Real Decreto 240/2007, de 16 de febrero, sobre entrada, libre circulación y residencia en España de ciudadanos de los Estados miembros de la Unión Europea y de otros Estados parte en el Acuerdo sobre el Espacio Económico Europeo*) Spanish Official Journal n.269, 9 November 2015, which entered into force on 9 December 2015.

descendants (provided that there is a stable cohabitation) is considered sufficient evidence to prove a durable relationship. Although these requirements are not in breach of the Directive, **clearer rules are needed** on the possible means of proof of the existence of a durable relationship.

For other family members within the scope of Article 3(2) of the Directive, it is necessary to prove 24 months of continuous cohabitation in the country of origin from the moment of their arrival. This could be considered to **restrict the notion of family member**. However, this is in line with the Directive since Article 3(2) allows for Member States to prescribe a minimum amount of time as long as personal circumstances are taken into account and any denial of entry or residence is fully justified¹⁴.

No other information was found on additional conditions in law or practice for family members in the exercise of their free movement rights.

1.2.3. Spain's approach towards the partners of EU citizens

As mentioned in Section 1.1.2 above, with respect to the consideration of registered partners as family members defined in Article 2(2) of the Directive, the RD imposed an additional condition on registered partners in 2008, whereby the State in which they had been registered must have had a system in place to prevent two simultaneous registrations. In 2010 the Spanish Supreme Court found this condition inconsistent¹⁵ and annulled it¹⁶. The Spanish Supreme Court recognised the validity of regional registrations for *de facto* couples and, today, **de facto couples are equivalent to spouses** in the national legislation and are thus subject to the same conditions.

1.2.4. Requirements for obtaining the right of residence beyond those contained in Articles 7(1) and 7(2) of the Directive

As described in Section 1.1.2, with regard to **Article 7 of the Directive** (right of residence for more than three months) the **liberal regime in Spain was replaced** by the full application of Article 7 of the Directive. Under Royal Decree-Act 16/2012 that amended Royal Decree 240/2007, EU citizens must have a work contract, be self-employed, or have sufficient resources 'so as not to become a burden on the Spanish National Health Service' in order to acquire the right of residence for more than three months. This is in line with the Directive. EU/EEA/Swiss citizens are also required to register in the Central Register of Foreigners. No other requirements for obtaining the right of residence beyond those contained in Articles 7(1) and 7(2) of the Directive were identified.

¹⁴ European Commission, Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC, COM(2009) 313 final, p.4.

¹⁵ As Sara Iglesias advanced in 2007, the former provisions on registered partnerships in the Royal Decree were inconsistent inasmuch as they conferred favourable treatment to *de facto* partnerships but did not recognise any legal effect to the partnerships registered in the Spanish territory. Iglesias Sánchez, S., 'Two issues raised by the Spanish transposition of Directive 2004/38 / EC through the RD 240/2007: the regime applicable to relatives in the ascending line of Spanish nationals and the extension of the concept of family members of citizens of the Union to registered partners' (*Dos cuestiones suscitadas por la transposición española de la Directiva 2004/38/CE a través del RD 240/2007: el régimen aplicable a los ascendientes de españoles y la extensión a las parejas registradas del concepto de miembros de la familia de los ciudadanos de la Unión*) [2007] European Community law Journal 28, 913-939, p. 936.

¹⁶ Fourth legal ground in the Spanish Supreme Court Judgment of June 1 2010, annulling several points of Royal Decree 240/2007

1.2.5. Conditions attached to the right of permanent residence beyond Article 16 of the Directive

With respect to **Article 16** of the Directive¹⁷, Spain remains **more favourable** system than the Directive: residence for a continuous period of three years in the host Member State is sufficient to acquire the right of permanent residence, while the period of absence necessary to lose this right has been increased to two years. Despite the text of the law, some applicants for **permanent residence** after five years of residence have been requested to **prove that they have sufficient resources** or that they are developing an economic activity. This may be contrary to Article 16 of the Directive, which states permanent residence status requires only proof of legal residence for a continuous period of five years. No other additional conditions on the right of permanent residence beyond those of Article 16 of the Directive were identified.

1.2.6. The notion of sufficient resources and unreasonable burden

The concept of **sufficient resources** has been interpreted broadly by implementing acts passed since 2008. Article 3 c) 2^a of the Order PRE/1490/2012¹⁸ (a non-legislative implementing act of the RD) clarifies the application of Article 7 of Royal Decree 240/2007, stating that sufficient resources can be demonstrated by 'any means of proof admissible in law', taking into account the personal circumstances of the person concerned. According to the legislation, the requirement of 'sufficient resources' will be considered sufficiently satisfied if the amount of resources of the EU citizen is higher than the threshold at which nationals become eligible for social assistance, taking into account all of the personal and family circumstances¹⁹.

Spanish law mirrors the wording of Article 14 of the Directive concerning retention of the right of residence²⁰. In accordance with Article 14 of the Directive, Union citizens and their family members shall have the right of residence in Spain, as long as they do not become an unreasonable burden on the Spanish social assistance system.

¹⁷ Transposed in Article 10 of the RD.

¹⁸ Order PRE/1490/2012 establishing rules for the application of Article 7 of Royal Decree 240/2007 (*Orden PRE/1490/2012, de 9 de julio, por la que se dictan normas para la aplicación del artículo 7 del Real Decreto 240/2007*) Spanish Official Journal n. 164, of 10 July 2012.

¹⁹ Article 3 c) 2^a of Order PRE/1490/2012.

²⁰ By means of a new Article 9 bis of the RD. Article 9 bis of the RD is a literal translation into Spanish of Article 14 of the Directive.

2. IMPLEMENTATION OF THE DIRECTIVE: DESCRIPTION OF THE MAIN PERSISTING BARRIERS

KEY FINDINGS

- The obligation in Spain for Union citizens and their family members to obtain a Foreigner Identity Number (NIE), in addition to a registration certificate remains an obstacle. EU citizens are unable to work, open a bank account or register with the Spanish social security authorities without having obtained an NIE, which can take up to six weeks. This is contrary to Article 25 of the Directive.
- The condition of 'sufficient resources' has been implemented in a highly arbitrary way and requires excessive formalities.
- In 2008, EU citizens had free access to the public healthcare system in Spain. Since 2012, EU citizens and their families are de facto excluded from accessing the public healthcare system (with the exception of children under 18, pregnant women or cases of urgent care) if they are not workers or unemployed workers receiving unemployment benefits (or members of their families) or if they do not hold a European Health Insurance Card (EHIC). This is not contrary to EU law.
- The EHIC is systematically refused for Spanish unemployed workers, and their family members, in receipt of unemployment benefits. Workers with temporary jobs who apply for an EHIC in order to visit other EU Member States, also see their applications refused. Going abroad for any reason or for any duration interrupts registration as an unemployed person, incurring the loss of social assistance and having a disproportionate impact on jobseekers registered in Spain.
- The procedure designed for the non-EU family member to obtain an entry visa is not accelerated nor is it free of charge.
- There are delays and considerable administrative obstacles in the recognition of marriages. While some of these barriers were removed in 2010 by the Spanish Supreme Court, others remain.

2.1. Main barriers for EU citizens

2.1.1. Entry

No persistent and systematic practical obstacles to entry rights for EU citizens were identified through the analysis of the legislation, case law or literature (although some isolated cases may exist).

2.1.2. Residence

The main obstacle highlighted in 2008 - the obligation for Union citizens and family members in Spain to obtain, in addition to the registration certificate, a **Foreigner**

Identity Number (*Número de Identificación de Extranjero* or NIE) remains today²¹. Union citizens are unable to work, open a bank account or register with the Spanish social security authorities without having obtained an NIE, a process that may take up to six weeks.

Since an NIE is issued at the moment of registration as a resident (i.e. the NIE is included in the registration certificate), this requirement may run counter to the spirit of the Directive and its objective to eradicate the requirement of residence cards and, more particularly, to Article 25 of the Directive which provides that a registration certificate or residence permit for members of the family cannot be made a precondition for the exercise of a right or the completion of an administrative formality. A number of consequences stem from this requirement:

- (i) It is difficult to enforce the rights of the Directive during the first three months (e.g. students looking for summer work). Although, in theory, there are no administrative requirements during the first three months, an NIE is needed for many formalities in Spain immediately on arrival.
- (ii) It may undermine the effectiveness of Article 25 of the Directive. It is **not possible to get a job** without being registered in the social security system and having a social security number. However, an NIE (which is issued with a registration certificate) is required to obtain a social security number. This is further complicated by the fact that it is not possible to get an NIE without a job. This creates a **catch-22 situation** in which an individual can enter Spain but cannot get the registration card necessary to find a job or obtain medical assistance.
- (iii) It is not possible to undertake other **administrative formalities** without an NIE and individuals must, therefore, be registered. This may be in breach of Article 25 of the Directive, since the NIE effectively creates a precondition for the exercise of a right or the completion of an administrative formality.
- (iv) There is **no harmonisation** of the requirements to obtain an NIE or even the need to have a job in order to obtain one. Administrative practice varies according to the region and changes over time. For example, TRAIAN, an association responsible for providing support and information to Romanians on the administrative procedures in Seville, stated in a report published in 2015 that the requirements for getting an NIE include a minimum income of EUR 5,008 per year, together with a one-year, full-time employment contract. Once the worker has a contract, a provisional NIE is granted, which will only be definitive once the person is registered in the social security system and the contract is fully processed²².

As described in Sections 1.1.2 and 1.2.3 above, the previous **liberal regime in Spain** ended when the Royal Decree-Act 16/2012²³ inserted the verbatim wording of Article 7 of

²¹ According to Article 206 of Regulation 557/2011 implementing the Organic Law 4/2000 on aliens' rights and freedoms in Spain (*Real Decreto 557/2011, de 20 de abril, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social, tras su reforma por Ley Orgánica 2/2009*), for certain administrative procedures any foreigner with economic, social or professional interests in Spain is required to have a personal and unique number for identification purposes. Applications for the NIE can be sent from within or outside Spain, documenting the reasons for the application.

²² Report of the Pro-Human Rights Association of Andalusia (*Informe de la Asociación Pro Derechos Humanos de Andalucía: 'Acceso de la comunidad roma a los derechos sociales en Córdoba'*), 2015, available at: <http://www.apdha.org/media/informe-roma-cordoba-2015-def.pdf>, pp. 30-41.

²³ Royal Decree-Law 16/2012 on urgent measures to guarantee the National Health System and improving the quality and safety of its services (*Real Decreto-ley 16/2012, de 20 de abril, de medidas urgentes para garantizar*

the Directive into the Spanish transposition act. Since 2012, EU citizens have had to be students, employees, self-employed, job seekers or to have sufficient resources so as not to become a burden for the Spanish National Health Service in order to reside in Spain for more than three months. Although this is not a barrier — as it complies with Directive 2004/38 — it represents a backwards step for EU citizens and their families in Spain.

The notion of **sufficient resources** has been **interpreted in an arbitrary manner** in practice. In recent years, the reports of the Spanish Ombudsman²⁴ have referred to several complaints from EU citizens against the requirement for fixed and regular economic resources²⁵. No information on the level of resources needed to register as residents is available to EU citizens beforehand, as the amount that is considered sufficient may vary from one case to another.

2.1.3. Access to social security and healthcare

In 2008, the Spanish social security system operated on the basis of the so-called universal service principle, which gave every Spanish citizen access to the social security system of healthcare. This principle also applied to EU citizens.

Since April 2012, the conditions of access to the social security and healthcare system have been **stricter for EU citizens**. In 2012, Royal Decree-Act 16/2012 entered into force to protect the sustainability of the National Health System and improve the quality of services. This act modified the RD to transpose Article 7 of Directive 2004/38. EU citizens must now have comprehensive sickness insurance in the cases provided for by the Directive. **European citizens staying less than three months** who need healthcare and who **do not hold an EHIC are not entitled to obtain free public healthcare** and are required to pay their own costs²⁶. In 2008, EU citizens had free access to the public healthcare system from the first date of their residence or for stays of less than three months. Although this is not in breach of EU law (under which it is not compulsory to grant access to healthcare to EU citizens that do not fall within the scope of Regulation 883/2004), this can be considered a retraction of a previously more favourable position for EU citizens. Today, EU citizens are only entitled to emergency care if they are covered by Regulation 883/2004 on the coordination of social security systems. It is worth noting that EU citizens and TCNs who are not insured in the social security scheme of another Member State are entitled to free emergency care.

Contrary to the rules in 2008, EU citizens —and their families— who have not been registered as residents are no longer entitled to access the public healthcare system if they are not workers or unemployed workers receiving unemployment benefits (or members of their families) or when they do not hold an EHIC. The only exception are children under 18, pregnant women or cases of emergency care²⁷. Thus, if an EU citizen or a family member

la sostenibilidad del Sistema Nacional de Salud y mejorar la calidad y seguridad de las prestaciones), Spanish Official Journal n. 98 of 24 April 2012.

²⁴ Spanish Ombudsman, Annual Report 2013, (*Informe Anual 2013*) pp. 209-210.

²⁵ Reports of Citizens without Borders, 'Free Movement and Residence in the European Union, a Challenge for European Citizenship', 2013.

²⁶ Royal Decree-Act 16/2012 on urgent measures to guarantee the National Health System and improve the quality and safety of its services (*Real Decreto-ley 16/2012, de 20 de abril, de medidas urgentes para garantizar la sostenibilidad del Sistema Nacional de Salud y mejorar la calidad y seguridad de las prestaciones*), Spanish Official Journal n. 98 of 24 April 2012.

²⁷ Citizens without Borders, 'Free Movement and Residence in the European Union: a Challenge for European Citizenship', 2013.

receives non-emergency medical care without being registered, they must bear the costs in full. Although this is not in breach of EU law, it is a less favourable change for EU citizens.

EU citizens already resident in Spain in 2008 retain their right of access to the social security healthcare system under the principle of universal access as long as they are: employed, registered as a pensioner, in receipt of periodic benefits from the social security system (including unemployment benefits), people having exhausted their entitlement to unemployment benefit (unless they have an annual income above EUR 100,000 per year) and not covered by other means, recognised as beneficiaries of other insured persons (spouses, *de facto* couples, children under 26 years of age or with a disability, siblings or dependent children)²⁸. If they do not meet these requirements, they will have access to emergency health care only.

2.1.4. Others

In Spain, recent austerity measures have resulted in amendments to the 2006 Royal Decree on active insertion income, with the result that **going abroad** for any reason or for any duration constitutes an **interruption to registration as an unemployed person, with the consequent loss of social assistance measures**. This may be incompatible with Regulation 883/2004. The Report on the Free Movement of Workers in Europe 2012-2013²⁹ questions whether it might also restrict the free movement of workers. Indeed, this may have a disproportionate impact on jobseekers registered in Spain, as attending a job interview in another Member State might be considered sufficient to cancel their registration as a jobseeker or their access to social assistance³⁰.

2.2. Main barriers for family members of EU citizens

2.2.1. Entry

Difficulties in obtaining an entry visa have been reported for the non-EU family members of EU citizens in Spain³¹. These obstacles are encountered in visa applications (e.g. additional documentation required³², lack of information on the type of visa needed and documents required³³) and, in particular, difficulties for non-EU family members of EU citizens in obtaining a visa (e.g. visa denied and right to accelerated procedure refused)³⁴.

There are two procedures for third country national family members of an EU citizen to obtain a visa: a simplified procedure and an accelerated one. It has been reported that Article 5(2) of Directive 2004/38 regarding the right of entry and the **accelerated procedure** is frequently **ignored** by Spanish consulates and/or embassies³⁵. The rule that this procedure should be **free of charge** is also **frequently ignored**. Additionally, the information about the **visa exemption** is not readily given, nor is the visa exemption

²⁸ Ibid.

²⁹ Groenendijk, K., Guild, E., Cholewinski, R., Oosterom-Staples, H., Minderhoud, P., Mantu, S., Fridriksdottir, B., 'European Report on the Free Movement of Workers in Europe in 2012-2013', February 2014.

³⁰ Ibid.

³¹ Your Europe Advice, 2015, Quarterly Feedback Report.

³² Petition No 0259/2012 to the European Parliament.

³³ Your Europe Advice, Quarterly Feedback Report, April-June 2014, p. 8.

³⁴ Petition Nos 1635/2012 and 0259/2012 to the European Parliament; Your Europe Advice, Quarterly Feedback Report, July-September 2014, p. 8, Your Europe Advice, Quarterly Feedback Report, January-March 2014, p. 12.

always applied³⁶. In many cases the visa is denied without a transparent procedure, as the decision is made at the discretion of the individual civil servant in charge of each case³⁷.

2.2.2. Residence

The main barrier to residence relates to the **recognition of civil status** and, more particularly, the **recognition of marriage certificates**.

Marriage certificates from third countries must be 'legalised' either in Spain or in another EU Member State in order to grant residence permits to members of the family. This procedure can be **cumbersome and slow**.

- Legalisation is required even if the marriage has been duly legalised and certified internationally under the Hague Apostille Convention³⁸.
- Even when the marriage was celebrated in another EU country, there may be unjustified requests for certified translations of the marriage certificate.
- There are a number of reported complaints against the Central Civil Register for delays of more than 18 months in the recognition of family ties³⁹.

The Spanish Ombudsman has pointed out for a number of years that this is a persistent problem affecting a large number of members of the families of EU citizens⁴⁰.

Until family ties are recognised, the family members remain in a situation of legal uncertainty in which they are considered irregular and may be detained by the police. They cannot, however, be expelled from Spain as there are no procedures in place for the expulsion of persons benefiting from free movement, except for reasons of public policy, public security or public health.

As the residence permit requires proof that the person has sufficient resources so as not to become a burden on the social assistance system⁴¹, there are some cases, for example regarding ascendants of EU citizens' family members, where the residence card is denied because they were unable to obtain public or private sickness insurance cover. The Spanish Ombudsman initiated proceedings to study the reasons for these denials. In its response the General Secretariat for Immigration and Emigration affirmed that neither the CJEU nor the Spanish Supreme Court have considered the right of EU citizens to be joined by their ascendants to be absolute, therefore it may be subject to some conditions⁴².

In order to issue the permanent residence card for family members of EU citizens, or to enforce the rights provided in Articles 13 and 14 of the Directive, the national ID card or

³⁵ *Inter alia*, Your Europe Advice, Quarterly Feedback Report, April-June 2012, July-September 2013, January-March 2014.

³⁶ Your Europe Advice, Quarterly Feedback Report, April-June 2012, April-June 2013, July-September 2012, October-December 2013 and others in 2014 and 2015.

³⁷ Citizens without Borders, 'Free Movement and Residence in the European Union: a Challenge for European Citizenship', 2013.

³⁸ Your Europe Advice, Quarterly Feedback Report, January-March 2014.

³⁹ Citizens without Borders, 'Free Movement and Residence in the European Union: a Challenge for European Citizenship', 2013.

⁴⁰ Spanish Ombudsman, Annual Report 2010 (*Informe Anual 2010*), p. 435; Spanish Ombudsman, Annual Report 2012 (*Informe Anual 2012*), p. 165.

⁴¹ Petition No 0776/2012 to the European Parliament.

⁴² Spanish Ombudsman, Annual Report 2014 (*Informe annual 2014*), Madrid 2015, p. 230.

NIE of the EU citizen is required. In some cases of legal separation, it can be very difficult for the individual to provide the national ID of the separated spouse (especially if they are not on good terms) and the residence card for their family members is therefore denied. The Spanish Ombudsman examined such situations⁴³, and tried to facilitate a less restrictive interpretation of the condition. Given that the subsequent Annual Reports of the Spanish Ombudsman have not raised this issue, it could be assumed that a less restrictive approach has since been implemented.

The recognition of *de facto* couples has also resulted in breaches of EU law. In 2008, the RD required the Member State in which the partnership had been registered to have had legislation preventing two simultaneous registrations (including regional registrations within the State). As described in Sections 1.1.2 and 1.2.3 above, in 2010 the Spanish Supreme Court found this condition to be contrary to the Directive and declared it void⁴⁴. The court recognised the validity of the regional registrations for partnerships. Since 2010, *de facto* couples are equivalent to spouses under the national legislation and are, thus, subject to the same conditions.

The same court decision invalidated the obligation for the family members of a Union citizen to apply for a residence permit according to the Spanish Legal Regime for Foreigners in the case of death of the EU citizen. This obligation was also considered by the Supreme Court to be contrary to the Directive.

2.2.3. Access to social security and healthcare

There are no obstacles for family members other than those reported for EU citizens in accessing social security and healthcare. As indicated in Section 2.1.3 above, since 2012, EU citizens applying for a residence permit in Spain have been required to have **private health insurance** in order to demonstrate that they have sufficient financial resources not to become a burden on the Spanish social security system⁴⁵. EU citizens and their families, who are not workers or unemployed workers receiving unemployment benefits (or members of their families) or who do not hold an EHIC, are *de facto* excluded from accessing the public healthcare system (with the exception of children under 18, pregnant women or cases of urgent care)⁴⁶.

2.2.4. Others

No other obstacles were identified for family members of EU citizens in exercising their free movement and residence rights.

⁴³ Spanish Ombudsman, Annual Report 2013 (*Informe Anual 2013*), p. 212.

⁴⁴ 4th legal ground on the Spanish Supreme Court Judgment of 1 June 2010, annulling several points of Royal Decree 240/2007.

⁴⁵ Petition No 1663/2012 to the European Parliament.

⁴⁶ Citizens without Borders, 'Free Movement and Residence in the European Union: a Challenge for European Citizenship', 2013.

3. DISCRIMINATORY RESTRICTIONS TO FREE MOVEMENT

KEY FINDINGS

- There are no public statistics or data on cases of discrimination on the ground of nationality with respect to free movement. There are, however, some isolated cases.
- A judgment has established the right of EU citizens to participate in individual national championships whose aim is to select a national champion.
- After a Supreme Court judgment, the RD was subsequently amended to clarify that legal separation is not equivalent to divorce but that registered partnerships are considered equal to marriage.
- Same-sex marriages have the same status as heterosexual marriages under Spanish law.

3.1. Discrimination based on nationality

There are no public statistics or data on cases of discrimination on the ground of nationality in Spain with respect to free movement.

Nevertheless, a review of the case law and public sources shows that there are some isolated cases of discrimination of this type. For instance, in the Spanish administrative practice, drivers or road haulage companies could opt to pay fines via bank transfer, with the exception of drivers of trucks with Romanian number plates. In those cases, the Spanish police required the drivers to pay immediately and, in the majority of cases, in cash⁴⁷.

In 2014, a judgment of the Spanish National High Court (*Audiencia Nacional*) had important implications for EU citizens or their family members remaining in Spain to pursue a sports career. Although some Spanish laws made it possible to discriminate against EU citizens on the ground of nationality in **national championships**, the Spanish *Audiencia Nacional* decided to allow EU citizens legally resident in Spain to participate in individual national championships to select national champions (Judgment of 12 December 2014, appeal number 199/2013⁴⁸). In this case the Spanish Court has gone further than the European Commission in its paper on the free movement of amateur sportspeople.

3.2. Discrimination based on civil status/sexual orientation

There are no public statistics or data on cases of discrimination on the grounds of civil status or sexual orientation in Spain. As described in Section 1.1.2 above:

- In 2008, the RD considered legal separation to be equivalent to divorce for the purposes of the Directive. In 2010, the Spanish Supreme Court ruled that the RD

⁴⁷ Your Europe, Advice, Quarterly Feedback Report, January-March 2014.

⁴⁸ Judgment of the Spanish High Court (*Audiencia Nacional* acting as appeal Court) of 12 December 2014, appeal number 199/2013.

cannot consider legal separation as equivalent to divorce if it is to be consistent with the Directive (see Section 1.1.2 above).

- As outlined in Sections 1.1.2, 1.2.3 and 2.2.2 above, in 2008, the RD required registered partners to be registered in a Member State whose laws prohibited the possibility of two simultaneous registrations within that Member State. In 2010, the Spanish Supreme Court held this condition to be contrary to the Directive and annulled it⁴⁹. Now, registered partners have the same status as spouses in the national legislation and are subject to the same conditions.
- Same-sex marriages are equivalent to heterosexual marriages under Spanish law.

3.3. Discrimination based on ethnic/racial origin

There are no public statistics or data on cases of discrimination on the grounds of ethnic or racial origin in Spain. Although some case law mentions ethnic origin and nationality (i.e. Roma Romanian citizens)⁵⁰, discrimination on grounds of their nationality or ethnic origin did not form part of those judgements.

Some administrative requirements to prove residence are particularly difficult for **Roma Romanian citizens** to fulfil, which creates a situation of discrimination in practice. In Spain, there is an obligation to be registered on the list of inhabitants of the town where the person resides. While the national legislation accepts any address for registration⁵¹ (even a fictitious one is permitted if Social Services are aware that the citizen concerned is homeless), the process to register homeless people (a majority of Roma Romanians citizens are officially designated homeless) is not sufficiently guaranteed⁵². As a consequence, Roma citizens face serious difficulties in proving their continuous periods of residence in order to get permanent residence, putting them in a disadvantageous situation⁵³.

⁴⁹ 4th legal ground of the Spanish Supreme Court Judgment of 1 June 2010, annulling several points of Royal Decree 240/2007.

⁵⁰ Judgments of the High Regional Court of Castilla-León (Administrative section) of 30 July 2015 (appeal n. 164/2015) and of 11 September 2015 (appeal n. 172/2015).

⁵¹ Law 7/1985 of 2 April regulating the general rules on the local regime (*Ley 7/1985, de 2 de abril, Reguladora de las Bases del Régimen Local*), Spanish Official Journal n. 80, 3 April 1985.

⁵² 'Report of the Association for Human Rights of Andalucía "Access of Roma citizens to social rights in Córdoba"' (*Informe de la Asociación Pro Derechos Humanos de Andalucía: Acceso de la comunidad roma a los derechos sociales en Córdoba*), (2015) available at: <http://www.apdha.org/media/informe-roma-cordoba-2015-def.pdf>, pp. 30-41.

⁵³ Ibid.

4. MEASURES TO COUNTER ABUSE OF RIGHTS

KEY FINDINGS

- In the last five or six years, robust checks have been established to combat the registration of marriages of convenience.
- Some measures have also been implemented to avoid fraudulent paternity claims.
- There are also some procedures to combat fraud in family reunification.

4.1. Marriage of convenience

In Spain, the measures to counter abuse of rights provided for in Article 35 of the Directive have been transposed neither systematically nor in a single legal instrument. Those measures can be found in the general mechanisms to fight against fraud and abuse.

With regard to marriages of convenience, there are a number of instruments applied by the Spanish authorities in order to prevent the abuse of free movement and residence rights. These instruments can be classified in three different categories: (i) legal instruments governing the registration of marriages, (ii) administrative sanctions, and (iii) possible criminal offences arising from a marriage of convenience.

i. Legal instruments governing the registration of marriages

The main legal instruments governing this issue are General-Directorate of Registries and Notaries Instructions of 9 January 1995 and 31 January 2006⁵⁴. Under these instruments, when a marriage takes place in Spain, there are both ex-ante and ex-post checks. Both checks aim to combat false marriages in the Civil Registry (including marriages of convenience).

Under Spanish law, if a marriage takes place abroad and at least one of the spouses is Spanish, the marriage can be registered in the Spanish Civil Registry once its legality is confirmed. This confirmation includes a review of all of the conditions established under Spanish law⁵⁵, e.g. verifying that the marriage is *bona fide* by interviewing both spouses about their personal relationship and having them make a declaration of its authenticity.

Under RD 240/2007, a marriage does not have to be registered in order for the family members of Union citizens to enjoy their rights. Nevertheless, in the last five or six years the Spanish authorities have, in practice, required marriages to be registered in

⁵⁴ General-Directorate of Registries and Notaries Instruction of 9 January 1995 (*Instrucción de 9 de enero de 1995, de la Dirección General de los Registros y del Notariado, sobre el expediente previo al matrimonio cuando uno de los contrayentes esta domiciliado en el extranjero*), Spanish Official Journal n. 21, of 25 January 1995, and General-Directorate of Registries and Notaries Instruction of 31 January 2006 (*Instrucción de 31 de enero de 2006, de la Dirección General de los Registros y del Notariado, sobre los matrimonios de complacencia*) Spanish Official Journal n. 41, of 17 February 2006.

⁵⁵ Article 61 and 65 of the Spanish Civil Code (*Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil*), Spanish Official Journal, n. 206, of 25 July 1889.

Spain, or legalised in another Member State, in order for family members to enjoy the rights accorded by the Directive.

ii. Administrative sanctions

The Spanish law on foreigners (Ley de Extranjería) was amended in 2009⁵⁶ to state that a marriage of convenience is considered an infringement that may lead to the imposition of fines (Article 53.2.b): 'To marry, or to simulate an analogous affective relationship or to be declared as a legal representative of a minor, when such conduct is made for profit or for the purpose of unduly obtaining a right of residence, provided that such events do not constitute a crime'.

This administrative infringement is punished with a fine ranging from EUR 501 - 10,000⁵⁷.

iii. Possible criminal offences

A marriage of convenience could, in extreme circumstances, constitute a criminal offence. Those extreme circumstances include where the marriage of convenience is linked to another criminal offence such as:

- The enhancement of illegal immigration (Article 318 bis of the Spanish Criminal Code).
- Document falsification (Article 392 of the Spanish Criminal Code).

There are no statistics on the implementation of these measures in practice. Several Spanish Ministries issued a 'Report on unlawful uses of the right of family reunification: marriages of convenience and false paternity acknowledgment'⁵⁸. Although it does not provide statistics or details, it states that this is a growing problem in Spain.

4.2. Other types of fraud

For other related types of fraud, there are two kinds of measures to counter abuse of rights under Spanish law: (i) measures concerning false paternity and (ii) fraud in family reunification.

⁵⁶ Spanish Organic Law 2/2009 (*Ley Orgánica 2/2009, de 11 de diciembre, de reforma de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social*), Spanish Official Journal n. 299, of 12 December 2009.

⁵⁷ Article 55(1)(b) of the Spanish Organic Law 4/2000 (*Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social*), Spanish Official Journal n. 10, of 10 January 2000.

⁵⁸ Foreign Affairs Ministry, Justice Ministry, Interior Ministry and Labour and Social Security Ministry, Report on unlawful uses of the right of family reunification: marriages of convenience and false paternity acknowledgment (*Usos indebidos del derecho de reagrupación familiar: matrimonios de conveniencia y falsos reconocimientos de paternidad*), May 2012. Available in Spanish at: http://extranjeros.empleo.gob.es/es/redeuropeamigracion/Estudios_monograficos/EMN_ES_Matrimonios_de_Convencionia_ES.pdf

i. False paternity acknowledgment

Pursuant to Article 2 c) of RD 240/2007, descendants under the age of 21 have the same rights as EU citizens. For children born in Spain there are some formalities and rules with respect to this right.

Under Spanish law⁵⁹, the declaration of paternity creates a contestable presumption of paternity, with the Civil Registry entitled to investigate the authenticity of the information declared⁶⁰. These investigations include personal interviews to reveal inconsistencies or requests for documents in order to detect possible fraud. If a falsification is established, the authorities can refuse the registration.

For example, the Spanish General Consulate in Guayaquil refused to issue a family reunification permit for two minors born in Ecuador on the grounds that the EU citizen (father) who sponsored the reunification could not be their biological father⁶¹. There was evidence that the reunification was undertaken with the sole intention of reuniting the minors with their mother, who lived in Spain and was not an EU citizen.

Finally, there is the possibility to ask for a DNA test in judicial procedures. As mentioned above, the Spanish Law on foreigners establishes that false declaration of paternity is punishable with administrative sanctions and, in extreme circumstances such as document falsification, with criminal sanctions⁶².

ii. Fraud in family reunification.

Under Article 2(c) RD, direct descendants under the age of 21 or who are dependants, as well as those of the spouse or partner, fall within the definition of family members of European Union citizens. The Spanish Administration can choose to verify whether or not a descendant over 21 years of age is really dependent on the EU citizen. There is no exhaustive checklist for such investigations. For instance, regular transfers of money may be relevant in proving dependence on the EU citizen but is not sufficient to prove that the individual is entirely financially dependent. This uncertainty about the forms and methods of such evidence may negatively affect EU citizens, as the Spanish Ombudsman acknowledged in its 2015 Annual Report⁶³.

⁵⁹ Article 113 of the Spanish Civil Code.

⁶⁰ General Directorate of Registries and Notaries Instruction of 31 January 2006 (*Instrucción de 31 de enero de la Dirección General de Registros y Notarías*).

⁶¹ Judgment of the High Regional Court of Madrid (Administrative Section) of 24 February 2012, (Case 143/2012).

⁶² Article 53(2)(b) of the Spanish law on foreigners (*Ley de extranjería*): provides for administrative sanctions in the following instance: '*To marry, or to simulate an analogous affective relationship or to be declared as a legal representative of a minor, when such conduct is made for profit or for the purpose of unduly obtaining a right of residence, provided that such events do not constitute a crime*' (*'Contraer matrimonio, simular relación afectiva análoga o constituirse en representante legal de un menor, cuando dichas conductas se realicen con ánimo de lucro o con el propósito de obtener indebidamente un derecho de residencia, siempre que tales hechos no constituyan delito'*).

⁶³ Spanish Ombudsman, Annual Report 2015 (*Informe Anual 2015*), p. 281.

5. REFUSAL OF ENTRY OR RESIDENCE AND EXPULSIONS OF EU CITIZENS AND THEIR FAMILY MEMBERS

KEY FINDINGS

- There is a possibility to refuse the right of entry or residence of an EU citizen on the grounds of public policy, public security or public health.
- In line with the Directive, Spanish law recognises the possibility to expel EU citizens on the grounds of public policy, public security or public health, even if they have been living in Spain for over 10 years, but only in extreme circumstances.

5.1. Refusal of entry or residence

Pursuant to Article 15 RD, the Spanish Administration may restrict the right to entry and residence for EU citizens and their families on the grounds of public policy, security or health. The RD is, in principle, consistent with the Directive, and case law has established a number of criteria applicable in some specific cases:

- The Spanish Administration is entitled to **reject the residence applications** of the family members of EU citizens if those citizens are serving a sentence in a Spanish prison⁶⁴, even if the sentence does not provide for the expulsion from the country of the EU citizen.

For example, in one case, an EU citizen's family member was serving a nine-year sentence for drug dealing. While in prison, the individual asked for a residence card, which the Spanish Administration denied on the grounds of public policy and security. The person then appealed before an administrative court of first instance who ruled in his favour, stating that the existence of a criminal record was not sufficient to deny the issuing of a permanent residence card⁶⁵. On appeal, the High Regional Court of Madrid quashed the judgment, stating that the relevance of the criminal offence committed, as well as the current situation of the applicant (i.e. he was serving a prison sentence), were sufficient grounds to deny him a permanent residence card. Despite its ruling, the High Regional Court of Madrid allowed the possibility for the individual to re-apply for residence after serving his sentence.

- The Spanish Administration is entitled to **reject EU citizens' applications for permanent residence** if those citizens are repeat criminal offenders or are not fully integrated into Spanish society from an economic and social point of view (e.g. having a job and a family in Spain)⁶⁶. Under Spanish law, being convicted of repeat offences is not enough in itself, meaning that the EU citizen, if well integrated, may be entitled to remain in Spain.

In principle, these criteria are in line with the Directive.

⁶⁴ *Inter alia* judgment of the High Regional Court of Madrid (Administrative section) of 12 May 2014 (Case 629/2014).

⁶⁵ Judgment of the 19th Administrative Court of Madrid of 24 October 2013 (Case 643/2010).

⁶⁶ *Inter alia* judgment of the High Regional Court of Castilla-León (Administrative section) of 19 March 2015 (Case 529/2015).

There are no public data available on the number of cases in which EU citizens have been prevented from entering Spanish territory or refused the right of residence on grounds of public policy, public security or public health.

Articles 30 and 31 of the Directive — which provide, inter alia, for the right to be informed of the means to challenge a decision restricting the right of entry and residence — have been transposed by the RD and there are no cases reported in public sources in which these procedural safeguards have been disregarded.

5.2. Expulsions of EU citizens and their family members

Pursuant to Article 15 RD, the Spanish Administration is entitled to expel EU citizens and their family members on the grounds of public policy, public security or public health, and subject to the procedural safeguards in Articles 30 and 31 of the Directive. The Spanish Criminal Code was modified in 2015, with its Article 89⁶⁷ allowing for EU citizens to be expelled from Spain where they present a serious threat to public policy, public order or public security. EU citizens who have lived in Spain for over 10 years can only be expelled if they have been ordered to serve a sentence for five years or more for committing crimes against life, freedom, or sexual freedom, and there is a grave risk of recidivism, or, alternatively, for terrorism or crimes committed within a criminal organisation. There are no cases reported in public sources in which the Directive's procedural safeguards have been disregarded.

Pursuant to case law, an EU citizen can only be expelled if **two conditions** are met: (i) the individual must have committed a number of **criminal offences**, and (ii) the individual is **not deemed to be fully integrated** into Spanish society from an economic and social point of view (e.g. having a job and a family in Spain). Citizens serving a sentence for serious criminal offences and who pose an actual and direct threat to public security can also be expelled from Spanish territory, while an EU citizen who has been detained more than 69 times (26 of them in the last eight months⁶⁸) can be deemed a direct threat to public security.

EU citizens who do not satisfy the condition of sufficient resources cannot in practice be expelled from Spain as there are no procedures in place for the expulsion of persons benefiting from free movement for reasons other than public policy, public security or public health.

⁶⁷ Spanish Organic Law 1/2015 amending the Criminal Code (*Ley Orgánica 1/2015, de 30 de marzo, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal*), Spanish Official Journal n. 77, of 31 March 2015.

⁶⁸ Judgment of the High Regional Court of Castilla-León (Administrative section) of 30 July 2014 (Case 164/2015).

6. CONCLUSIONS

Although the transposition of Directive 2004/38/EC into Spanish law may, in the author's opinion, be considered 90% complete, since 2008 the situation has generally worsened because of a Directive-compliant tightening of provisions. Thus, the liberal regime that was apparent in Spain in 2008 is no longer quite so liberal.

As a result of the economic crisis, the RD was amended in 2012 to include the literal wording of Article 7 of the Directive concerning the right of residence for more than three months. This change, while in line with the Directive, imposes a restriction on the rights of EU citizens.

The main obstacles to free movement do not arise from incorrect transposition but, rather, from practical implementation. They generally relate to administrative burdens and bureaucracy, such as delays and excessive documentation requirements, unjustified denial of entry visas for family members, difficulties encountered in marriage recognition and the interpretation of 'sufficient resources' in an arbitrary manner. The obligation for EU citizens and their families to obtain an NIE in addition to a registration certificate remains a significant obstacle. This may be a breach of Article 25 of the Directive (general provisions concerning residence documents) as the NIE constitutes a precondition for the exercise of rights (e.g. access to employment) and the completion of administrative formalities. Furthermore, there is no harmonised approach to the requirements for obtaining an NIE in the Spanish administration, with, in some cases, proof of a job required before an NIE is issued.

While, in 2008, every EU citizen had access to public healthcare irrespective of their circumstances, this has now changed. Since 2012, EU citizens and their family members are no longer entitled to public healthcare if they are not workers or unemployed people receiving unemployment benefits (or members of their families) or if they do not hold an EHIC. There are only minor exceptions to this rule. Although this is not in breach of EU law, it could be considered a step back in terms of the rights of EU citizens.

In the case of discriminatory restrictions to free movement, there are no specific public data or statistics on EU citizens and their family members. Some isolated cases of discrimination have been identified, e.g. the participation of EU citizens in national sports championships. This problem was overcome when a Spanish Court annulled the decisions preventing EU citizens from participating in national sports championships, with important implications for EU citizens wishing to remain in Spain and pursue a sports career. In practice, in 2014 the Spanish administration allowed drivers or road haulage companies to pay fines via bank transfer, with the exception of drivers of trucks with Romanian number plates. In these cases, the Spanish police required the drivers to pay immediately, often in cash. However, this problem has not been reported in subsequent years.

Finally, there are no procedures in place for the expulsion of persons benefiting from free movement for reasons other than public policy, public security or public health in Spain. EU citizens who have lived in Spain for over 10 years may only be expelled on these grounds in extreme circumstances. This is in line with the Directive.

ANNEX I: TRANSPOSITION OVERVIEW TABLE

Table 1: Transposition overview

Directive's provisions	National provisions	Assessment	Changes since 2008
<p>Article 3(2) Beneficiaries:</p> <ul style="list-style-type: none"> - Family members - Partners 	<p>Article 2 bis of Royal Decree 240/2007 (RD)</p>	<p>In line with the Directive:</p> <ul style="list-style-type: none"> • The Decree includes, in the category of other family member, a family member with a 'disability' and, as in the Directive, a family member dependent due to serious health grounds. • The RD provides the same right to registered partners as to spouses under Article 1. Therefore, Article 2 bis on other family members only applies to non-registered partners. • It states two criteria to prove the condition of family member or partner that exempt other personal circumstances from further examination by the national authority: 1) in the case of family members: to prove 24 months of continuous cohabitation in the country from which they have come and 2) in the case of partners to prove (part 4b) at least one year of cohabitation or, if there are common descendants, it is only necessary to prove stable cohabitation. This is in line with the Directive. 	<p>This article has been recently added to Royal Decree 240/2007, according to the amendment set out in Royal Decree 987/2015 of 30 October that entered into force on 9 December 2015. As a result of the amendment, the individual circumstances of durable relationships must now be extensively examined by the Administration. In particular, one year of cohabitation or the existence of common descendants (provided that there is a stable cohabitation arrangement) is considered sufficient evidence to prove a durable relationship.</p>
<p>Articles 5(1) and 5(2) Right of entry</p> <ul style="list-style-type: none"> • No entry visa or equivalent formality may be imposed on Union citizens • To facilitate granting third country family 	<p>Articles 4(1) and 4(2) of the RD.</p>	<p>In line with the Directive</p>	<p>This article was modified by Royal Decree 1161/2009 of 10 July that entered into force on 23 July 2009. This Royal Decree modified paragraph 2 of Article 4, removing the restriction on residence cards to those cards issued exclusively in the</p>

Directive's provisions	National provisions	Assessment	Changes since 2008
members the necessary entry visas			Schengen Area.
Article 6 Right of residence for up to three months without any conditions or any formalities other than an ID	Articles 6(1) and 6(2) of the RD.	In line with the Directive	No change since 2008
Articles 7(1) and 7(2) Right of residence for more than three months for EU citizens and their family members based on employment, sufficient resources or student status	Articles 7(1) and 7(2) of the RD	In line with the Directive.	This article was modified by the Royal Decree-Act 16/2012 and Order PRE/1490/2012 to reduce the economic impact on Spain. The original article did not contain any of the requirements set out in Article 7 of the Directive, giving Spain a much more favourable regime after its initial transposition (see Section 1.1.2 above).
Article 14 Retention of residence rights as long as they do not become an unreasonable burden on the social assistance system	Article 9 bis of the RD	In line with Directive.	The original version of the RD did not contain this Article, which was added to the Royal Decree 240/2007 by the Royal Decree 1192/2012 , in order to allow national authorities to verify that the conditions of residence are fulfilled in specific cases.
Article 24(1) Equal treatment	Article 3 (4) of the RD	Incorrect transposition. This is transposed almost exactly, however, instead of referring to 'on the basis of the Directive' it refers to 'on the basis of the RD' which may create problems if the RD does not transpose the Directive correctly. In addition, some parts	No change since 2008

Directive's provisions	National provisions	Assessment	Changes since 2008
		of the Directive's requirements and rights are transposed through other legislation, thus the reference to the RD is more restrictive than the Directive.	
<p>Article 27 Restriction on the freedom of movement and residence of Union citizens and their family members on grounds of public policy, public security or public health</p>	<p>Articles 12(3), 12(4) 15(1) and 15(5) of the RD</p>	<p>Incomplete transposition. Articles 15(1) and 15(5) of the RD correspond to Articles 27(1) and 27(2) of the Directive. Article 12(3) of the RD corresponds to Article 27(3) of the Directive.</p> <p>In contrast to the Directive, the RD details the specific restrictions imposed on the freedom of movement (Article 15 (1)):</p> <ul style="list-style-type: none"> • Denial of the right of entry. • Denial of registration or a residence card. • Expulsion. <p>The RD does not mention the principle of proportionality (Article 15(6)(d)) included in Article 27(2) of the Directive.</p> <p>Article 12(4) of the RD adds an extra condition not present in the Directive: in order to ascertain whether the person concerned presents a danger to public health, a medical certificate attesting the health status of the person may be required (Article 12(4) RD).</p> <p>Article 27(4) of the Directive is not included in the RD.</p>	<p>No change since 2008</p>
<p>Article 28 Protection against expulsion</p>	<p>Article 15(1) second paragraph and Article 15(6) of the RD</p>	<p>In line with the Directive.</p>	<p>No change since 2008</p>

Directive's provisions	National provisions	Assessment	Changes since 2008
Article 35 Abuse of rights		<p>In line with the Directive . Although, the Royal Decree does not provide specific measures to combat the abuse of rights, the general rules of the Spanish legal framework on abuses and fraud⁶⁹ apply. (e.g. the Instruction of 31 January 2006 on marriages of convenience⁷⁰). Such general rules comply with the Directive.</p>	No change since 2008

⁶⁹ Calvo Cádiz, E., 'Free movement and residence of citizens of the Union: Ten years after Directive 2004/38 and seven after Royal Decree 240/2007' [2014] Journal of the Ministry of Employment and Social Security, ('Libre circulación y residencia de los ciudadanos de la Unión: diez años después de la Directiva 2004/38 y siete después del Real Decreto 240/2007' [2014] *Revista del Ministerio de Empleo y Seguridad Social*), 223-255, at p. 253.

⁷⁰ General-Directorate of Registries and Notaries Instruction of of 31 January 2006 (*Instrucción de 31 de enero de 2006, de la Dirección General de los Registros y del Notariado, sobre los matrimonios de conveniencia*) Spanish Official Journal n. 41, of 17 February 2006.

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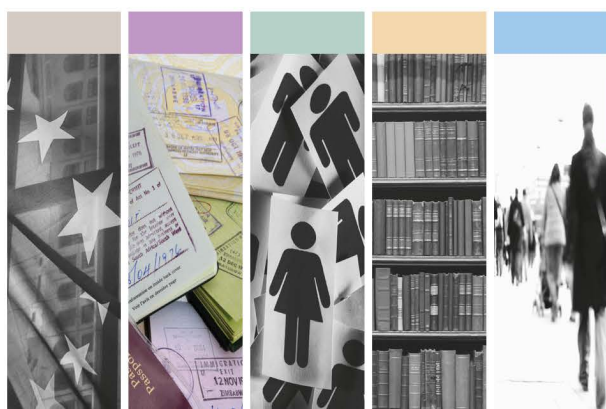
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