

Duration of prelim ruling procedures

The statute and the rules of procedure provide for two fast track procedures:

- Accelerated procedure (Applicable to all types of cases) e.g. environmental protection, rule of law, free movement of persons. Accelerated because the deadlines are shorter, however, the elements of the procedure are the same. The COJ decides whether it'll be decided under this procedure.
- Urgent preliminary ruling procedure for Justice and Home Affairs matters (PPU procedure *préjudicielle d'urgence*) – criminal law, migration (3rd country nationals when they enter the EU), in the EU is free movement of persons, private international law.
- Deadlines are very short, anything from 2 – 3 months, trouble is that no. of PPI's has increased e.g. refugees, immigration crisis. National court may request it, but COJ will decide whether they allow it, e.g. child dispute both different countries, which country should decide then by default it is a PPU.
- In both procedures, the AG present views.

Infraction procedures:

Ensure that the MS complies with EU law and the Jurisdiction belongs to the COJ not the General Court.

Infringement proceedings:

Article 258 TFEU – Commission v MS for breach of EU Law commission takes MS to the COJ for a breach in EU law which may be subject to infringement proceedings, this leads the COJ to make declaratory judgments. If nothing happens then the commission can resubmit the case under **Article 260** and impose a penalty. The COJ has full discretion, it is not bound by the Commissions' request, they can increase or decrease the amount. Article is where the Commission v MS is penalised for their non-compliance with the Article 258 judgment. Thus for 260 to take place 258 has to occur.

Article 259 – MS can sue another MS for the breach of EU law.

Commission against a member state – article 258 may be attributable to national authorities

Commission v UK – **attributable to the parliament** – Factortame – commission took UK to the court arguing that the merchant shipping act was in breach of the right of establishment. The court agreed.

Breach of EU law attributable to the executive – **Commission v France** – French police and law authorities didn't do all that was possible to prevent vandalism and to facilitate free movement of goods

Breach of EU law attributable to a national court – **Commission v Spain** – Spanish supreme court rendered a ruling interpreted VAT legislation which was contrary to EU directive, they didn't send a reference for prelim ruling. This was followed by the tax authority and there was a knock-on effect hence the breach brought by the Commission.

Breach of EU law attributable to the devolved authorities – **Commission v UK** – devolution problems, Scottish assembly didn't have enough capacity to transpose EU directive within the devolved powers.

- National courts sent reference to COJ, do they qualify for permanent residence or not. Thus, Article 16 provides EU citizens who have resided lawfully in the host MS for 5 years plus have the permanent right to reside – this Article doesn't specify what lawfully means? This may mean under the directive or even national law of the MS.
- Mystery solved = preamble and main text – this preamble explains the rationale of the legislation and in this case the preamble provided clarity – as to lawfully being under the Directive.
- Those who have resided under national law, do not have permanent residence under the directive. To qualify you need to be a worker, self-employed or self-sufficient.
- However, one may argue that the fulfilment of this criteria you are fully integrated, however, you can reside under national law and not engaged in economic activity but rather social work – so you are integrated into the host society more than when you are under EU law.
- COJ rather took a strict approach – this was in contrast to AG who suggested reading the directive in the light of EU citizenship, rather COJ stated that to qualify for permanent residence under Directive 2004/38 you need to reside continuously for 5+ years in accordance with condition in the Directive.
- Residence behind bars? Doesn't qualify evidenced in *Nnamdi v Sec of State*.

Regulation 492/2011 – applies automatically, it is directly applicable.

- It deals with the substantive **rights of workers**
- Article 10 – children of migrating workers, have the right to education (go to school), not children of retired or those self – employed but only children of **WORKERS**.

C-310/08 Harrow v Ibrahim

- Question was whether the child of a former migrating worker gives right to reside to the other parent who is not economically active.
- Third country national arrives in the UK, with husband who is Danish with four children. She has no children and fully relies on the husband. 2 out of 4 children go to school, now the husband gets a job he is a migrating worker Danish national residing in the UK. However, Mr Ibrahim then departs and leaves woman with four children with no income whatsoever, thus, she applies for benefits to feed children and have somewhere to live.
- Local authorities state she doesn't have legal residence, you're a third country national and no one knows where the spouse is, you're not entitled to the benefits.
- She argued that she has the right to reside, triggering the right to education from the father as a short migrating worker because 2/4 are at school.
- National court sent reference for prelim ruling to the COJ
- **COJ stated by all means the woman has the right to reside as long as the children are in education and she is the primary carer of these children.**
- Question is – when does a parent stop being a primary carer? People say when others turn 18, growing old is compulsory but growing up is optional. Thus, parents remain primary carers remain so for years.

Alarape – when does this period end? If someone resides for more than 5 years under the right to education (different provision of EU law) – do they have a permanent right to residence?

- COJ: this is not a purely internal situation because you have an Irish citizen in the United Kingdom. It's not a UK citizen in the United Kingdom that's purely internal. Even if the government states that they are not Irish, regardless on paper they are Irish.
- COJ conditions: you need financial resources, comprehensive healthcare insurance and cannot be a burden to social protection system – cannot be on benefits or ask for it. Government disagreed because the child cannot fulfil those conditions, therefore, **COJ stated they have the right because child fulfils conditions despite her age.**
- **COJ – mother has right to reside derived from her daughter.** Moreover, the Advocate General goes into human rights – right to family life – Article 8. This was unusual because it was only the ECHR (charter) was in force as binding and applicable with the Lisbon Treaty in 2009. The court had to consider, if the mother is deported to China, the child would end up in an orphanage and it would break up the family. Court considered Article 8 and the child's right to reside.
- Accordingly, Ireland changed their rules on nationality after.

C-456/02 Trojani:

- French national living in Belgium in a tent, then living in a hostel, then the salvation army.
- He was covered by social occupational reintegration program – in the Salvation Army the deal was to clean floors and his room etc and he would be provided with some money.
- However, he wasn't happy with the money he was receiving, so he applied for minimax – which is minimum subsistence allowance from the state to meet his basic needs.
- Belgium authorities stated you're not residing legally on the grounds of both EU and Belgium law.
- Belgium sent a reference to the COJ – questions: is he a worker? Is he self – employed? Is he a service provider covered by free movement of services?
- COJ eliminated what was not applicable – He is not under Article 56 – free movement of services – this covers temporary movement to country to receive or provide a service.
- Article 49 – is he self-employed? – he would need to register with the national insurance.
- Fundamental question – can he reside under the general right to reside – does he fulfil the 3 conditions as in Chen? **No, he doesn't fulfil, he wanted to receive benefits from the state.**
- **Is he a worker? – provide services for someone else, receive remuneration and their control and instruction – he could qualify as a worker.** However, according to jurisprudence, if the work is part of medical treatment it doesn't make you a worker, it's not a genuine economic activity.
- COJ – status of social occupational integration program? – is it similar to various addiction treatments you can receive or is it something else? This is for the national court to decide, because they know more about this program, this is not for the COJ to decide.
- However, case was pending at the court, then the referring court provided additional information, Mr Trojani now has a residence permit in Belgium under Belgium law. This changed everything. Therefore, COJ looked beyond, at Article 18 TFEU provides prohibition of discrimination on grounds of nationality.
- **COJ if he has right to reside under Belgium law, he falls under the Article 18, he is entitled to the minimax as the Belgian citizens are.**
- Interesting case – substantive and procedural law.

C-34/09 Zambrano

- Two Colombian citizens residing in Belgium, received political asylum in Belgium, no longer safe in Colombia.

- This was a fast track procedure – it wasn't only about the couples litigating but because there were a lot of similar cases in Ireland.
- **COJ held that Irish law was contrary to the Directive 2004/38. If the EU legislator wanted to provide a restriction they would have done so in the Directive but clearly they haven't in the main text, text or the preamble – to suggest that the MS may limit the rights of third country nationals who enter the country as already married to the EU migrating citizen.**
- Counter argument of the Irish government – we don't want paper marriages. **COJ says the Directive provides a legal basis for national law for various procedures to check if people are genuinely married or not. But you cannot restrict free movement rights in this way – important judgment.**

Permanent Residence

COJ in **C-162/09 Lassal** and **C-325/09 Dias** – periods of lawful residence in accordance with EU law pre dating Directive 2004/38 counted towards the 5 years. They could benefit from the permanent right to reside immediately as of 30th April 2006, which was the transposition deadline.

Tomasz Ziolkowski – interesting judgment – COJ asked about periods of residence but based only on national law. People of Polish nationality resided in Western Germany from 1989 onwards. All of them were residing on humanitarian grounds, arrived as teenagers. Neither of them worked or any self-employment but relying on benefits. German authorities were happy to supply them with. Then Directive 2004/38 adopted, and Poland joined the EU the following day, then the transposition period expired. Man and woman asked for the issue of permanent residence cards, but it wasn't necessary because it doesn't confer rights, the permanent right to reside is automatic. German authorities said NO you don't have the right to reside under EU law, you're only resided under national law and you don't meet the criteria on residence on humanitarian grounds, so they were threatened with deportation.

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illegal residence beforehand, so you ground the person for 3 years to prevent shame being brought to the country again.

- However, Mr Jipa argued the procedural requirements laid down in Directive 2004/38 apply. The decision has to survive proportionality test, public health, security and policy
- Reference to the COJ – does the Directive apply and the limits with these restrictions.
- Right to exit – is explicitly regulated in Article 4 of the directive EU citizen has right to leave country of nationality, without any formalities being imposed on one.
- However, Article 3 of the directive, it applies only when you move and reside in another country, so you need to activate your rights.
- Mr Jipa – didn't desire to go anywhere, thus, could Article 4 apply in hypothetical situation – no because it'll be contrary to jurisprudence

the rules apply to exit from one MS to another, not to exit to third countries

Restrictions on grounds of public policy and security

- MS may restrict free movement right on grounds of public policy or public security
- **5 – 10 years of residence**, you could be deported on grounds of serious public policy or security grounds
- **10 years plus** – could be deported only on imperative grounds of security

PI case

- Raping the daughter of his partner at the home
- He's an Italian in Germany lived there for 10 years plus
- He was arrested then prosecuted
- He can only be deported on imperative grounds of public security once served time in jail
- German court and the Advocate General – he didn't commit similar crimes outside of the household but all at home – is it a threat to public security or not?
- What is public policy or security? Cannot be the former because he has been there longer than 10 years. Thus, he is a threat to public security.
- Draw the line of public policy and security – COJ held that the **'MS essentially retain the freedom to retain the requirements of public policy and public security in accordance with their national needs, which can vary from one MS to another and from one era to another...these requirements must be nevertheless be interpreted strictly...'** MS have room for manoeuvre.

Restrictions on grounds of health

- **Article 29** – only covers diseases with epidemic potential under the rules of WHO (incl. infectious diseases or contagious parasitic diseases).
- In serious cases, the MS may order a free of charge medical check of a person, but it cannot be required as a matter routine.

General rules Article 27 of the Directive 2004/38:

- Restrictions must comply with the principle of proportionality applied by the courts
- Doubts the courts will send reference for preliminary ruling
- Previous criminal convictions may not constitute ground for restrictions.