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## Marrying someone from outside the EU = marriage of convenience? February 25, 2016



Ever since the 2008 CJEU Decision in *Metock* ruling that non-EU migrants were allowed to live with an EU national in a host state also in cases where they had no prior lawful residence in a Member State, several Member States have expressed their concern about the presumed frequent use of free movement to regularize unlawful stay or to bypass national immigration rules.

The Brexit deal has offered the UK a window of opportunity to address this discomfort (on the legal nature of the deal see Steven Blockmans).

A Commission declaration in the Brexit deal hints at an upcoming proposal to amend Citizens Directive 2004/38 to reverse the *Metock* decision. The declaration also includes a clarification on marriages of convenience that turns the use of free movement into 'abuse' and this is highly questionable from the point of standing case law, the Commission's own 2014 Handbook on marriages of convenience, and the Union's own values and principles such as proportionality, human dignity and non-discrimination.

On 19 February 2016, the European Council reached a deal with the UK government to prevent the threatening 'Brexit' of the UK from the EU. The deal consists of four sections: 1. on economic governance, considering the position of the UK in the decision-making structure of the euro-zone, 2. on competitiveness, addressing the wishes of the UK to simplify EU legislation and reducing red tape, 3. on sovereignty, including the explicit recognition that the UK is not committed to further political integration and finally, 4. on social benefits and free movement, acknowledging Member States' competence to limit 'flows of workers' and their access to social benefits in a host State. These four issues have been amply covered in the media.

The Commission's declaration on "issues related to the abuse of the right of free movement of persons" received much less attention, but is equally important (for a comment on general immigration issues in the new settlement package see Steve Peers). It is related to a small paragraph in the main new settlement Decision's section on social benefits and free movement, emphasizing that Member States are able to prevent abuse of rights or fraud – such as marriages of convenience – and that further exchange of information and administrative cooperation between Member States plus Commission is developed in order to more effectively fight against abuse of rights and fraud. In the past, the Member States already strongly connected the so-called EU-route with marriages of convenience. This resulted in Guidelines to the Union Citizens Directive

(that explicitly addressed the issue of combating marriages of convenience) as well as in a Handbook on marriages of convenience by the European Commission (on the Handbook see Alina Tryfonidou).

## 1. Abuse of rights

The Handbook explains that freedom of movement must be given a broad interpretation, and derogations from that principle must be interpreted strictly. Hence, the right to free movement cannot be unjustly restricted by unjustified and disproportionate measures by national authorities. They cannot deter EU citizens from making use of their right to free movement. Measures may not be founded on the general presumption of abuse, and Member States may not use their powers arbitrarily. The principle of proportionality requires an individual assessment and prohibits considerations of general prevention. The Commission is clear on that the burden of proof to restrict rights under the Union Citizen's Directive lies with the national authorities. The authorities must build a convincing case, and it is for the national courts to verify the existence of abuse in individual cases.

It is doubtful whether the concerns of the Member States are supported by facts and figures. The EMN study on the issue of fraudulent family relationships concluded that there was no statistical evidence as to the number of marriages of convenience in the studied Member States (*Misuse of the Right to Family Reunification. Marriages of convenience and false declarations of parenthood*, European Union 2012, p.67). A Communication accompanying the Handbook, indicates that the statistics provided by the Member States show that the number is limited. Finally, a recent Dutch study of marriages of convenience, based on a study of files of the Immigration and Naturalisation Service demonstrated a rather low percentage of 4 % of applications for family reunification that were refused because it was considered a fraudulent marriage (Letter to Second Chamber 15 December 2015, 32175, nr, 59).

## 2. The definition of marriages of convenience

Furthermore, the Commission gives a clarification of the concept of 'marriage of convenience' that seems to imply that marriages between EU citizens and a non-EU nationals who had no prior lawful residence in the EU are per definition marriages of convenience. The Commission clearly shifts into the direction of the concerned Member States.

The Commission's clarification cannot be considered of an 'administrative' nature, where it beholds a small but significant modification with respect to the previous definition in the preamble to Directive 2004/38 and in the Handbook: "marriages of convenience or any other form of relationships contracted with the *sole purpose* of enjoying the right of free movement and residence."

The clarification says "The concept of marriage of convenience – which is not protected under Union law – also covers a marriage which is maintained for the purpose of enjoying a right of residence by a family member who is not a national of a Member State." The small but significant change consists in the disappearance of the word 'sole' before 'purpose'. Let us take a closer look at the implications.

Article 35 of Directive 2004/38 provides that 'Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by the Directive in the case of abuse of rights or fraud, such as marriages of convenience'. In *O. and B.* the CJEU has given further interpretation to the concept of abuse: it requires 'first, a combination of objective circumstances in which, despite the formal observance of the conditions laid down by the European Union rules, the purpose of those rules has not been achieved, and, secondly, a subjective element consisting in the intention

to obtain an advantage from the European Union rules by artificially creating the conditions laid down for obtaining it' (para 58). While the Commission's definition in the Handbook, referring to the 'sole' purpose of obtaining residence rights, aligns with the interpretation of abuse, the new clarification does not. In case there is a genuine relationship, a decision to marry may have the purpose (but not the 'sole' purpose) to obtain residence rights. According to the Commission's clarification, this would be considered a marriage of convenience and, following article 35 of Directive 2004/38, abuse. But it is hard to see how in a situation where there is a genuine relationship a marriage can be considered 'artificial'.

The clarification on marriages of convenience will not be included in a proposal to amend existing legislation, but will be further developed in Commission guidelines on the application of Union law on free movement of persons. So one might consider it quite harmless, in view of the fact that it will not be legally binding, and in view of the Court's position that a marriage of convenience does not apply to genuine relationships. Nevertheless, it is very disconcerting for the signal the clarification gives: marriages of convenience only apply to marriages (or durable relationships) between EU citizens and non-EU nationals (as if there never could be a marriage of convenience between two EU citizens); a marriage between an EU citizen and a non-EU citizen who does not have a regular residence status is per definition a marriage of convenience (as if these type of relationships cannot be genuine); and a marriage between an EU citizen and a non-EU citizen is automatically connected with abuse and fraud. This seems to fit with the obvious trend to make migration of third country nationals to the EU more and more difficult.

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■ Case law, EU Policy-making, Member States, Policy developments

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