

## Examples of cases

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### **A large number of persons working in the Belgian Commune of Momignies (Province of Hainaut) and living across the border in France, find themselves residents for tax purposes in both France and Belgium.**

The automatic registration of these persons by the Momignies commune was administered on grounds of their alleged "intention to avoid taxation", i.e. by artificially registering as residents in France just across the border. However, the right to move and reside freely within the territory of Member States exercise is recognised by article 18 of the EC Treaty. In the same way that citizens are free to move from one commune to another within Belgium, whatever the fiscal consequences, they ought to be free to do the same from Belgium to France. This implies that they will not incur double taxation of their income because they do so, nor that they will be arbitrarily taxed in one country rather than another. ECAS is currently pursuing this case on behalf of the persons concerned.

### **A German tourist died of a heart attack after queuing for 2 hours 30 minutes at the border between Spain and Gibraltar**

The Anglo-Spanish agreement of June 200 would, ECAS hoped, bring normality to the border, even though free movement of people was not formally part of the negotiations. When as a result of the above tragedy and many complaints about border queues, this appeared not be the case, ECAS sent a complaint to the Ombudsman about maladministration by the Commission and / or the European Parliament. The complaint detailed all the steps taken by ECAS since 1993 to convince the Commission that border controls were disproportionate and that action had to be taken. ECAS has constantly been dismissed with vague assurances that this essentially bilateral problem can only be solved in the general context of eliminating internal border controls. The four page letter and 12 annexes has been registered as complaint no. 935/2000 by the European ombudsman, but who still has to decide whether it is admissible.

### **A Spanish citizen wanted to know where he has to go in order to request that certain data contained in a file in the Schengen information System be deleted.**

He was informed that according to the Schengen Convention, the possibility of changing data included in the SIS depends on the national rules foreseen for similar purposes. In this respect, the right of access to information and modification of the files of the Security Body is foreseen in the Spanish Constitution and regulated by Spanish law. The caller was advised to contact the Spanish Ministry of the Interior for further advice and information.

### **An Italian journalist who wanted to write an article about Schengen complained about the fact that when he recently travelled to Italy from Slovenia, he noticed extremely long queues at the border.**

An official told him that this was because the Schengen agreement meant controlling third country nationals at external borders and inserting their data into

a database on a computer. He was informed about the legal and political implications of the Schengen convention, and recent developments in Italy. External controls are intensified in order to satisfy the other Schengen partners that each member is performing their duties well. It would seem that this is the price to be paid for genuine free movement inside the Schengen area.

**A Nigerian national would like to visit Germany and has applied for a Schengen visa. He was refused without reasons and would like to appeal against the decision.**

He was informed that national rules apply in this case, and that he should independent legal advice in order to challenge the decision of the German authorities.

**A Moroccan national resident in Belgium travelled to France with her Belgian residence card. She was arrested by the French police and taken to their head office because she should have travelled using her passport. Her identity has been filed (probably in the Schengen information System - SIS) and she was put on a train back to Belgium.**

A valid residence card issued by one of the Schengen countries is a substitute to a Schengen visa, however this must be presented to the authorities, in case of a control, together with a valid passport. The residence card on its own is not a valid travel document for third country nationals although it would be for EU nationals. The action taken by the police does however appear excessive given that the citizen was simply ill-informed.

**An EU national married to a non-EU national asks whether his wife, who has a Belgian residence permit, can travel in Schengen and whether the permit allows her to travel to Nordic countries.**

The wife, who is a non-EU national, can travel for up to three months within the Schengen zone with her passport and Belgian residence card. She cannot however use her residence card to enter countries such as Denmark or other countries which are signatory to Schengen but have not yet ratified the agreements. In this case, the national rules apply. This question reflects the lack of sufficient dissemination of information about Schengen.

**A French national returning from Latin America in Spain complaints that after he was controlled at the external border zone (Spain) he was once again controlled upon arrival in France. Is this allowed?**

Yes, controls inside Schengen are allowed, for persons coming from another Schengen country, on the condition that these controls are applied unsystematically for security reasons.

**A Dutch student complains that his wife, a British citizen, is not entitled to unemployment or other benefits in the Netherlands because he believes that she is not entitled to a residence permit to access such social rights. His wife has lost her job and the financial situation is made worse by the fact that she is expecting a baby. After correspondence with the British embassy and a MEP the case is handed on to ECAS.**

The right to stay in another EU country other than one's own is not absolute. In fact, there is no right to stay for people who, without having last worked in the host country for a qualifying period, do not have (1) sufficient resources to provide for their needs - calculated according to the host country's minimum guaranteed revenue - and (2) health insurance, whether private or legal.

In order to allow people to meet the above conditions - unless they are migrant workers or parents of such workers, in which case it is just a matter of verifying the existence of work in the country - a residence permit procedure exists provided by EC law. However, the EC Court of Justice has repeatedly stressed that the right to stay, when conditions are met, exists regardless of whether one holds a residence permit or not. The latter is just a matter of "regularisation", i.e. of establishing one's legal residence for all other consequences. Also, just as nationals of the host country are - in most EU countries at least - bound to have identity cards to correspond with their local registration, so do foreign EU residents in the country by way of their residence permit (serving in this case as residence card). To summarise, the citizen is wrong to believe that a residence permit cannot be requested for his wife.

**A German national resident in Belgium has worked for 15 years as a relocation counsellor. She contacted ECAS after the professional institute of estate agents claimed that she was illegally practising their trade, a claim upheld in a commercial Court. She cannot carry out her normal work as a result.**

The case at first sight might appear to be an infringement of the right of establishment. It is certainly an example of the difficulties facing people where a profession is recognised in one EU country, but not in another. Relocation counsellors subscribe to codes of ethics which make their business distinct from that of estate agent. Belgian law requires them however to register as estate agents and it does so irrespective of nationality. ECAS advises on how the case can be pursued politically, but sees no legal solution.

**A Dutch national with a Dutch driving licence resident in the UK was charged with a speeding offence, a charge she admitted. She was not allowed to pay the fixed rate fine of £40, but was summoned to appear in the Magistrates Court, where she pleaded guilty in writing and agreed to pay the fine, and was charged £110 costs in addition.**

She contacted an MEP for assistance in this matter, who contacted the Home Office in the UK. The Home Office's response was that there is no facility for the endorsement of foreign driving licences in the UK, that fixed penalty notices cannot be sent by post to the holders of foreign drivers' licences in the UK, and that the effectiveness of the fixed penalty system derives from the strict application of statutory rules which are fixed in domestic legislation and "refer only to driving licences over which the authorities can exercise some control."

Article 12 of the Treaty prohibits any discrimination on grounds of nationality, not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead to the same result

ECAS sent in a complaint to the Commission who contacted the relevant British authorities. The British authorities now recognise that the fixed penalty system is not satisfactory and inform the Commission services that work will now commence on revising it so as to ensure that it is operated in a satisfactory manner. They indicate as most practical solution to provide that a fixed penalty may be imposed on any holder of a Community licence.

**A British/Dutch national lived in Leuven between 1995 and 1998, where he worked as an employee until he was made redundant. He received a six-month permit that expired in July 1996. He failed to attempt to renew this permit until he moved to Ixelles in July 1998. The Commune d'Ixelles refused to renew his old permit on the ground that it was out of date, and advised him that he was no longer entitled to live and work in Belgium because his permit was invalid. Between July and October 1998, he was issued with three-month permits, the last one expiring in February 1999. In the meantime, he found employment in France in November 1998. He was obliged to return to the Commune before the end of February 1999 in order to renew his permit. He attempted to present the Commune with his contract of employment on a number of occasions, whereupon he was either informed that the file had been lost, the papers he had presented were not in order, or that the official was too busy to deal with his case. In May 1999, he telephoned the Commune to complain about the delay in obtaining his permit. He was told to come to the Commune the same day at 5 p.m. so that the case could be finalised. When he arrived at the office, he was presented with an order to leave the territory of Belgium within five days because his permit had expired. The order also prohibited him from entering nine other Member States of the European Union, including the**

**Netherlands, despite the fact that he has Dutch nationality.** Member States are obliged to grant the right of residence to workers who are able to present a valid document used for entry into the country concerned and a confirmation of engagement or contract from the employer, or other persons with a valid right of residence. It has been long established that the issue of residence permits has only a declaratory effect, and that the right of entry and residence is a right conferred directly by Treaty or by secondary legislation. Member States are entitled to oblige nationals of other Member States to report their presence to the host Member State concerned in order to monitor population movements, and are therefore entitled to apply penalties for failure to observe the formalities prescribed in secondary legislation. However, deportations under these circumstances are not permitted on the grounds that they negate the right of residence conferred by Community law, and that penalties imposed have to be comparable with those imposed for infringements of provisions of equal importance by nationals and cannot be so disproportionate to the gravity of the infringement that it becomes an obstacle to free movement. Failure to renew a temporary residence permit does not constitute a threat to public policy, public security or public health, which would allow Member States to derogate from the provisions of secondary legislation. ECAS has contacted the Commission about this case, which has taken it up with the Belgian authorities.

**A Belgian who has always lived and worked in Belgium is now in early retirement. The pension age for men in Belgium is 65. He complains that if he moves from Belgium to France, he would, under Belgian law, lose his pension entitlement. Does this conform with EC law?** Unfortunately the answer is yes. EC Regulation 1408/71 on the co-operation of social security schemes for migrant workers (a retired worker is a "worker" within the meaning of the regulation) presents a gap in this respect. Early retirement ("pre-retirement pension") is not considered, and therefore the abolition of the condition of residence in Belgium does not apply in this case. It is only after he has reached the legal pension age that he can claim the right to collect his Belgian pension through the French pension office.

This gap in EC law has recently been pinpointed in the report submitted to the Commission by the high level panel on free movement of people, recommending the adaptation of Regulation 1408 to the growing use of pre-retirement pension schemes to cover unemployment. A similar case involved a Dutchman who wanted to retire to Spain.