

EU FREEDOM OF MOVEMENT: WHAT ARE YOUR RIGHTS?

A guide for professionals working
with destitute mobile EU citizens



This work is supported by the European Programme for Integration and Migration (EPIM).

Sole responsibility for the contents lies with the author and the contents may not necessarily reflect the positions of EPIM or its partner foundations.



This guide takes account of EU law as of 2018. A comprehensive overview of the EU legal framework is beyond the scope of this Guide; only the most basic concepts from Court of Justice of the European Union case-law and Directive 2004/38 are presented. The authors are not responsible for the use which might be made of the following information.

CHAPTER I

- 5 Who can benefit from EU free movement rights under Directive 2004/38?**
- 5 Which residence periods are taken into account?**
- 6 What is the status that permits EU citizens and family members to regularly reside after 3 months?**
- 7 Who are mobile EU citizens and family members?**
- 7 What are the conditions to be considered a mobile EU citizen?
- 7 In which cases does a family member of a mobile EU citizen enjoy the right to free movement?
- 8 Does the family member have to be regularly residing?
- 8 Who is considered a family member?
- 9 When are family members considered dependent?
- 9 Case studies – Family Members
- 10 What happens to family members in case of death and departure of the EU citizen or of divorce?

CHAPTER II

- 11 The first three months: what are the rights and the conditions to be met?**
- 11 Which documents are required?
- 11 Are there additional requirements?
- 12 Do mobile EU citizens have access to social assistance and student benefits in the first three months?
- 12 Is it possible to exit and re-enter the same MS and enjoying again the 3 months period?

CHAPTER III

- 13 After the first three months: what are the rights and the conditions to be met?**
- 13 What status allows regular residence?
- 14 Which are the documents required to register?

- 15 Is registration a condition for staying in the host MS?
- 15 Is the existence of an address a condition to register?
- 15 What happens to those who are not regularly residing after 3 months?
- 15 Do mobile EU citizens who have been residing for more than 3 months have access to social benefits?

CHAPTER IV

- 16 After five years: what are the conditions to be met?**
- 16 What does legal residence mean?
- 17 What does continuous residence mean?
- 17 Do mobile EU citizens who are permanent residents enjoy equal treatment with nationals?

CHAPTER V

- 18 Who may enjoy equal treatment with the national of the host MS?**
- 18 What is the difference between social security and social assistance benefits?
- 19 Do mobile EU citizens have access to social assistance and social security in the first three months in the host MS?
- 19 Do mobile EU citizens who have been residing for more than 3 months have access to social assistance in the host MS?
- 20 Do mobile EU citizens who have been residing for more than 3 months have access to social security in the host MS?
- 20 Do jobseekers who have been residing for more than 3 months have access to social assistance and social security?

CHAPTER VI

- 24 Who can be considered a worker?**
 - 24 When is the economic activity considered genuine?
 - 25 Case studies: notion of worker
-
- 26 Who can be considered as a self-employed person?**

27 In which cases do mobile EU citizens retain the status of worker or self-employed?

28 Who is considered as a job-seeker?

28 What are the conditions for job-seekers to enjoy residence rights?

29 Who decides whether the individual concerned can be considered a job-seeker?

29 What does "actively looking for a job" mean?

29 What does "having a genuine chance to find a job" mean?

30 Who can be considered as having 'sufficient resources'?

30 How much money is needed to be considered as having 'sufficient resources'?

31 Is the origin of the resources important?

31 Can social assistance be considered when assessing 'sufficient resources'?

32 What is a comprehensive sickness insurance?

32 Who needs to prove that s/he has a comprehensive sickness insurance?

CHAPTER VII

33 Can MS expel mobile EU citizens and for which reasons?

33 What happens to mobile EU citizens once they are expelled?

34 What should be included in an expulsion order?

34 What is public policy or public security as a ground for expulsion?

34 Is the residence period important in the assessment of whether a mobile EU citizen must be expelled on ground of public policy or security?

35 What needs to be considered in the assessment of a threat to public policy or security?

36 When is an expulsion order adopted on ground of public policy or security proportionate ?

38 When are expulsions possible in case of loss of residence rights?

40 When and how can a MS check if a mobile EU citizen is regularly residing?

40 When do mobile EU citizens become an unreasonable burden?

41 What is fraud or abuse of rights? What can that entail?

GLOSSARY

EU	European Union
MS	Member State
NHS	UK National Health System
TCN	Third-country national
UK	United Kingdom

CHAPTER



Who can benefit from EU free movement rights under Directive 2004/38¹?

- ▶ Mobile EU citizens;
- ▶ family members of a mobile EU citizen.

Which residence periods are taken into account?

- ▶ All EU citizens and family members may stay in the host MS up to 3 months;
- ▶ only EU citizens and family members having a certain status that permit them to regularly reside in the host MS may stay for more than 3 months and up to 5 years²;
- ▶ permanent residents for all EU citizens and family members after 5 years of regular residence.

¹ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member (hereinafter **the Directive**).
² In some cases, as retirement and permanent incapacity to work, active mobile EU citizens and their family members may enjoy the right of permanent residence even before the completion of a period of 5 years (see Article 17 of the Directive).

What is the status that permits EU citizens and family members to regularly reside after 3 months?

- ▶ Economically active:
 - ▶ workers;
 - ▶ self-employed;
 - ▶ persons who retain the status of workers or self-employed;
 - ▶ jobseekers
 - ▶ self sufficient;
 - ▶ students;
 - ▶ family members.

Who are mobile EU citizens and family members?

What are the conditions to be considered a mobile EU citizen?

There are two cumulative conditions to be satisfied:

- ▶ s/he needs to hold EU citizenship, which means holding the nationality of a Member State (MS) of the EU. A third country national is not an EU citizen because s/he is a national of a country not in the European Union;
- ▶ s/he must exercise, or have exercised, the right to free movement. This means that
 - ▶ s/he must have moved from a Member State of which s/he is national to another Member State – for instance, a Portuguese national who lives in Belgium;
 - ▶ or resided in a Member State of which s/he is not a national in the past – for instance, a French national who resided in Germany and then came back to France³.

In which cases does a family member of a mobile EU citizen enjoy the right to free movement?

The right to free movement also applies to family members of a mobile EU citizen. This is particularly relevant for third-country nationals, but also for EU citizens who do not have an autonomous right to reside in the host

Member State. It is very important to bear in mind that free movement rights are enjoyed by family members only when they accompany or join an EU citizen who has exercised his right to free movement.

3 See, to that effect, case C-456/12, O. and B, paragraph 50.



A Cuban citizen joins her/his Spanish wife who lives in Sweden. Free movement applies, and the case is regulated by EU law



The same Cuban joins her/his Spanish wife who lives in Spain and has never exercised the right to free movement. EU law does not apply, and the case is regulated by national law, which might be stricter. This situation is referred to as reverse discrimination: EU mobile citizens may enjoy more favourable treatment than non-mobile.

Family members can accompany the EU citizen as they move between Member States, join her/him from outside the EU or begin the relationship in the Member State where the mobile EU citizen moved to.

Does the family member have to be regularly residing?

The European Court of Justice ruled that a TCN who is the spouse of an EU mobile citizen enjoy derivative free movement rights irrespective of when and where their marriage took place and of how the national of a non-member country entered the host Member State (no prior lawful residence is required)⁴.

Who is considered a family member?

- ▶ The spouse⁵ or registered partner (if the partnership is recognised by both host and home MS);
- ▶ children (also adopted) under 21 years of age or dependent, including the children of the spouse or partner;
- ▶ dependent parents of the EU citizen and those of the spouse or partner;
- ▶ TCN parents who are the primary carers of EU children living in the MS of nationality of the children⁶.

4 Case C-127/08, Metock.

5 In the case of the same-sex spouse of an EU citizen see the case C-673/16, Coman.

6 This category of family members is not formally recognised by the Directive, but the EU Court confirmed that third Country Nationals may enjoy residence rights in the host MS if their children with EU citizenship depend on them (Case C-34/09, Ruiz Zambrano).

The entry and residence of other family members (extended) has to be facilitated for:

- ▶ any other family member dependent on, or member of household of, or having serious health conditions requiring personal care by, EU citizens, and for;
- ▶ partners with a durable relationship duly attested (this covers partnership not recognised by host MS).

When are family members considered dependent?

A family member is dependent when her/his material support is provided by the EU citizen or by his/her spouse/partner. This is irrespective to the duration of the dependency or the amount of support.

Case studies – Family Members

a. Children under 21 years old



Aziz, 15 years old, Moroccan who resides in Morocco, is the son of a French woman living in Belgium. Aziz can enjoy free movement and join her mother in Belgium.

b. Children over 21 years old and not dependant



Karim, 25 years old, Moroccan who resides in Morocco, is the son of a French woman living in Belgium. Karim is not supported by his mother thus not considered dependant on an EU citizen and must rely on Belgian immigration rules to move to Belgium.

c. Dependent parent



Li, a Chinese national, is married to a German and both are residing in Sweden. Ms Jia, mother of Li and Chinese herself, lives in China and relies on the financial contribution from her son and his wife. Ms. Jia, being a dependent family member of an EU citizen, is entitled to a residence permit in Sweden⁷.

⁷ Case C-1/05,Yunying Jia.

What happens to family members in case of death and departure of the EU citizen or of divorce?

The residence right is retained in case of death or departure of the EU citizen:

- ▶ by EU family members in case of death and departure of the EU citizen;
- ▶ by TCN family members in case of death (but not departure) of the EU citizen provided that they have been residing in the host MS for at least one year before the death;
- ▶ in case of death or departure of the EU citizen by his TCN children and by the TCN parent having the custody until completion of the studies.

The residence right is retained in case of divorce or termination of partnership:

- ▶ by EU family members;
- ▶ by TCN family members provided that the marriage or registered partnership has lasted at least three years (including one year in the host MS) or when the TCN has the children custody or a right to access to a minor child or in case of domestic violence.

CHAPTER



The first three months: what are the rights and the conditions to be met?

EU Citizens and their family members have the right to move to and reside in another EU Member State for up to three months. However, economically inactive EU citizens may not become an unreasonable burden on the social assistance system of the host MS (Article 14(1) Dir. 2004/38).

Which documents are required?

EU CITIZENS	TCN FAMILY MEMBERS
Valid identity card or passport	Only passport

Are there additional requirements?

EU CITIZENS	TCN FAMILY MEMBERS
MS (of exit and of entering) may not require any visa or equivalent formality	Host MS may require upon entering to obtain an entry visa. Such visa shall be granted free of charge as soon as possible. This does not apply if such TCN family members already possess a valid residence card in an EU MS ⁸ .

- ▶ A delay of more than 4 weeks for issuing a visa for TCN family members is not reasonable;
- ▶ TCN family members entering without documents or visa may prove their identity or marital ties and must be accepted if there is no risk to public policy⁹.

8 Case C-203/13, McCarthy.

9 Case C-459/99, MRAX, paragraph 61.

Do mobile EU citizens have access to social assistance and student benefits in the first three months?

They are not entitled to social assistance unless they are:

- ▶ workers; or
- ▶ self-employed; or
- ▶ persons who retain the status of worker or self-employed; or
- ▶ family members of workers or self-employed or of individuals who retain the status of worker.

Access to social assistance for job-seekers is not compulsory.

Is it possible to exit and re-enter the same MS and enjoying again the 3 months period?

If the person leaves the Member State and comes back again, a new period starts. Some countries like France consider that artificially multiplying short term stays with the goal to maintain the right to stay may amount to an abuse of EU rights¹⁰.

10 Code de l'entrée et du séjour des étrangers et du droit d'asile - Article L511-3-1.

CHAPTER



After the first three months: what are the rights and the conditions to be met?

Mobile EU citizens and their family members may be asked by the host MS to report their presence on the territory within a reasonable period and not less than 3 months from their arrival. National authorities must provide:

- ▶ mobile EU citizens regularly residing with a residence certificate immediately upon request after verification of the conditions and with a validity of 5 years from the date of issue;
- ▶ within 6 months, TCN family members of mobile EU citizens with a residence card that has a validity of 5 years but that might expire in case of prolonged absences. The validity of the residence card cannot be affected by temporary absences not exceeding six months a year, or by absences of a longer duration for duly attested reasons.

What status allows regular residence?

The Directive sets out the categories of people with a right to reside in a host MS for longer than three months:

- ▶ economically active individuals: workers with a confirmation of engagement from the employer or certificate of employment; self-employed persons; persons who retain the status of workers or self-employed; job-seekers with a genuine chance to find a job;

- ▶ self-sufficient persons: economically inactive individuals who have sufficient resources for themselves and their family members not to become a burden on the social assistance system and have comprehensive sickness insurance;
- ▶ students: who have comprehensive sickness insurance cover and provide a declaration stating that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system;
- ▶ family members accompanying or joining an EU citizen who has the right to reside.

Which are the documents required to register?

WORKERS AND SELF-EMPLOYED	<ul style="list-style-type: none"> ▶ ID or passport; ▶ a confirmation or certificate of employment or proof of self-employment.
PERSON OF INDEPENDENT MEANS	<ul style="list-style-type: none"> ▶ ID or passport; ▶ proof of sufficient resources and sickness insurance.
STUDENTS	<ul style="list-style-type: none"> ▶ ID or passport; ▶ proof of enrolment and sickness insurance; ▶ declaration on sufficient resources.
FAMILY MEMBERS	<ul style="list-style-type: none"> ▶ ID or passport; ▶ proof of family relationship; ▶ registration certificate of the EU citizen they are accompanying or joining.
JOBSEEKERS	<ul style="list-style-type: none"> ▶ ID or passport; ▶ employment office registration; ▶ evidence of job seeking and of genuine change (if registering after 6 months of staying).

Is registration a condition for staying in the host MS?

In principle registration or the possession of a document or of a registration certificate are not conditions for enjoying the right to reside in the host MS. Failure to comply with the registration requirement cannot therefore justify the expulsion of a mobile EU citizen.

Is the existence of an address a condition to register?

EU law precludes a MS from making the right of residence of an EU citizen in another MS subject to a condition of having a permanent or temporary address. EU citizens who meet the conditions set out in the Directive have a right of residence, irrespective of whether they are homeless or not. The EU Commission made it clear that being homeless cannot not be considered as a reason to revoke the right of residence of a EU mobile citizen.

What happens to those who are not regularly residing after 3 months?

They lose the right to reside and may be expelled or served with an order to leave the territory if they become an unreasonable burden on the social assistance of the host MS.

Do mobile EU citizens who have been residing for more than 3 months have access to social benefits?

Workers, self-employed persons and persons who retain these statuses, self-sufficient persons and family members who accompany or join people who hold these statuses are entitled at the same level than nationals to host welfare benefits. Access to host welfare benefits is not compulsory for job-seekers with a genuine change to find a job or who do not retain the status of worker and for students.

CHAPTER IV

After five years: what are the conditions to be met?

After five years of legal and continuous residence, mobile EU citizens are entitled to a permanent residence certificate immediately upon application, and after having verified duration of residence, and TCN family members to a permanent residence card no later than 6 months from the application.

Once acquired, the right of permanent residence may be lost only after an absence from the host MS for a period exceeding two consecutive years. Permanent residents no longer have to provide evidence of being economically active nor of having sufficient resources.

What does legal residence mean?

It means that the person in question has been residing in the host state under one of the statuses for regularly residing in the host MS after three months.

This may also result in a combination of the statuses for regularly residing. By way of example, if an EU citizen entered the host MS as student or a jobseeker and then found a job, the MS will take into account both periods to calculate the five years of legal residence.

What does continuous residence mean?

Continuity of residence cannot be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another MS or a third country.

Do mobile EU citizens who are permanent residents enjoy equal treatment with nationals?

Permanent residents enjoy equal treatment with nationals and have full access to the welfare system on the same terms as nationals. This access is irrespective of the status that they hold.

CHAPTER

V

Who may enjoy equal treatment with the national of the host MS?

The prohibition of discrimination under article 18 and article 45 of the Treaty on the Functioning of the EU entitles mobile EU citizens to equal treatment in the host MS under the same conditions as nationals of that MS. In brief, this principle requires MSs to treat mobile EU citizens and their own nationals equally in terms of benefits (social and tax benefits, education and social welfare).

This principle has been confirmed by article 24(1) of Directive 2004/38/EC that extends the right to equal treatment also to family members who are not nationals of a Member State and who have the right of residence or permanent residence.

What is the difference between social security and social assistance benefits?

Social security benefits are contributory benefits (paid in return for contributions) such as sickness, maternity, work-related accidents, unemployment benefits and pensions. This includes also universal non-contributory social security benefits (as family and child benefits).

The rules concerning the access to these benefits for mobile EU citizens are established in Regulation 883/2004/EC.

Social assistance benefits cover any assistance granted by public authorities to destitute persons who do not have resources sufficient to meet their needs (and of their family).

These are non-contributory cash benefits paid with no contribution requirements to cover minimum living expenses (as subsistence benefits, social allowances, contribution to accommodation, heating costs, etc.).

The rules concerning the access to social assistance for mobile EU citizens are established in the Directive 2004/38/EC. Some of these benefits are also falling under the scope of Regulation 883/2004/EC.

Do mobile EU citizens have access to social assistance and social security in the first three months in the host MS?

Workers and self-employed and persons who retain these statuses, self-sufficient persons and family members who accompany or join people who hold these statuses are entitled to the same social assistance and social security benefits as nationals from the beginning of their stay¹¹. During the first three months of residence the host Member State is not obliged to grant social assistance to economically inactive EU citizens. Neither is it obliged to grant social assistance to first-time jobseekers or jobseekers who did not retain the status of worker or of self-employed person.

Do mobile EU citizens who have been residing for more than 3 months have access to social assistance in the host MS?

Workers and self-employed and persons who retain these statuses, self-sufficient persons and family members who accompany or join people who hold these statuses are entitled at the same level than nationals to social assistance benefits.

Economically inactive EU citizens without resources or sickness insurance are in principle not entitled to social assistance benefits. Social services may decide on the basis of the national rules to provide also inactive EU mobile citizens with social assistance. However, claiming social assistance can give rise to a reasonable doubt on the part of the national immigration authorities that the person may have become an unreasonable burden on the social assistance system. A Member State may therefore make the grant of a social assistance or special non-contributory benefit to an EU citizen from another Member State conditional upon that citizen meeting the requirements for obtaining a legal right of residence for a period exceeding three months. However, Member States cannot refuse the granting of these

¹¹ In addition, Regulation 883/04 (article 6) entitles mobile EU citizens to have the periods of insurance, employment and residence they have completed in a Member State taken into consideration for the entitlement to benefits in the host MS.

benefits automatically to economically inactive EU citizens nor can they automatically consider those claiming these benefits as not possessing sufficient resources and thus as not having a right of residence. Authorities should assess the individual situation considering a range of factors such as the amount, duration, temporary nature of the difficulty or overall extent of the burden which a grant would place on the national assistance system. If, on this basis, authorities conclude that the persons have become an unreasonable burden, they may terminate their right of residence.

Do mobile EU citizens who have been residing for more than 3 months have access to social security in the host MS?

Workers, self-employed and persons who retain these statuses, self-sufficient persons and family members who accompany or join people who hold these statuses are entitled at the same level than nationals to social security benefits.

To obtain social security benefits economically inactive EU citizens have to pass a habitual residence test, proving that they have their centre of interest in the Member State in question. They also

have to prove to have a right to reside in the host MS.

Do jobseekers who have been residing for more than 3 months have access to social assistance and social security?

Job seekers, after three months of staying, even if they fulfil the conditions for not being expelled (job seeking and having a genuine chance), are not entitled to social assistance in equal terms with the national of the host MS.

However, job-seekers, in the opinion of the EU Court, qualify as workers under the Treaty, and therefore have the right to equal treatment and they may be entitled to benefits aimed at facilitating access to employment in the labour market of the host MS (as basic benefits for jobseekers). In case they have their habitual residence in the host MS they may also qualify for social security benefits other than social assistance in the host MS provided they fulfil the substantial requirements (such as family benefits).

In addition, jobseekers may also, under certain conditions, continue to receive unemployment benefits in the host MS from the MS where they became unemployed (the MS of origin)¹².

¹² For further information https://europa.eu/youreurope/citizens/work/finding-job-abroad/transferring-unemployment-benefits/index_en.htm

PERIOD OF STAYING	STATUS
FIRST THREE MONTHS	<p>Workers, Self Employed and persons who retain the status</p>
	<p>Inactive EU citizens</p>
	<p>Family members of EU citizens</p>
	<p>Jobseekers</p>
RESIDENCE BETWEEN 3 MONTHS AND 5 YEARS	<p>Inactive with no resources</p> <ul style="list-style-type: none"> <li data-bbox="430 531 1012 563">▶ <i>Not worker or self-employed;</i> <li data-bbox="430 563 744 595">▶ <i>not retaining that statuses; or</i> <li data-bbox="430 595 1001 659">▶ <i>not still seeking a job or does not have genuine chance of finding a job.</i>
	<p>Jobseekers</p>
	<p>Former Active</p>
	<p>Workers or self-employed</p>
	<p>Self-sufficient persons</p>
	<p>Family Members of EU citizens with a right to reside</p>
PERMANENT RESIDENT (OVER 5 YEARS)	<p>EU citizens and their family members</p>

ACCESS TO SOCIAL ASSISTANCE IN THE HOST MS

Social assistance like national citizens.

MS have no obligation to grant social assistance

Only family members of workers, self-employed or persons who retain the status are entitled to social assistance during the first three months of staying.

MS have no obligation to grant social assistance

MS have no obligation to grant them social assistance

Social security benefits may be granted if they have their habitual residence and are regularly residing¹³ in the host MS

Jobseekers up to five years of legal residence in the host MS are not entitled to social assistance, even where the benefit in question appears to be an unemployment benefit.

EU jobseekers are entitled only to claim benefits that facilitate access to the labour market (like job-seekers allowances), but not where the benefit has a social assistance element.

Social security benefits may be granted if they have their habitual residence and are regularly residing in the host MS

Social assistance like national citizens as long as the status of worker or self-employed person is retained

All social benefits like national citizens

Social assistance like national citizens, unless they become an unreasonable burden

Social security benefits may be granted if they have their habitual residence and are regularly residing in the host MS

All social benefits like national citizens

All social benefits like national citizens

13 Case 308/14, Commission v. UK

CHAPTER VI

Who can be considered a worker?

The broad interpretation of the notion of workers provided by EU Courts is binding and is not subordinated to national labour law.

The main conditions to be considered a worker are:

- ▶ to carry-out a genuine and effective economic activity, i.e. any work activity that is not marginal or ancillary (also, part-time work; traineeship, apprenticeship, domestic work, au pair work);
- ▶ for a remuneration. The amount is irrelevant (also low-income or even just food and lodging as remuneration);
- ▶ for and under the direction of someone else. The employment relationship requires the involvement of two parties;
- ▶ for a certain period, including short-term activities.

When is the economic activity considered genuine?

EU case law does not set any minimum number of hours, duration of the working relationship, nor level of compensation among the requirements to be considered as a worker. A national rule or policy that automatically provides a threshold of minimum hours or compensation to be considered a worker is in breach of EU law.

Case studies: notion of worker



Early case law considered that an activity provided as part of a drug rehabilitation program cannot be regarded as a real and genuine economic activity since the work was designed for persons who, by reason of addiction to drugs, were unable to work under normal conditions¹⁴.



The previous decision was partially upheld in a following case where a person employed under a job creation scheme was considered a worker. This was the case of a working contract reserved for recipients of social assistance in order to enable unemployed persons to enter or re-enter the general labour market¹⁵.



Work in the context of a reintegration program in the labour market was again confirmed as an activity that could be genuine and real in another decision. A French national living in Belgium who performed for a charity hostel various jobs for 30 hours a week, as part of a personal reintegration programme, in return for which they receive benefits in kind (accommodation) and some pocket money can claim a right of residence as a worker if the activity is real and genuine¹⁶. The Court considered that neither the *sui generis* nature of the employment relationship under national law, nor the level of productivity of the person concerned, the origin of the funds from which the remuneration is paid or the limited amount of the remuneration can have any consequence in regard to whether or not the person is a worker.



A cleaner with a contract of employment of 5.5 hours per week providing them a monthly wage of EUR 175 must be considered as a worker even if the wage covers only partially the minimum necessary for their subsistence¹⁷.

14 Case C, Bettray, paragraph 17.

15 Case C-1/97 Birden.

16 Case C-456/02, Trojani, paragraphs 20-24.

17 Case C-14/09, Genc, paragraphs 26-28.



MSs tend to interpret the genuine and effective nature of the activity narrowly in order to exclude EU mobile citizens executing low wage and hour employment from residence rights. Many national public authorities employ hours or earnings thresholds as a means to define what constitutes work. For instance, in Denmark and Belgium work below 10-12 hour is generally considered as marginal and ancillary¹⁸.

A person who bases their income on begging cannot be considered a worker because there is not an employment relationship.

Who can be considered as a self-employed person?

Self-employed people are those who work in their own business for the purpose of earning a profit. They perform tasks under their own responsibility,

outside any subordination relationship, in return for remuneration and bear the economic risk of the business.



Sex work may be considered a provision of services for remuneration and therefore may fall within the concept of economic activities¹⁹. In MS (like Germany and Netherlands) where street and window or club prostitution is regulated, prostitutes may be considered as self-employed persons and therefore having a right to reside if they are able to furnish proofs of their activity (bills, clothes receipts, registration to the public order office).

18 <http://ec.europa.eu/social/BlobServlet?docId=15476&langId=en>

19 Case C-268/99, Jany.



In the UK, a homeless mobile EU citizen vendor of a newspaper for the homeless was considered by a British Tribunal as self-employed person and therefore entitled to access housing benefits²⁰. However, in another case, a different British Tribunal considered that the vendor could not establish a right to reside on the basis of being a self-employed person given the lack of corroboration of the hours worked each week and the very low level of earnings²¹

In which cases do mobile EU citizens retain the status of worker or self-employed²²?

STATUS	Temporal inability to work for illness or accident	Involuntary unemployment after having been employed for more than 1 year	Involuntary unemployment after having been employed for less than 1 year	Attending vocational training	Maternity ²³
CONDITIONS		Being registered as jobseekers	Being registered as jobseekers	Unless in case of involuntary unemployment the training must be related to previous employment.	Returning to work or find other employment
DURATION	For all the duration of the inability	Indefinitely	For at least 6 months After 6 months, they may stay in the host MS as jobseekers	For the duration of the vocational training	Within a reasonable time after birth

20 Bristol City Council v FV (HB) [2011] UKUT 494 (AAC), CH/2859/11.

21 DV v SSWP [2017] UKUT 0155 (AAC) - <https://www.gov.uk/administrative-appeals-tribunal-decisions/dv-v-secretary-of-state-for-work-and-pensions-2017-ukut-155-aac>

22 In case C-442/16 Florea Gusa the Court of Justice confirmed that provisions on retention of worker status also apply to mobile Union citizens who have been self-employed

23 The Court stated that the list of cases in article 7(3) of the Directive is not exhaustive and recognized maternity as a ground for retaining the status (Case C-507/12, Saint-Prix).

CASE STUDY:

An EU citizen living and working in Germany who lose his/her job after having worked for less than one year, will initially retain the status of worker for at least 6 months, but after that date, if s/he cannot find a new job and do not fulfil the condition to be considered a jobseeker s/he will lose her right

to reside and access to social assistance. However, if that same EU citizen loses his/her job after working for more than one-year s/he may retain the status of worker and keep his/her right to reside in the host member State provided that s/he is registered as a jobseeker²⁴.

Who is considered as a job-seeker?

What are the conditions for job-seekers to enjoy residence rights?

- ▶ During the first six months of residence, they are only required to hold a valid identity card or passport. Member States cannot automatically require a job-seeker to leave as soon as the six months' period expire;
- ▶ After six months they can remain and are protected against expulsion if they can provide evidence of having a genuine chance of being engaged and are actively looking for a job



Some MSs tend to consider that jobseekers have the right of residence without being subject to any conditions or formalities only for a period not exceeding three months. For instance, in Belgium jobseekers need to prove registration to the employment office and to have a genuine chance of being engaged already after three months of staying.

24 See for instance Case C-67/14, Alimanovic.

Who decides whether the individual concerned can be considered a job-seeker?

This varies according to Member States. EU citizens are normally required to register in a job centre as jobseekers but the assessment of the genuine chance to find a job, as a condition for having a right to reside in the host MS, is responsibility of the Immigration Office.

What does “actively looking for a job” mean?

This essentially means that the person must provide evidence of job-seeking. This normally requires being registered to a job centre and actively using the services offered there (as following action plans proposed by the job consultants at job centres), updating the CV and submitting reports on job applications

What does “having a genuine chance to find a job” mean?

National authorities must take into account the personal situation of the person concerned, including any diploma that s/he has obtained, any professional trainings that s/he has undertaken and the duration of the period of unemployment in order to assess whether the person has a genuine chance to find a job. Registering with the employment

office is not sufficient for being considered as having a genuine chance. Intensive personal initiative is required and it must be possible to verify that the individual is actively seeking a position, e.g. through correspondence with potential employers or by way of job interviews and newspaper advertisements.

EXAMPLES OF THE IMPLEMENTATION OF THE GENUINE CHANCE REQUIREMENT

A person still seeking work but who provides evidence that s/he has recently undertaken further training which guarantees her/him a position as an apprentice upon completion of the training course must be considered as having a genuine chance of being engaged in work.

An individual who is not registered at a job centre or who systematically refuses to accept any referred suitable employment offer or that does not accept to participate in job training courses and other relevant activities will not be considered as having a genuine chance of being engaged.

A long period of inactivity may be taken as demonstration that a jobseeker does not have a genuine chance of being engaged.

Taking language classes or engaging in vocational training have not been considered as sufficient to demonstrate a genuine chance of being engaged.

Who can be considered as having ‘sufficient resources’?

Having sufficient resources is the only status, besides being a family member or student, that allows economically inactive EU citizens to stay for more than 3 months. The condition to have a right of residence for economically inactive EU citizens is to have *sufficient resources* for themselves and their family members not to become a *unreasonable burden on the social assistance system*. This means they need to have enough money to live in the host MS without making recourse to social assistance.

CASE STUDY

In Germany for instance the existence of sufficient means of subsistence can be assumed if no application is made for social benefits. The immigration office can, however, require proof of the existence of sufficient means of subsistence after a stay of 3 months.

How much money is needed to be considered as having ‘sufficient resources’?

EU citizens are generally considered having sufficient resources when the level of their resources is higher than the threshold below which social assistance benefits are granted in the host MS (a minimum subsistence benefit or a minimum social security pension). In practice proof of sufficient resources can be demonstrated by means such as the possession of a credit card or a certification of having funds at a bank or being entitled to social benefits such as pensions or contributory unemployment benefits.

CASE STUDY

In Belgium an amount of €892,70 per month corresponding to the threshold below which a person may be eligible for social assistance has been considered as the minimum level of sufficient resources to have a right to reside.

A person with a limited amount of resources (like a 500 euro invalidity pension from another MS) and with accommodation in the host MS may be considered having sufficient resources.

Is the origin of the resources important?

The origin of resources does not matter; it may come for instance from previous employment or private savings and do

not have to be periodic and can be in the form of accumulated capital. The resources may also come from social benefits such as pensions or from third parties as family members, from alimony paid by former partner or also from a person not having a legal link with the beneficiary.

Can social assistance be considered when assessing 'sufficient resources'?

Sufficient resources must be assessed without considering the social assistance granted by the host MS. Money coming from social assistance must not be considered but money coming from other social benefits, such as pensions or contributory unemployment benefits, must be taken account of.

What is a comprehensive sickness insurance?

Any health insurance, private or public, contracted in the host MS or elsewhere that provides comprehensive coverage and does not create a burden on the public finances of the host MS.

The European Health Insurance Card offers such comprehensive cover during short period of stay in the host Member State (when the EU citizen concerned does not move her/his residence in the host MS and has the intention to return in the home MS, as in case of studies or posted workers).

Who needs to prove that s/he has a comprehensive sickness insurance?

Students and economically inactive EU citizens. Pensioners fulfil the condition of comprehensive sickness insurance cover if the MS that pays their pension also covers for health treatment.

Example: a German national brought his Colombian family to the UK. They lived off private income and did not rely on public financial assistance. They also had comprehensive medical cover back in Germany. UK refused to renew their residence permit because they did not have emergency cover in UK. The Court of Justice considered that B already satisfied the condition of having medical insurance and that it would have been disproportionate to deny his right of residence simply on the ground that his sickness insurance did not cover emergency treatments²⁵.

In the UK, EU mobile citizens may use public National Health system (NHS), but affiliation to the NHS does not count as comprehensive sickness insurance. Inactive mobile EU citizens who cannot rely on coverage by their home MS need additional coverage by contracting private insurance.

25 Case C-413/99, Baumbast.

CHAPTER **VII**

Can MS expel mobile EU citizens and for which reasons?

EU rules allow for expulsions of mobile EU citizens and the members of their families:

- ▶ for reasons related to public policy or public security²⁶ (as for criminal activity or social harming behaviours). This ground applies to all mobile EU citizens;
- ▶ for reasons related to loss of residence rights. This ground applies only to economically inactive persons without sufficient resources;
- ▶ for reasons related to fraud or abuse of rights (falsification of documents or marriage of conveniences). This ground applies to all mobile EU citizens.

What happens to mobile EU citizens once they are expelled?

They can re-enter the territory of which they are nationals without any formality and they can also move to another Member State. Moreover, they can re-enter the MS that expelled them, unless they were object of a re-entry ban, which can be issued only on grounds of public policy or public security.

26 Under the Directive public health is also mentioned as a ground for adopting restrictions on free movement. The limitation on threat to public health is in fact more a condition for refusal of access to the territory of the host MS or to release a first residence card or certificate than a ground for expulsion. Once recognized the right of residence cannot be contested on health grounds.

What should be included in an expulsion order?

An expulsion order must be notified in writing and include:

- ▶ a full justification to understand the reasons of the decision and its implications;
- ▶ the time limit and the court or administrative authority to lodge and appeal;
- ▶ the time allowed for the individual concerned to leave the territory of the MS. Save in cases of urgency, the time allowed to leave the territory cannot be less than one month from the date of notification. In assessing the need to reduce this time in cases of urgency, the authorities must consider the impact of an immediate or urgent removal on the personal and family life (e.g. need to give notice at work, terminate a lease, need to arrange for personal belongings to be sent to the place of new residence, the education of children, etc.).

What is public policy or public security as a ground for expulsion?

The notions of public policy and security are established at national level by Member States in accordance with their needs, which can vary from one period to another.

Public policy aims at preventing disturbance of social order (criminal offence, unlawful possession of drugs, violent actions to overthrow the order of the state or others social harmful behaviours) while public security covers internal and external security of the MS. Terrorism, trafficking in human beings, sexual exploitation, drug and arms trafficking, money laundering, corruption, counterfeiting means of payment, computer crimes and organised crime might all be considered as imperative grounds of public security.

Is the residence period important in the assessment of whether a mobile EU citizen must be expelled on ground of public policy or security?

The longer a person has resided in the host MS the stronger the safeguards against expulsion:

- ▶ less than 5 years: s/he might be expelled only if the personal conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;
- ▶ more than 5 years: s/he may be expelled only on serious grounds of public security or public policy;

- ▶ more than 10 years or minors: may be expelled only on imperative grounds of public security. Trafficking in narcotics as part of an organised group²⁷ and sexual exploitation of children²⁸ have both been recognised as criminal offences covered by the concept of 'imperative grounds of public security.

What needs to be considered in the assessment of a threat to public policy or security?

- ▶ The nature and seriousness of the offences;
- ▶ their frequency and time elapsed since the offences (good behaviour? release on parole?);
- ▶ the damage or harm caused;
- ▶ the degree of social danger resulting from the presence of the person in that MS.

Past conduct, previous criminal conviction or actual imprisonment shall not in themselves constitute grounds for expulsion and can be considered only as evidence of personal conduct where there is a likelihood of reoffending²⁹.

A simple infringement of the social order by breaching the law - as possessing drugs or prostitution or city begging - is not enough, but persistent petty criminality may represent a threat to public policy, even though any single crime, individually, would be insufficient. Danger of re-offending may be considered greater in the case of drug dependency if there is a risk of further criminal offences committed in order to fund the dependency.

CASE STUDIES

- ▶ Collective expulsions of mobile EU citizens found to be living in illegal settlements or in abandoned flats, without financial means, are in breach of EU law if adopted without considering their personal conduct and the background of the individuals concerned. Illegal occupation of property is not sufficient to qualify as a threat;
- ▶ a Bulgarian citizen is sleeping rough in the streets of Copenhagen and is begging to make his end meets. He is arrested by the police and receives a deportation order because he is considered a threat to public policy.

27 Case C-145/09, Tsakouridis.

28 Case C-348/09, P.I.

29 See Cases C-482/01 and 493/01 Orfanopoulos and Olivero (paras 82 and 100) and C-50/06 Commission v Netherlands (paras 42-45).

Expulsions must not be automatic: in this case the Foreign Office, after having assessed the existence of a serious and present threat on public policy, to justify the expulsion should take into account the personal conduct and the degree of social integration of the person;

- ▶ A and Z have finished serving their two-year sentence for robbery. This was A's first conviction and since she left prison she has found a job. She does not represent a genuine, present and sufficiently serious threat. For Z, this was her fourth conviction and in less than two weeks, she is caught planning another robbery. Her conduct may be considered a threat to public policy and therefore a sufficient ground for expulsion.

When is an expulsion order adopted on ground of public policy or security proportionate ?

Once the authorities established the existence of a threat, they also have to assess whether the expulsion measure is appropriate and whether there are less stringent measures.

MSs must consider the personal situation of the individual concerned and in particular:

- ▶ the length of residence and social integration in the host MS (family links, language skills);
- ▶ age and health;
- ▶ the impact of the expulsion on other family members who would have a right to remain;
- ▶ the links with the country of origin.

CASE STUDY

The expulsion of a French citizen who was raised in Germany from an early age and who does not speak French may be considered disproportionate because of the lack of ties with the MS of origin and the strong ties with the host MS. On the contrary, the expulsion of a mobile EU citizen, who committed the same crime but who has been living in the host MS only for a few months, could be considered proportionate.

When are expulsions possible in case of loss of residence rights?

These grounds only target economically inactive mobile EU citizens who do not have sufficient resources and ask for social benefits in the host MS.

Economically active persons (and persons treated as such) and their family members always retain their right of residence and in no case should be expelled on grounds related to residence conditions

Economically inactive persons during the first three months retain a right of residence as long as they do not become an unreasonable burden on the social assistance system of the host MS

Economically inactive persons with a right to reside (student or self-sufficient persons) after 3 months retain a right of residence as long as they satisfy the conditions on financial resources and sickness insurance.

Economically inactive persons not regularly residing after 3 months (as jobseekers who do not have a genuine chance of being engaged) can be expelled if they become an unreasonable burden on the social assistance system of the host MS.
Expulsions must not be the automatic consequence of recourse by an EU mobile citizen and his family members to the social assistance system of the host MS. But If an EU mobile citizen without sufficient resources apply for social benefits he may be considered a burden

*M, an Italian citizen entered Germany to seek employment and found a job. He and his family members may not be expelled on this ground as long as M keeps the status of worker
Jobseekers may not be expelled as long as they demonstrate to have a genuine chance of being engaged*

However, under EU law these persons are not entitled to social assistance in that period. Only a repeated and protracted use of social assistance would justify an expulsion measure during the first 3 months of staying in the host MS. In practice, they are generally not allowed to apply for welfare assistance

A homeless person in Berlin has no resources nor health insurance; consequently, s/he does not meet the conditions to have a right to reside in the host MS. If s/he is not using any emergency care or shelter in the host MS s/he cannot be considered an unreasonable burden for the social assistance of the host MS and therefore s/he must not be expelled. If s/he is using emergency care or shelter provided by the host MS s/he may be considered an unreasonable burden and therefore s/he may be expelled.

When and how can a MS check if a mobile EU citizen is regularly residing?

The burden of proof is on the MSs. They have therefore to prove that the individual concerned does not have sufficient resources or a sickness insurance before issuing a removal order. When there is a reasonable doubt, MSs may verify if these conditions are fulfilled. This verification of residence rights cannot be carried out systematically.

For instance, a national policy controlling the residence rights of all the mobile EU citizens found rough sleeping or asking for social benefits in the host MS would amount to a systematic verification of EU rights that is against EU law.

When do mobile EU citizens become an unreasonable burden?

In assessing whether an individual who was granted social benefits is an unreasonable burden, public authorities must carry out a proportionality test, which features three sets of criteria:

- ▶ Duration:
 - ▶ for how long is the benefit being granted? Is it a case of temporary difficulties?

- ▶ Is it likely that the EU citizen will get out of the safety net soon?
- ▶ How long has the residence lasted in the host MS?
- ▶ Personal situation and individual circumstances:
 - ▶ what is the level of connection of the EU citizen with the society of the host MS?
 - ▶ Are there special considerations on age, state of health, family and economic situation?
- ▶ Amount:
 - ▶ what is the total amount of aid granted?
 - ▶ Does the EU citizen have a history of relying heavily on social assistance?
 - ▶ Does the EU citizen have contributed to the financing of social assistance in the host MS?

CASE STUDY

A Polish citizen moved to Belgium and found a job in the construction sector. After X months, he was made redundant and lost his job. He then applied for social assistance that was granted. However, the social security authori-

ties sent his details to the Immigration office, that served him with an order to leave the territory because he did not have sufficient resources and was considered an unreasonable burden on the social assistance system. Even though he was not deported, he was unregistered and lost his social security number and access to health insurance in the host MS.

Belgium is accused of systematically controlling the economic situation of economically inactive EU migrants. Details of EU citizens who have claimed unemployment benefits are routinely passed on by the Belgian National Employment Office to the Immigration Office which then proceeds to determine if action can be taken to put an end to their right of residence.

What is fraud or abuse of rights? What can that entail?

MSs may adopt the necessary measures to refuse, terminate or withdraw any residence right in the case of abuse of rights or fraud. This ground covers artificial conducts, such as marriages of convenience, entered solely with the purpose of enjoying the right of free movement and residence.

CASE STUDIES

According to French immigration Law³⁰ a suspicion by the French authorities that the EU citizen is residing in France with the secret aim of benefiting from the welfare system justifies his expulsion. This definition of abuse of rights seems to go beyond the notion of abuse of rights existing under EU law that merely refers to artificial conducts like marriage of convenience and falsification of documents.

In the United Kingdom, the Home Office introduced the concept of rough sleeping as an abuse of rights in May 2016. Homeless charities have reported a vast increase in the numbers of mobile EU citizens, often legally residing in the UK, being removed on grounds of misuse of right because they were found rough sleeping. That policy was recently found to be unlawful by the UK High Court. The Home Office have confirmed that no further action was being taken against EU citizens for rough sleeping, and their most recent guidance has removed all references to rough sleeping as a misuse of rights³¹.

30 Code de l'entrée et du séjour des étrangers et du droit d'asile - Article L511-3-1.

31 In R (Gureckis) v Secretary of State for Home Department, on 14 December 2017.

PERIOD OF STAYING	STATUS
FIRST THREE MONTHS	Inactive EU citizens receiving social assistance All other EU citizens
RESIDENCE BETWEEN 3 MONTHS AND 5 YEARS	Inactive without resources: ▶ Not worker or self-employed; ▶ worked less than one year and run out the 6 months period; or ▶ not still seeking a job or does not have genuine chance.
	Jobseekers
	Former Active
	Workers or self-employed
	EU mobile citizens with sufficient resources and insurance
PERMANENT RESIDENT (over 5 years)	All EU citizens and their family members
RESIDENCE FOR MORE THAN 10 YEARS OR A MINOR	All EU citizens and their family members

IN WHICH CASES IS EXPULSION POSSIBLE?

On grounds of non-fulfilment of residence conditions if they are considered an unreasonable burden

On grounds of public policy and security or on grounds of abuse of rights

Only on grounds of public policy and security or on grounds of abuse of rights

On grounds of non-fulfilment of residence conditions if they are considered an unreasonable burden (assessment case by case). The expulsion must not be the automatic consequence of recourse to social assistance.

On grounds of public policy and security or on grounds of abuse of rights

If evidence of job seeking & genuine chance of being engaged, only on grounds of public policy and security or on grounds of abuse of rights

As long as they retain the status, only on grounds of public policy and security or on grounds of abuse of rights

Only on grounds of public policy and security or on grounds of abuse of rights

Only on grounds of public policy and security or on grounds of abuse of rights

Only on serious grounds of public policy and security or on grounds of abuse of rights

Only on imperative grounds of public security or on grounds of abuse of rights

NOTES

Like us



Follow us



Connect with us



European Federation of National Organisations

Working with the Homeless

194 Chaussée de Louvain, 1210 Brussels, Belgium

T +32 (0)2 538 66 69 • information@feantsa.org