

New legal framework for immigration into the Welfare State

Selected articles taken from the Directive 2004/38/EG of 29 April 2004
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Text of the Directive:	Comments:
A. Right of residence for up to three months	
<p>Article 6 (1):</p> <p>“Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.”</p>	<p>During this initial period, entitlement to social assistance in the host country can be excluded in some cases by national law.</p> <p>This follows from the considerations laid down in the preamble of the Directive:</p>
<p>Preamble, No. (21):</p> <p>“However, it should be left to the host Member State to decide whether it will grant social assistance during the first three months of residence, or for a longer period in the case of job-seekers, to Union citizens other than those who are workers or self-employed persons or who retain that status or their family members, or maintenance assistance for studies, including vocational training, prior to acquisition of the right of permanent residence, to these same persons.”</p>	<p>Exclusion is possible only in the case of individuals who are inactive or self-employed persons. The specific rule by which they can be excluded from receiving social assistance (only!) during the first three months of their stay reads as follows:</p>
<p>Article 24 (2):</p> <p>“By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of</p>	<p>With respect to the category of persons and the period of time defined here, there is no “equal</p>

<p>residence or, where appropriate, the longer period provided for in Article 14 (4) (b) [i.e., job-seekers], nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.”</p>	<p>treatment” with nationals that is otherwise required by Article 24.</p>
<p>Article 14 (1): “Union citizens and their family members shall have the right of residence provided for in Article 6 [for up to three months], as long as they do not become an unreasonable burden on the social assistance system of the host Member State.”</p>	<p>Nevertheless, even during this initial period of residence expulsion is possible only if individuals become an “unreasonable” burden on the host country’s social assistance system, not a burden as such (see below).</p>
<p>B. Conditions for a right of residence for more than three months</p>	
<p>Article 7 (1): “All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they: (a) are workers or self-employed persons in the host Member State; or (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; (...)”</p>	<p>Rules regarding longer stays are clearly more important. Employed persons have a right of residence subject to no further conditions. For other individuals, the right of residence is subject to a proof of having “sufficient resources” and comprehensive sickness insurance cover, as in the pre-existing law. Closer examination reveals, however, that these conditions have now been weakened.</p>

<p>Article 8 (1):</p> <p>“Without prejudice to Article 5 (5), for periods of residence longer than three months, the host Member State may require Union citizens to register with the relevant authorities.”</p> <p>Article 8 (4):</p> <p>“Member States may not lay down a fixed amount which they regard as ‘sufficient resources’, but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State.”</p>	<p>After three months, individuals can be required to register and give proof that they satisfy the relevant conditions (cf. Article 8 (3)).</p> <p>However, the term “sufficient resources” shall not defined as a fixed amount in national law. Furthermore, no criteria are being given for how to determine the relevant amount of resources taking into account the “personal situation of the person concerned”. Clearly, any specific requirement would have to be made transparent before, and eventually accepted by, the ECJ.</p>
<p>Preamble, No. (31):</p> <p>“This Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In accordance with the prohibition of discrimination contained in the Charter, Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinion, membership of an ethnic minority, property, birth, disability, age or sexual orientation.”</p>	<p>There may be yet another restriction:</p> <p>It is unclear how absence of discrimination with respect to property, a fundamental commitment stated in the preamble of the Directive, could interfere with a personalised definition of sufficient resources. An extreme implication could be that denying individuals with few resources the right of residence is effectively impossible. In any case, there is a conflict here implying that the amount of resources required for a given</p>

	individual may have to be set substantially below the social assistance threshold.
<p>Article 14 (2): “Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein. In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.”</p> <p>Article 14 (3): “An expulsion measure shall not be the automatic consequence of a Union citizen’s or his or her family member’s recourse to the social assistance system of the host Member State.”</p>	<p>The condition of having sufficient resources is relevant during a period of residence of up to five years. Verifying whether it is met is possible if there is “reasonable” doubt, but there shall be no systematic checks.</p> <p>In principle, EU citizens are given access to the host country’s social assistance system from the very beginning, even though this entitlement is temporarily suspended through the condition of holding sufficient resources (cf. Article 24 (1) below). If resources are being run down faster than expected, claiming social assistance benefits is not in itself a legitimate reason for expulsion (as with Article 6).</p>
<p>Preamble, No. (16): “As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. (...)”</p>	<p>This is again evident from the Preamble: Expulsion of individuals claiming social assistance benefits is the exception rather than the rule, restricted to the case where paying benefits</p>

	<p>is an “unreasonable burden”. Claims that are reasonable are justified. There are no criteria for what would be unreasonable. In the case of a dispute, the host country would have to prove that specific claims are unreasonable.</p> <p>In the future, Article II (34) of the EU Constitution would have to be taken into consideration stating that non-employed persons are entitled to full inclusion in their host country’s social protection system.</p> <p>Expulsion is in no case possible in the following two cases C and D:</p>
<p>C. Special regulations regarding employed persons</p>	
<p>Article 14 (4):</p> <p>“By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if:</p> <p>(a) the Union citizens are workers or self-employed persons, or</p> <p>(b) the Union citizens entered the territory of the host Member State in order to seek employment. (...)”</p>	<p>First, expulsion is ruled out if individuals have the status of employed persons,</p> <p>also in the case where they are seeking employment (not necessarily being entitled to social assistance benefits in this sub-case, cf. Article 24 (2) above).</p>

<p>Article 7 (3):</p> <p>“For the purposes of paragraph 1 (a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:</p> <p>(a) he/she is temporarily unable to work as the result of an illness or accident;</p> <p>(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;</p> <p>(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;</p> <p>(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.”</p>	<p>What also matters in this context are the rules by which the status of an employed person can be retained for an extended period of time.</p> <p>In particular, the fact that after one year in employment the status of an employed person is retained, effectively implies a right of permanent residence even in the absence of sufficient resources. The only restriction is that individuals have to register as unemployed (and may thus be required to accept a new job that is offered).</p>
<p>D. Right of permanent residence</p>	
<p>Article 16 (1):</p> <p>“Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III [i.e., Articles 6–15, among these the existence of sufficient resources and comprehensive sickness</p>	<p>Second, expulsion is ruled out if individuals have acquired a right of permanent residence. Formally, this right is granted after a maximum of five years of legal residence without inter-</p>

<p>insurance cover].”</p>	<p>ruptions of more than six months per year. (Only in the case of absence of two or more years in continuity is the right lost). After five years, a right of permanent residence is also given to persons who are not employed. It is granted without any further conditions, even if these individuals do not have sufficient resources or comprehensive sickness insurance cover.</p>
<p>Article 17 (1): “By way of derogation from Article 16, the right of permanent residence in the host Member State shall be enjoyed before completion of a continuous period of five years of residence by:</p> <p>(a) workers or self-employed persons who, at the time they stop working, have reached the age laid down by the law of that Member State for entitlement to an old age pension or workers who cease paid employment to take early retirement, provided that they have been working in that Member State for at least the preceding twelve months and have resided there continuously for more than three years. If the law of the host Member State does not grant the right to an old age pension to certain categories of self-employed persons, the age condition shall be deemed to have been met once the person concerned has reached the age of 60;</p> <p>(b) workers or self-employed persons who have resided continuously in the host Member State for more than two years and stop working there as a result of per-</p>	<p>Employed persons who entered the host country before reaching the statutory retirement age have a right of permanent residence, and are thus entitled to receive social assistance benefits, as soon as they reach this age threshold. A minimum period of stay before this entitlement becomes effective is specified only for the case of early retirement (three years of residence, at least twelve months in employment).</p> <p>In cases of incapacity to work, the right of permanent residence is also granted after fewer</p>

<p>manent incapacity to work. If such incapacity is the result of an accident at work or an occupational disease entitling the person concerned to a benefit payable in full or in part by an institution in the host Member State, no condition shall be imposed as to length of residence; (...)"</p>	<p>than five years of stay (in principle, after two years; without any time limit if incapacity to work is a consequence of work injury or occupational disease giving rise to a related benefit entitlement in the host country).</p>
<p>Article 24 (1): "Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence."</p>	<p>After a maximum of five years, Union citizens are thus entitled to claiming all kinds of benefits that the Welfare State offers its nationals.</p>

Excerpt by Ifo Institute, Munich.