

# **THE SCOPE AND INSTRUMENTATION OF THE PRINCIPLE OF EQUAL TREATMENT REGARDING SOCIAL ASSISTANCE BENEFITS**

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## **ABSTRACT**

Although social assistance is specifically excluded of Regulation No 883/2004 on the coordination of social security systems, however it regulates cash benefits which have characteristics both of the social security and of social assistance. Related to those benefits, the requirements to gain the right of residence in a different Member State according Directive 2004/38 will restrict the principle of equal treatment and non-discrimination on grounds of nationality. This takes place especially for those citizens who retain the status of worker despite not being workers, or those who are only job seekers, even when this status is lost.

**KEY WORDS:** Freedom of movement of workers, the right of residence, job-seeker, principle of equal treatment and non-discrimination on grounds of nationality, social assistance.

## **RESUMEN**

Aunque la asistencia social está expresamente excluida del Reglamento 883/2004 sobre coordinación de los sistemas de seguridad social de los Estados miembros, la propia norma regula unas prestaciones económicas que, por su naturaleza, participan de caracteres tanto de asistencia social como de seguridad social. Respecto de las mismas, el principio de igualdad de trato y no discriminación por razón de la nacionalidad va a encontrar serias matizaciones o restricciones en combinación con los requisitos para disfrutar del derecho de residencia en otro Estado miembro que contempla la Directiva 2008/34, en especial cuando se trata de ciudadanos que sin estar realizando una actividad por cuenta ajena mantienen el estatuto de trabajadores, o que son únicamente demandantes de empleo, incluso cuando pierden esta condición.

**PALABRAS CLAVES:** Libre circulación de trabajadores, derecho de residencia, demandante de empleo, igualdad de trato y no discriminación por razón de la nacionalidad, asistencia social.

## SUMMARY

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## I. SPECIAL NON-CONTRIBUTORY CASH BENEFITS

The scope *ratione materiae* of Regulation 883/2004 on the Coordination of social security systems, that replaces the former Regulation 1408/71, covers “all legislation concerning the following branches of social security: sickness benefits; maternity and equivalent paternity benefits; invalidity benefits; old-age benefits; survivors' benefits; benefits in respect of accidents at work and occupational diseases; death grants; unemployment benefits; pre-retirement benefits; family benefits”. Specifically, this Regulation precludes the Social Assistance (Article (3)1). However, the Regulation No 883/2004 is applied to a “special non-contributory cash benefits” which have “characteristics both of the social security legislation referred to in Article 3(1) and of social assistance” (Article 70(1)).

Likewise, Regulation 1247/92, amending Regulation 1408/71, indicated that “certain benefits provided under national laws may fall simultaneously within the categories of both social security and social assistance, because of the class of persons to whom such laws apply their objectives and their manner of application”. Similarity to social assistance becomes the extent “that need is an essential criterion in its implementation and the conditions of entitlement are not based upon the aggregation of periods of employment or contributions, whilst in other features it is close to social security to the extent that there is an absence of discretion in the manner in which such benefits are provided there under are awarded and in that it confers a legally defined position upon beneficiaries” (Preamble).

Social Assistance has been considered “a technique inside the broader scope of social security, which aims at the elimination of the need, when citizens, with their own means, cannot cope with the circumstances that befall them”<sup>1</sup>. This kind of situations has been identified with the following features: beneficiaries without sufficient resources; attending basic needs and not only the need for assistance; residual and complementary social insurance; benefits free of charge; financing derives from state budget, and voluntary nature for beneficiaries<sup>2</sup>.

Notwithstanding, social assistance has experienced a process in common with the progressive extension of social security scope<sup>3</sup>. In the same way, the next criteria have been used by some author to identify social assistance systems<sup>4</sup>: a) exclusively based on individual needs; b) principle of general access for all persons, not limited only to those who have developed an occupation; c) not granted according to specific risks, with the

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<sup>1</sup>Martín Mateo, R.; “Sobre el concepto de asistencia social”. Problemas Fundamentales de Beneficencia y Asistencia Social. Ministerio de Gobernación, colección Estudios 10. Madrid. 1967, p. 66.

<sup>2</sup>Martín Mateo, R.; “Sobre el concepto de asistencia social”. Op. cit., pp. 64 y 65; Rubio Nombela G.; “Caridad, beneficencia y asistencia social”. Problemas Fundamentales de Beneficencia y Asistencia Social. Ministerio de Gobernación. Colección Estudios 10. Madrid. 1967.

<sup>3</sup>An interesting study of the origins of the terms "social security" and "social welfare", the different consideration of social assistance in the international and domestic fields and, in general, the doctrinal debate on the two concepts, see Sánchez-Rodas Navarro, C.; La Aplicación del Derecho Comunitario a las Prestaciones Especiales No Contributivas. Comares. Granada. 1997, p. 104.

<sup>4</sup>Bieback, K.J.; La Discrimination Indirecte Fondee Sur le Sexe dans le Droit Social des Etats Membres des CE au Regard de la Directive (CE) 79/7. Comisión Europea. Febrero 1996, p. 20.

exception of indigence; d) usually financed by taxes; and e) supplementary character with respect to other benefits. All in all, the distinction between “social assistance” and “social security” is relative: attending needs is a common characteristic to both and, to this aim, sometimes they carry out a work of interrelation of their duties<sup>5</sup>.

In the field of EU Law, the Court of Justice has specified that the nature of each benefit is stated by Community law and internal law provisions of Member States are not decisive in this matter<sup>6</sup>. The concept of “social assistance” has a Community meaning, so identifying a benefit with the social assistance will depend on “the constituent elements of the particular benefit, in particular its purposes and the conditions on which it is granted, and not on whether a benefit is classified as a social security benefit by national legislation”<sup>7</sup>. Other elements to take into account are its contributory or non-contributory nature, and even the institution which is competent to provide benefits. It is clear that no one of these criteria is decisive to classify a benefit into the social security or social assistance scope. Over all, the surest rule to difference whether a benefit falls within one or another scope is probably the recipient position according to the host Member State legislation: “a benefit may be regarded as a social security benefit in so far as it is granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position”<sup>8</sup>. Otherwise, it is a social assistance benefit when need is prescribed as an essential criterion for its application and does not stipulate any requirement.

Article 70 of Regulation 883/2004, as noted, defines the so-called “special non-contributory cash benefits” offering a very definite legal regime that leaves little interpretive doubt. The aim of this provision is not to establish the material requirements to access to benefits, which is the responsibility of each Member State just as it is to define the scope of social coverage of such benefits<sup>9</sup>.

The hybrid nature of the “special non-contributory cash benefits” projects in their personal scope, objectives and conditions thereof. The purpose of guarantee a minimum subsistence income according the social economic level of the country concerned reveals the assistance character of that kind of benefits. Meanwhile, its social security nature derives from the objective consisting in offering an additional, supplementary or alternative protection to the risks covered by the social security branches expressly listed in Article 3(1) of the Regulation aforementioned. The “non-contributory” condition is strengthened by two main elements: on one hand, recognition and granting

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<sup>5</sup>See for instance: Rodríguez Piñero, M.; *La Seguridad Social de los Trabajadores Migrantes en las Comunidades Europeas*. IELSS. Madrid. 1981. Pérez Del Río, T.; “El Concepto de Prestaciones de Asistencia Social establecido por la Corte de las Comunidades Europeas y la Normativa Española”. *Revista Andaluza de Trabajo y Bienestar Social* n°7/1986, p.77. Alarcón Caracuel, R.M.; “La integración de los servicios sociales y la asistencia social en la seguridad social”, *Revista Andaluza de Trabajo y Bienestar Social* n°7/1986, p. 9; Sánchez-Rodas Navarro, C.; “Las Prestaciones No Contributivas y el Reglamento 883/2004”. *Revista del Ministerio de Trabajo y Asuntos Sociales* n°64/2006, p. 116.

<sup>6</sup>Cases 79/76, Fossi; 9/78 Guillard, 237/78, Toia.

<sup>7</sup>Case C-78/91 Hughes

<sup>8</sup>Case 1/72, Frilli.

<sup>9</sup>Asunto C-333/13, Dano.

of these benefits do not depend on previous contributions of the recipient; and on the other, they are financed by the general budget of each country. However, this last element hardly can be used to define de benefit nature. The attempt to demarcate the two concepts (social security and social assistance) shows new difficulties; the reason is the current globalizing trend of social protection systems and the progressive public financing through budgets.

To finish this off, each Member State has identified in its own social security system the “special and non-contributory” benefits which participate from the mentioned characters. An exhaustive and restricted list of those benefits is contained in the Annex X of Regulation No 883/2004. In conclusion, it should be understood that benefits out of this list do not fall into that category<sup>10</sup>.

Some examples of this sort of benefits are in the Community case-law. First, the Austrian law establishes a “compensatory supplement” that is granted to an individual when his retirement pension plus net revenue from other sources (plus any other amount which should be taken into account) falls short of a specific reference amount. In this case, having a habitually and lawfully resident in Austria is required to be entitled to a compensatory supplement which is equal to the difference between the reference amount and that individual’s personal income. Therefore, the right of residence is conditioned to having sickness insurance and sufficient resources, in a way that the individual has no need to request social assistance benefits, neither a compensatory supplement. The requirement consisting in having legal residence linked to having no need of a compensatory supplement or any social assistance benefit, means that the national rule presumes sufficient resources in the recipient. The compensatory supplement tries to improve a minimum level of income which allows the individual to meet their needs. Whether his incomes are below that level, it is understood that he has no sufficient resources to maintain the right to residence and could become a burden on the social assistance system of the host Member State<sup>11</sup>.

Second, the “basic provision benefits for jobseekers” established by German law, had been characterized as ‘special non-contributory cash benefits’ within the meaning of Article 70(2) of Regulation No 883/2004, because those benefits are intended to cover subsistence costs for persons who cannot cover those costs themselves and that they are not financed through contributions, but through tax revenue. Moreover, those benefits are mentioned in Annex X to Regulation No 883/2004<sup>12</sup>.

Lastly, the British law regulates the “Income support”. It is a means-tested benefit granted to various categories of persons depending on the resources they have. The granting of income support requires, inter alia, that the income of the beneficiary should

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<sup>10</sup>See, Sánchez-Rodas Navarro, C., “Las Prestaciones No Contributivas y el Reglamento 883/2004”. Op. cit., p. 124.

<sup>11</sup>Case C-140/12, Brey.

<sup>12</sup>Case C-67/14, Alimanovic.

not exceed the prescribed ‘applicable amount’. Where that amount is ‘nil’, no benefit is granted<sup>13</sup>.

A relevant issue is whether the “special non-contributory cash benefits”, which in part has nature of social assistance, has correspondence with references to “social assistance” in Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the member States. The aim of this Directive is to state the requirements to be entitled to the right of residence, and not to become a burden on the social assistance system of the host Member State; therefore, references to “social assistance” in Directive 2004/38 comprise the benefits regulated by Article 70(2) of Regulation No 883/2004. Accordingly, the Court of Justice has held that that concept “must be interpreted as covering all assistance introduced by the public authorities, whether at national, regional or local level, that can be claimed by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family and who, by reason of that fact, may become a burden on the public finances of the host Member State during his period of residence which could have consequences for the overall level of assistance which may be granted by that State”<sup>14</sup>.

The unique mixed nature of the benefits regulated by Article 70 justifies that they apply a different system of coordination within the provisions of Regulation No 883/2004, considering its features to provide adequate protection for workers and their families. This particular position is even reflected in how they apply to the granting of these benefits the basic principles governing the coordination of national social security systems of the Member States. In essence, these principles are:

First, the principle of exportability of benefits regulated by Article 7 of Regulation 883/2004. This one is not apply to “special non-contributory cash benefits” according Article 70(3) of Regulation 883/2004, meaning whether the recipient resides in a different Member State that the one whose competent institution provides and grants the benefits, he could not perceive it. Reinforcing this regard, Article 70(4) states that such benefits “shall be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation”. The Court of Justice has held that it “is thus characterized by non-exportability of special non-contributory cash benefits as the counterpart of equal treatment in the State of residence”<sup>15</sup>.

At present, it is probably that budgetary reasons common to all Member States could justify the impossibility of applying the principle of exportability to this sort of benefits. Undoubtedly, this exception today is a real challenge for the future in the progressive coordination of social security systems<sup>16</sup>.

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<sup>13</sup>Case C -507/12, Saint Prix.

<sup>14</sup>Case Brey, cited.

<sup>15</sup>Case Dano, cited..

<sup>16</sup>“The elimination of the principle of exportability of benefits” has been called as “a serious obstacle which prevents the access to these benefits”. Fernández Orrico, F.J.; “La Coordinación de las Prestaciones Especiales No Contributivas en los Diversos Estados Miembros de la Unión, Antes y

Second, the principle of aggregation of periods (Article 6 of Regulation 883/2004) is obviously not applicable regarding the coverage of periods of insurance, or employment, or professional activity. However, it is possible aggregation of periods of residence in the territory of any other Member State without discrimination on grounds of nationality, being a need to observe the particular provision in each case.

Third, the principle of a single applicable legislation (Articles 11 to 16 of Regulation 883/2004) with regard to “special non-contributory cash benefits” is simplified to the extent that the legislation of the Member State where the beneficiary resides is the only applicable, without further consideration. The Court of Justice has stated that Article 70(4) of the aforementioned Regulation establishes a “dispute rule” to determine the applicable legislation and the competent institution to grant these special benefits. This Article has a double aim: on one hand, to avoid the simultaneous application of several national legislations with the complications that it entails; on the other, to prevent that the absence of applicable legislation deprive protection on social security to persons to whom this Regulation applies<sup>17</sup>.

Finally, the principle of equal treatment and non-discrimination on grounds of nationality (Article 4 of Regulation 883/2004) implies that persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof. This principle finds also specifications and exceptions linked to the right of residence and maintenance of the status of worker, aspect which will be discussed later.

## II. FREE MOVEMENT AND RIGHT OF RESIDENCE

“The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured” (Article 3(2) of Treaty on European Union). Under these words, the Treaty on the European Union recognizes the right to freedom of movement of citizens within the territory of the Member States, as one of the fundamental freedoms on which the Union is based, for which applies the principle of prohibition of discrimination on grounds of nationality (Article 18 of the Treaty on the Functioning of the European Union). The right of every citizen of the Union “to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect” is also recognized (Article 21 TFEU).

The right of free movement is especially significant when the EU citizen also has the status of worker. It is a subjective right in front of other subjects of Community law: the European Institutions themselves, the Member States or entities or private persons<sup>18</sup>. The ECJ has stated that the free movement of workers implies the right of nationals of

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Después del Reglamento (CE) 883/2004, de 29 de Abril”. Revista del Ministerio de Trabajo y Asuntos Sociales nº 64/2006, p. 48.

<sup>17</sup>Case Brey, cited.

<sup>18</sup>See, López Garrido, D.; Libertades Económicas y Derechos Fundamentales en el Sistema Comunitario Europeo. Tecnos. Madrid.1986, p. 41.

Member States to move freely within the territory of the other Member States and to reside there for the purposes of searching employment<sup>19</sup>.

This freedom of movement is projected on two different and interrelated levels: labour and social security. The first one tries to guarantee the free of movement for workers by abolishing any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment (Article 45(2) TFEU), issues to be developed by Regulation No 492/2011. The second one, pretends to ensure the optimal level of coordination among the different national social security systems, in order to national legislations do not obstruct or impede migrant workers and their families from enjoying free movement. (Article 48 TFEU). These matters are detailed in Regulation No 883/2004.

A full and effective freedom of movement of workers must acknowledge to its holders the right to reside in one of the Member States in order to seek a job and, if necessary, exercising the rights to social security. The right of residence is an accessory right of the aforementioned freedom. It is not part of the essential content of free movement but, under certain circumstances, may affect it. Directive 2004/38 regulates the right to residence and aims to facilitate and strengthen the exercise of the fundamental right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. The Directive governs the right of residence in the host Member State in a different way, depending on whether the Union citizen has or not the status of worker. In an overall assessment, the treatment is more favourable when the citizen is a worker.

For the first period of residence (up to three months), the only requirement for every citizen is holding a valid identity card or passport (Article 6(1) of Directive 2004/38). They shall have the right of residence as long as they do not become an unreasonable burden on the social assistance system of the host Member State (Article 14(1) of Directive 2004/38). As the CJEU holds, it would be contrary to the objective of the Directive accepting that people who do not have the right of residence, may claim entitlement to social assistance benefits and be treated equally with nationals<sup>20</sup>.

Exceeded the short period of the first three months of residence, certain conditions must be fulfilled by citizens to retain the right of residence in another EU country. These conditions differ depending on if the citizen holds or not the status of worker. Citizens have the right to reside for longer than three months only if they have comprehensive health insurance and sufficient financial resources<sup>21</sup> so as not to become a burden on the host Member State's social assistance system (Article 7(1) b of Directive 2004/38).

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<sup>19</sup>Case C-292/89, Antonissen.

<sup>20</sup>Case García Nieto, cited.

<sup>21</sup>The requirement consisting in having sufficient resources on order to not become a burden on the social assistance system of the host Member State during their period of residence, "is based on the idea that the exercise of the right of residence for citizens of the Union can be subordinated to the legitimate interests of the Member States – in the present case, the protection of their public finances" (case Brey, cited). "Therefore, the financial situation of each person concerned should be examined specifically, without taking account of the social benefits claimed, in order to determine whether he meets the condition of



In this field, Member States may require Union citizens to register with the relevant authorities in order to demonstrate those conditions (Article 8(3) of Directive 2004/38). However, the Directive does not let Member States to lay down a fixed amount which they regard as “sufficient resources”. They must take into account the personal situation of the person concerned. Notwithstanding, the Directive states an important rule: “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 (Article 8(4) of Directive 2004/38). It follows that, “although Member States may indicate a certain sum as a reference amount, they may not impose a minimum income level below which it will be presumed that the person concerned does not have sufficient resources”<sup>22</sup>.

The citizen who is a worker, has the right of residence after the first three months. It is understood that he has a regular income (a salary) to guarantee him his maintenance: in other words, he has sufficient resources in the meaning of the Directive. However, the host Member State may require him to register and even to provide proof of his worker status, for instance, a confirmation of engagement from the employer (Article 8(3) of Directive 2004/38).

The concept of worker, in the context of the free movement established by TFEU, does not relate to national law, but to Community law. As the CJEU holds, the provisions of the Treaty “would therefore be deprived of all effect and the objectives of the Treaty would be frustrated if the meaning of such a term could be unilaterally fixed and modified by national law”<sup>23</sup>. That concept must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person, in return for which he receives remuneration”<sup>24</sup>. Exceptions based on the objective of the activity developed by the worker, or the period in which the activity itself should be exercised, are not allowed<sup>25</sup>.

Within the meaning of Article 45 TFEU, the concept of worker has an autonomous meaning, specific to European Union law. Together with the concept of employment relationship, must be interpreted narrowly. A “worker” must pursue effective and

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having sufficient resources to qualify for a right of residence” (case Dano, cited). The right of residence is not always based on the condition of having sufficient resources; as an exception, it occurs when the right of residence of a parent who is the primary carer for a child of a migrant worker is linked to the right of residence that has de child himself, who is in vocational training in the host Member State (case C-480/08, Teixeira).

<sup>22</sup>Case Brey, cited.

<sup>23</sup>Case 75/63, Unger.

<sup>24</sup>Case C-46/12, NL.

<sup>25</sup>Pocar, F.; Derecho Comunitario del Trabajo. Civitas. Madrid. 1988, p. 61.

genuine activities which are not on such a small scale as to be regarded as purely marginal and ancillary<sup>26</sup>, or activities without remuneration.

The CJEU has put “economic activity” on the same level as “remunerated activity”<sup>27</sup>. In practice, the discussion is whether the concept of “worker” includes or not a person who performs part-time activity very limited in terms of work hours per week, receiving a pay proportionally below the minimum wage or the minimum subsistence of the host Member State<sup>28</sup>. The answer given by the Court is that the activity performed must be effective and genuine.

In conclusion, a person who has been considered a “worker” by Community law has the right of residence and no extra requirement should be demanded to him according the Directive. Whether that worker has or not sufficient resources is not questioned, even when having a reduced pay if the activity performed is effective and genuine, but no purely marginal and ancillary. In these circumstances, the principle of equal treatment means that the worker is entitled to social assistance benefits in the host Member State as the own nationals (Article 24(1) of the Directive).

The Directive regulates some situations in which the person concerned retains the status of “worker” although he or she is not developing an activity, having consequently the right of residence, with no temporary limits. These cases refer to the next Union citizens: first, persons who are temporarily unable to work as the result of an illness or accident; second, persons who are 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; and third, persons who are embarking 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) (Article 7(3)(a), (b) and (d) of Directive 2004/38).

Apart from these cases, the case-law refers to another one in which a woman who gives up work, or seeking work, because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth retains the status of ‘worker’, within the meaning of the article 45 TFEU, provided she returns to work or finds another job within a reasonable period after the birth of her child. In these circumstances, she cannot be deprived of the status of worker. The Court has held that “the fact that she was not actually available on the employment market of the host Member State for a few months does not mean that she has ceased to belong to that market during that period, provided she returns to work or finds another job within a reasonable period after confinement”. In addition, “a Union citizen would be deterred from exercising her right to freedom of movement if, in the event that she was pregnant in the host State and gave up work as a result, if only for a short period, she risked losing her status as a worker in that State”<sup>29</sup>.

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<sup>26</sup>Case 53/81, Levin.

<sup>27</sup>Dastis Quecedo, A. M.; “La Libre Circulación de Trabajadores”, Estudios de Derecho Comunitario Europeo”. Consejo General del Poder Judicial. 1989, p. 294.

<sup>28</sup>Cases Lawrie Blum, cited; 139/85, Kempf and Levin, cited.

Lastly, the job-seeker retains the status of “worker” and has the right of residence in the host Member State for no less than six months when he or 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 (Article 7(3)(c) of Directive 2004/38). In consequence, principle of equal treatment is applied and the person concerned is entitled to social assistance benefits as nationals of the host Member State.

However, after that period of six months, his right of residence will depend on providing evidence that he is continuing to seek employment and that he has a genuine chance of being engaged (Article 14(4)(b) of Directive 2004/38). His situation becomes precarious because the exception to the principle of equal treatment of Article 24(2) of Directive 2004/38 comes into play: the host Member State is not obliged to confer entitlement to social assistance to migrant workers, although the own nationals would be entitled if they were in the same circumstances.

### III. PRINCIPLE OF EQUAL TREATMENT: DIFFICULTIES AND GUARANTEES

The prohibition of discrimination on grounds of nationality is enshrined in Article 18 TFEU as a general and fundamental principle of the Union. Citizens are entitled to move and reside freely in the territory of the Member States, with the guarantees and limits established by the treaties and the Community rules (Article 20(2) TFEU). This principle entails the equal treatment which in turn is regulated by Article 4 of Regulation No 883/2004 and Article 24(1) of Directive 2004/38.

The principle of equal treatment is applied to citizens who have legal residence in another Member State for a period up to three months, when they have valid identity card or passport and sufficient resources not to become a burden on the social assistance system of the host Member State. Also it is applied for the ensuing period (for more than three months and up to gain the right of permanent residence) to migrant workers and citizens who have comprehensive sickness insurance and sufficient resources. As result, these individuals are entitled to social assistance benefits as the own nationals.

After the legal and judicial analysis practiced, it is possible to say under some circumstances that the freedom of movement is conditioned by the right of residence which is regulated by Directive 2004/38. This one establishes a gradual system as regards the retention of the status of ‘worker’ which seeks to safeguard the right of residence and access to social assistance. In this context, even the principle of equal treatment and non-discrimination on grounds of nationality is conditioned to the accomplishment of the residence requirements. In other words, only the Union citizens who fulfil the conditions of the Directive to be entitled to residence, could claim the equal treatment with nationals in the access to social assistance benefits.

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<sup>29</sup>Case C-507/12, Saint Prix. In this case, the Court of Justice has held that the list of Article 7(3) of Directive 2004/83 was not exhaustive.

The case-law shows cases where legislation of some Member States has been questioned from the point of view of the principle of equal treatment. It is common to all of them to refuse a migrant citizen's claim of some social assistance benefits according its legislation. The core reason is the lack of sufficient resources in those Union citizens.

The principle of equal treatment of Directive 2004/38 has an exception in Article 24(2) in virtue of which the Member States are not obliged to confer entitlement to social assistance during the first three months of residence neither to citizens who have not the condition of "worker", nor to whom do not retain the status of worker. In addition, that exception come into play for job-seekers for the ensuing period of six months in which the status of "worker" was retained, even though they must provide evidence that they are continuing to seek employment and that they have a genuine chance of being hired.

The reason of that exception is to prevent individuals who do not meet conditions to entitle the right of residence, for instance, having sufficient resources not to become a burden to the social assistance of the host Member State during their period of residence. It could happen this way when citizens lacking in resources because they do not perform an economic activity, or when they exercising their right to freedom of movement for the sole purpose of obtaining social assistance from another Member State, since neither they have sufficient resources to obtain the right of residence. In these cases, the host Member State is legitimated to reject the social assistance grant, whilst, on the contrary, it is given to the own nationals under the same circumstances<sup>30</sup>.

In the specific case of the first three months of residence, the CJEU has held that the host Member State may not require having sufficient resources and a sickness insurance to nationals of other EU countries, and Member States must not be obliged to take in charge those citizens. Neither the host State have to assess the citizen's particular situation when intends to adopt an expulsion measure, nor to declare that he is an excessive burden for national social security system throughout his residence. In particular, such an examination is not necessary, first, for the job-seekers; second, for those who don't retain the "worker" status and, finally, for economically non -active citizens supporting their right of residence in Article 6(1) of Directive 2004/38<sup>31</sup>.

The refusal of claiming social assistance during the first three months can be justified as said, although the same cannot be expressed with equal forcefulness with respect to job-seekers that includes the Article 7(3)(c) of Directive, whose situation is especially serious and become precarious, once their employment relationship has terminated and the ensuing six months, in which they retained the worker status, have expired.

The principle of equal treatment and non-discrimination on grounds of nationality applies to job-seekers as set out in Article 1(2) of Regulation No 492/2011 on freedom of movement for workers within the Union: Any national of a Member State have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State. In particular, the national have the right to take up available employment in the territory of another Member State with the same priority

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<sup>30</sup>Case Dano, cited.

<sup>31</sup>Case García Nieto, cited.

as nationals of that State. This guarantee tries to avoid national provisions or administrative practices which limit application for and offers of employment, or the right of foreign nationals to take up and pursue employment or subject these to conditions not applicable in respect of their own nationals, or though applicable irrespective of nationality, their exclusive or principal aim or effect is to keep nationals of other Member States away from the employment offered (Article 3). The equal treatment in this field entails that a national of a Member State who seeks employment in the territory of another Member State must receive the same assistance there as that afforded by the employment offices in that State to their own nationals seeking employment (Article 5).

For the ensuing period after the six months, it is remarkable that the individual does not retain the worker status, in consequence it is considered that he has not sufficient resources or incomes to guarantee his own support, which are indicatively equal to or higher than the income threshold under which social assistance is granted. This situation weakens his right to residence so that the host Member State is not obliged to respect the principle of equal treatment in case he would claimed for social assistance.

The CJEU has stated that the period of six months “does not appear in principle to be insufficient to enable the persons concerned to apprise themselves, in the host Member State, of offers of employment corresponding to their occupational qualifications and to take, where appropriate, the necessary steps in order to be engaged and, therefore, does not jeopardize the effectiveness of the principle of free movement. However, if after the expiry of that period the person concerned provides evidence that he is continuing to seek employment and that he has genuine chances of being engaged, he cannot be required to leave the territory of the host Member State”<sup>32</sup>.

In that regard, once have expired the six months, the right of residence will be based on his status of “job-seeker”, and the host State could not adopt an expulsion measure against him whether he can provide evidence that he is continuing to seek employment and that he has a true opportunity of being hired (Article 14(4)(b) of Directive). The expression “provide evidence” reveals the necessary control of previous requirements; in other case, the expelled measure could be applied reasonably<sup>33</sup>. Which is the underlying reason? It is supposed that the lack of regular incomes or sufficient resources to meet the own needs is increasing the risk to become a burden on the social assistance system of the host State, and the situation is aggravated with the passing of time, when

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<sup>32</sup>Case Antonissen, cited.

<sup>33</sup>As interesting precedent, Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, stated that nationals of any Member State who leave their territory in order to take up activities as employed persons and to pursue such activities in the territory of another Member State, had a deadline of three months to find an employment. If they were not hired in that period, it could be possible to terminate their stay in the territory of the host Member State. However, if within the period of three months these persons were granted social assistance benefits financed with public funds, “they could be invited to leave its territory”. The job-seeker situation was precarious due to the concern for set up a free movement of non-active persons, despite of the right of temporary residence was recognized in the Treaties aimed to pursue an activity. After that period, the host State was legitimated to terminate the residence in its territory of the national of any Member State who could not find an activity. See Ribas, J. J.; Jonczy, M. J.; and Seche, J. C.; *Derecho Social Europeo*. Instituto de Estudios Sociales. Ministerio de Trabajo. Zaragoza. 1980, p. 87.

employment is not found by the EU citizen. In these circumstances, the principle of equal treatment is deeply weakened to the extent that the host State is legitimated to apply the exception to that principle, rejecting, in consequence, a social assistance or special non-contributory benefit claimed by this person.

In this context, authorities of Member States should assess the individual situation in each case, taking into account a range of factors such as the amount and its duration, temporary nature of the difficult, sectoral labour market status, family responsibilities as an influential factor in the economic content of social benefits provided in general for citizens of the Union, and the number of applicants for such benefits. All this considering, however, that the mere fact that granting social assistance benefit to a citizen is not sufficient to show that he is actually a burden on the social assistance system of the host Member State.

Another important factor must be considered: these citizens, who once were workers in the host State, in most of the cases have been integrated in the society of that country together with their families. Their vocation of “EU citizens” is clear. They are the real peons in the construction of an integrated Europe. Under this consideration, they are deserving of special protection.

#### IV. CONCLUSIONS

Nowadays, the exercise of the fundamental right to move freely within the territory of the Member States is conditioned by the right of residence for more than three months, as is set out, when the citizen has not sufficient resources to meet the own and familiar needs, meaning when he is not a worker who has a retribution in correspondence to an economic activity, nor a citizen with a sickness insurance and sufficient resources. Undoubtedly, the risk of becoming a possible burden on the social assistance system of the host Member State is *in crescendo* when the worker loses his job and does not get another contract in six months, with the possibility of expulsion from the country. In these circumstances, the exception to the principle of equal treatment in regard to the granting of social assistance benefits to non-nationals residing in the territory of the host State is a measure justified, allegedly, by financial reasons shared and approved by all Member States. However, from the point of view of adversely affected citizens, it is evidence that free movement of citizens and workers in the European Union is still incomplete and needs, reflecting on its funding, new efforts at the level of the coordination of social security systems to ensure its full realization.