

European Union citizens in Germany: the right to move freely and claim social benefits

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Foreword

Our last guide to the social rights of EU citizens appeared in 2011. Since then the political and social debates about internal migration in the European Union, freedom of movement in Europe and related rights regarding equal treatment have taken on a new dimension. Fuelled by the electoral campaigns for the German Federal Parliament and the European Parliament, discussions about internal migration quickly spread with the result that, in 2013, the concept of “social tourism” was declared the “un-word” of the year.

Yet freedom of movement in the EU is a success story and one of its central achievements. Germany benefits considerably from the work of people from other EU countries employed in industry, the health system, agriculture, hotels and catering and the building sector, as confirmed by the Expert Council of German foundations for integration and migration in its 2013 annual report. This body sees freedom of movement as clearly paying dividends.

There is no proof that social security systems are under undue pressure, as claimed, or of the much-quoted social fraud or even abuse of free movement in Germany and other EU states. Nor does this reflect the picture of what happens day in, day out in our diaconal institutions and advice centres. Immigrants from the European Union are serious about trying their luck on the European labour market, and also in Germany. Many fall into hardship only after entering Germany, when their savings have run out and they cannot find a reasonable source of income quickly enough. Then, however, being job seekers, they are legally excluded from basic social security (Grundsicherung). Only after taking legal action can they receive benefits to cover their livelihood, which will then enable them to integrate into the labour market. This guide is intended to provide support for this process.

Diakonie Germany takes the view that it is incompatible with EU law and the German constitution to maintain the current exclusion from benefits as set out in Books II and XII of the

German Code of Social Law (SGB II and SGB XII) for Union citizens legally claiming their right to freedom of movement in order to look for work. Consequently these provisions urgently need to be changed. Under European law, job seekers from the EU have a right to equal treatment regarding basic social security while they are seeking work in Germany. Moreover, excluding them from benefits entails a series of negative consequences both for this group of people and for German society.

People without housing or health insurance, including families with children, come to the institutions and services for the homeless, migration advice centres, neighbourhood projects, medical emergency services and the premises of the railway station mission. Their multiple needs cannot be met because they are excluded from obtaining benefit, and this leads them into precarious situations. Without social security, however, no one can integrate into the regular employment market and acquire knowledge of their own rights and duties. The plight of such migrants is easily open to exploitation by German firms. It is not uncommon for job-seeking EU citizens to slip into exploitative work situations, sometimes leading to serious forms of exploitation and even to human trafficking.

Anyone who has a right to social benefits and lawfully lays claim to their right of free movement for the purpose of seeking work is not committing an “abuse of social benefits”. On the contrary:

The inviolable human dignity enshrined in Article 1 of the German constitution calls for a minimum subsistence level; this is especially intended to protect people from the abuse and exploitation to be found in many sectors on the labour market. The goal must therefore be to offer everyone a genuine chance of participating in work and in society as soon as possible.

The fundamental right to a sociocultural subsistence level in Germany also means that migrants from the EU must be given support for their livelihood when they need it. German

society is responsible for preserving them from suffering discrimination or exploitation and slipping into precarious life situations.

Proposals to restrict the freedom of movement of EU citizens must be rejected. It is inadmissible to distinguish between desired and undesired immigration in a common area of freedom, security and law. Instead, there must be more opportunity for participation from the start, e.g. through an integration policy, and clear and simple rules for Europe-wide mobility at the national and European level.

In addition, the countries from which the migrants come must be enabled to improve their living and working conditions, so that people who are urgently needed to build up a good infrastructure can enjoy better prospects in their home countries.



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Summary

EU citizens who have immigrated to Germany turn for assistance to the advisory services of Diakonie Germany and other associations when they need support in integrating into the employment market, or suffer material hardship.

This guide is intended to assist advisors and staff in their task of improving the precarious life situation of clients who have not yet found a job and have fallen into poverty. It concentrates on legal questions regarding residence permits and social benefits, particularly subsistence benefits under the books of German social law (abbreviated below as SGB with their respective numbers), notably SGB II and SGB XII. It also deals with health-related benefits. Family benefits such as child allowance and work promotion programmes under SGB III will be dealt with in passing. The guide focuses on EU citizens who have lived in Germany for less than five years. The reason is that after five years of lawful residence they will acquire the right of permanent residence under EU law. As job seekers with a permanent residence permit they are no longer excluded from the social benefit system. Even if they are not in work, drawing social benefits will have no impact on their right of residence as EU citizens.

EU citizenship is fundamental to the right of residence. This means that EU citizens are allowed to enter another member state without any conditions and to stay there initially for three months. Phased conditions for residence follow, which is then dependent on whether residence is related to exercising one of the four freedoms of the Treaty on the Functioning of the European Union (TFEU). EU citizens may enjoy the free movement of workers and the freedom of establishment. The status of employee and a self-employed person entails many rights. This is reflected in the SGB II benefits, i.e. unemployment benefit available to needy employees and self-employed persons from EU states under the general preconditions.

By contrast, both SGB II and SGB XII exclude benefits for job seekers who have entered Germany solely for the purpose of looking for work. There is no such statutory exclusion for

non-employed or non-economically active EU citizens. However, their right to freedom of movement does presuppose adequate means of subsistence and health insurance.

It is a matter of debate whether the exclusion clauses of SGB II and SGB XII are applicable since EU law takes precedence over national law. These legal questions are currently awaiting clarification from the highest courts, i.e. Germany's Federal Social Court (Bundessozialgericht) and the Court of Justice of the European Union (ECJ). Possibly the regulation on the coordination of social security systems (Regulation (EC) No 883/2004) can provide a foundation for granting EU citizens the same basic social security benefits for job seekers as German nationals receive.

The current legal situation is complex and presupposes a knowledge of the European right of freedom of movement and social legislation. A few concepts are defined differently under EU law from German law or need to be interpreted more precisely within EU law. This can be seen, for example with the term "social assistance". According to the directive governing freedom of movement in the EU, the member states are not obliged to grant "social assistance" to citizens of other member states in the first three months of residence for the purpose of seeking work.

The question of whether benefits under SGB II represent social assistance within the meaning of European law or rather support access to the labour market has not been definitively decided. The same applies to the connection between European legal provisions for freedom of movement (Directive 2004/38/EC on the right of Union citizens and their family members to move and reside freely within the territory of the member states – which allows for the possibility of exclusion from benefit) and the coordinating of European social law (Regulation EC No 883/2004 on the coordination of social security systems – which underlines equal treatment) although both the directive and the regulation were adopted at the same time in June 2004.

Current legislation shows that, in most cases, needy EU citizens looking for work do have a right to social benefits. However, in the experience of the diaconal organisations, they are often left in ignorance of this or their application is hindered, or initially rejected, due to the complicated legal situation. In practice, therefore, applications by job seekers are generally rejected on the basis of the statutory exclusions. However, due to the questions currently pending before the ECJ in the “Dano” and “Alimanovic” cases it is now possible to make a direct application for provisional benefits to the authorities responsible, until clarity is achieved on the German exclusions from benefit. As a second step, benefits provided by the social security authority (Sozialamt) under SGB XII or by way of discretion on the basis of “irrefutable need” must be examined in every individual case.

In addition, assistance in the case of illness is also a field where interpretation differs on many points and much remains to be satisfactorily settled. The advisory services are frequently confronted with the considerable problems arising from the lack of health insurance of destitute EU citizens and their family members; this reveals a particularly blatant gap in the German social system. It is likewise caused by excluding job seekers from benefits under SGB II and SGB XII, according to which drawing benefits includes the automatic, obligatory insurance coverage by a statutory health insurance fund.

Even without drawing basic social security (Grundsicherung) EU citizens are meant to be insured when they can prove that they are seeking work. However, anyone in material need and seeking work has normally no way of financing the

sometimes high health insurance contributions in addition to their subsistence. Consequently, health insurance schemes react negatively to applications for membership by EU citizens – despite the statutory obligation. Likewise, it may make sense in individual cases to fall back on health insurance existing in the country of origin via the European Health Insurance Card (EHIC). This being health insurance for travel abroad, it is not suitable for long-term residence in Germany and also involves a number of subsequent problems. For example, the costs of health benefits in Germany are, in some cases, not refinanceable by the health systems of all EU member states, so that the German health insurance funds accumulate considerable arrears. Furthermore, there are many bureaucratic obstacles in practice.

There is disagreement whether and how EU citizens are statutorily insured if they are not able to work or are economically inactive. In any case, if they have the right to subsistence benefits under SGB II or SGB XII there is always an obligation to register with one of the statutory health insurance schemes.

This guide focuses on describing the complex legal situation. The application of existing legislation may indeed bring about a distinct improvement in the lives of those concerned. We also describe modes of action and argumentation to support them in asserting their rights.

The guide was compiled to the best of our ability but it cannot replace professional legal advice in the individual case.

I. Introduction

Migration to Germany from other EU member states

EU citizens are the biggest group of migrants to Germany; after deducting the number of those leaving Germany, we find an immigration gain from EU states of 300,000 for 2013. The most common country of origin was Poland with a migration gain of 73,000. About 135,000 people came from Romania, while 85,000 returned there, so the migration gain here is 50,000. 59,000 people immigrated from Bulgaria and 37,000 returned again (leaving a gain of 22,000). The immigration movements from southern EU states to Germany have developed in different ways. A total of 60,700 came from Italy. After deducting the returnees there remains a migration gain of just under 33,000 (52 percent more than in 2012). A total of 44,000 came from Spain. After deducting the returnees we find that 24,000 remained (19 percent more than in 2012).¹ By contrast, in 2013 – after steep rises between 2009 and 2012 – the migration gains declined for Bulgaria (22,000, minus 13 percent), Greece (minus 9 percent) and Hungary (minus 7 percent).²

After the abolition of restrictions on worker mobility for Romania and Bulgaria (EU-2) as of 1 January 2014 no great rise in entries is expected. After all, this was not the case after the dropping of restrictions for the EU-8 countries which joined in 2004 (Estonia, Latvia, Lithuania, Poland, Slovakia, Slovenia, Czech Republic and Hungary). The Federal Employment Agency anticipates that annually between 100,000 and 180,000 people will come to Germany from Romania and Bulgaria. Encouraging is the high level of

employment of migrants from these two countries and the slight drop in unemployment.³

The immigration gain of Croatian citizens has risen by about 1000 to 13,000 since 1 July 2013.⁴

The immigrants from the European Union are extremely diverse; they are skilled workers, business people, graduates, unskilled workers, posted employees, seasonal workers, researchers, students and au pairs, interns and volunteers or cross-border workers based in the neighbouring country. Many have a steady income, and some live in Germany on a temporary basis. According to the diverse experience of diaconal advisory services and organisations, what they all have in common is the desire to make a decent living in Germany by their own efforts. Often they lack sufficient knowledge of German or information about the rights of workers, opportunities for seeking work, real chances on the German employment market, the recognition of vocational qualifications and knowledge of the social system. Accordingly, there is a huge demand for advice offered by specialised migration services and for integration programmes – this demand will certainly continue to rise in the years to come.

EU citizens as advice-seekers

Diaconal institutions and advisory services are frequently asked for support by citizens from the new EU member states. The specialist migration services often play a major

1 <http://mediendienst-integration.de/migration/wer-kommt-wer-geht.html>.

2 Federal Statistical Office, press release of 22 May 2014 – 179/14.

3 Zuwanderungsmonitor Rumänien und Bulgarien, Institut für Arbeitsmarkt- und Berufsforschung (IAB), April 2014, Ausblick und Bewertung p.4.

4 Federal Statistical Office, press release of 22 May 2014 – 179/14.

role in mediating between those seeking advice and the authorities.

Particularly when they can offer advice in the language of the inquirer, these specialist services have a visibly positive effect on relations with institutions and authorities, even if precarious situations cannot be improved immediately for all those seeking advice.

One reason is that clients often only come when urgent action is needed due to homelessness, illness, debt or exploitation, non-payment of wages, irregular work, or threats by employers. Situations of dependence often arise through established migration routes in the country of origin and continue in Germany. Consequently the persons concerned are isolated and often do not find out about suitable institutions and advice centres, trade unions and welfare associations where they could obtain advice and assistance – ideally in their own language.

Particularly in cases of acute homelessness, it is very hard to enforce claims for social benefits, even though these may indisputably exist from previous employment. The reason is that, if the person does not have an address, questions arise about which authority is responsible and processing the assessment of hardship takes longer. In cases of doubt, legal action must be taken and, to bridge the time gap, the persons concerned are dependent on emergency accommodation that is often overcrowded and unsuitable for families, or for mothers with children. Homelessness arises, on the one hand, by many firms not providing suitable accommodation and, if the person loses their job, it is hard to find new accommodation in conurbations. On the other hand, if they live below the subsistence level, the accommodation situation is precarious anyway. Without having an address to register with the city authorities, or a lease, an immigrant cannot apply for social benefits and assistance with the rent. If the accommodation is overcrowded, the social welfare authorities do not accept such applications either. Those seeking advice have not enough German language skills or relevant information to be able to improve their situation by their own efforts.⁵ Even charitable organizations and advisory services face great challenges in this regard.

Diaconal advisory services for the homeless report that, above all in big towns, job-seeking men from other EU countries – also families with children – have to go to emergency accommodation especially in the winter. Pregnancy advice centres report of women who have lived in Germany for a long time with a partner, but are now on their own and are particularly worried about their lack of health insurance. Many job-seeking EU citizens who arrive in Germany by bus or train first seek assistance from the volunteer-run help centre at the railway station (Bahnhofsmission). Likewise, many visitors to soup kitchens (e.g. Tafel) are immigrants from EU member states who have not yet started earning. Social work with prostitutes reveals that a large number of those seeking advice are EU citizens. The victims of different forms of exploitation and human trafficking for the purpose of labour or sexual exploitation increasingly look for specialised advice centres, but not in all cases. The advisory and training programmes in this field should be stabilised and expanded, so as to increase the awareness of authorities and civil society for the issue of human trafficking and to ensure that the necessary assistance and support reaches those who need it in good time.

Situation in countries of origin

Advice-seekers from the EU frequently, but not always, come from countries that joined in 2004 (EU-8) and 2007 (EU-2), in order to seize their opportunity to work on the German employment market. The unemployment rate in their countries of origin is often considerably over 10 percent, and in rural areas much higher. It is particularly common to see young people without work. The highest youth unemployment rates in the member states are in e.g. Greece (55.3 percent, cf. 16.1 percent overall) and Spain (53.2 percent, cf. 20.6 percent overall) and the lowest in Germany (8.1 percent, cf. 4.1 percent overall).⁶

They come with great hopes of earning their own living in Germany or other European countries, particularly in home care, housekeeping, child care, building, agriculture, hotel and catering, or in prostitution. But well-trained staff are

⁵ "I go to the building site but I can't speak German. If I could learn German in a course I would work for Germans, have rights, pay my social contributions and accommodation, and not run around like a down-and-out." Radio report, 22.04.14, on Bulgarians in Berlin.

⁶ Eurostat press release 107/2013 – 12 July 2013.

needed in Germany as well, such as doctors, nurses, engineers, tradesmen. They ease the shortage of skilled workers in many sectors. The victims of this “brain drain” are the economies of the countries of origin. In southern and southeast Europe, where there is a tighter economic situation, these skilled workers are then lacking; instead, they contribute to the prosperity of Germany. Romania, for example, has lost three million people in the last 10 years, almost 10 percent of its population. About 20,000 nurses and 30,000 doctors have left the country in the last two years alone.⁷

Another matter that is unforeseeable and needs further investigation is the social impact of westward migration on families and, above all, the large number of children and adolescents left behind. The number of EU orphans growing up without one or both parents, mostly with the grandparents’ generation, is particularly high in eastern Europe.⁸ In addition, many are not aware of the fact that in the medium term the immigration of (skilled workers) from southern and southeast Europe will soon end. Those countries have the greatest decline in population ahead of

them due to the low-birth cohorts in Europe. This decline is being favoured by the economically insecure times and the migration abroad of the parents’ generation. The forecast great demographic transformation may have devastating consequences in structurally disadvantaged regions and will particularly hit Romania and Bulgaria, parts of Poland and Italy and further eastward non-EU countries. The skilled workers in these countries are already becoming scarcer and in the near future they will not suffice. Then these states will themselves have to rely on immigration.⁹

Some of the EU citizens who have migrated to Germany do not arrive directly from their home countries. They have already lived in another European country, have made a living and are now again making use of freedom of movement and the pan-European labour market. Their onward migration to Germany is frequently a consequence of economic deterioration in other EU countries. For example, since 2010 the immigration from the old EU-14 states has increased, in particular from Greece, Spain, Portugal and Italy.¹⁰

7 Quoted from: Diakonie Report Hamburg 1/2014 p. 2.

8 Die Kinder sind die unsichtbaren Opfer, Andrea Hitzemann, Neue Caritas 09/201.

9 Quoted from: Der demographische Wandel in Europa schafft enorme regionale Verwerfungen, Dr. Steffen Kröhnert, Europa kontrovers, bpb März 2011.

10 Interim report of the joint committee of the labour/social affairs and interior ministry on legal questions and challenges to social security systems when used by nationals of EU member states (in German), BMAS/BMI April 2014 p.17.

II. Union citizens' right to move freely in Germany

A fundamental distinction must be made between the right to move freely enjoyed by EU citizens and the right of residence for nationals from third states. Third-state nationals from countries outside the European Union are subject to general alien law and can stay in Germany legally if they are in possession of a residence permit that was duly applied for and approved. They are normally subject to a general prohibition of residence but have the possibility of obtaining a residence permit.

The free movement of persons in the European Union reverses this approach: EU citizens are to be treated in principle like the nationals of a member country. They can enter the country without any problem, take up residence there and the legal assumption is that their residence in Germany is lawful, i.e. they enjoy freedom of movement. They just have to register their address with the authorities, as required for German nationals; it is no longer necessary to certify their freedom of movement. Residential status only needs to be checked for lawfulness on very few points. Some rightfully call this a right to protection against migration control measures.¹¹ Only when a right of free movement no longer exists or the preconditions for it have not been fulfilled can the immigration authorities determine the loss of this right and thus oblige someone to leave the country. After five years of lawful residence everyone receives a permanent residence permit for the EU. This has nothing to do with exercising the right to free movement. A loss of this right to permanent residence may only be determined in a handful of exceptional cases.

Before they acquire permanent residence, social benefit claims by EU citizens must be linked to the exercise of the right of freedom of movement. If the right of residence derives from other rights of free movement than the free

movement of workers or freedom of establishment, claims for social benefits may be subject to some restrictions. European and German law differ on these questions. Likewise, since the Federal Constitutional Court on 17 July 2012 issued a fundamental decision on the right of foreigners to a decent subsistence minimum, the discussion about guaranteeing the subsistence of EU citizens even within the territory of German constitutional law, has moved forward (see III.).

1. Legal framework

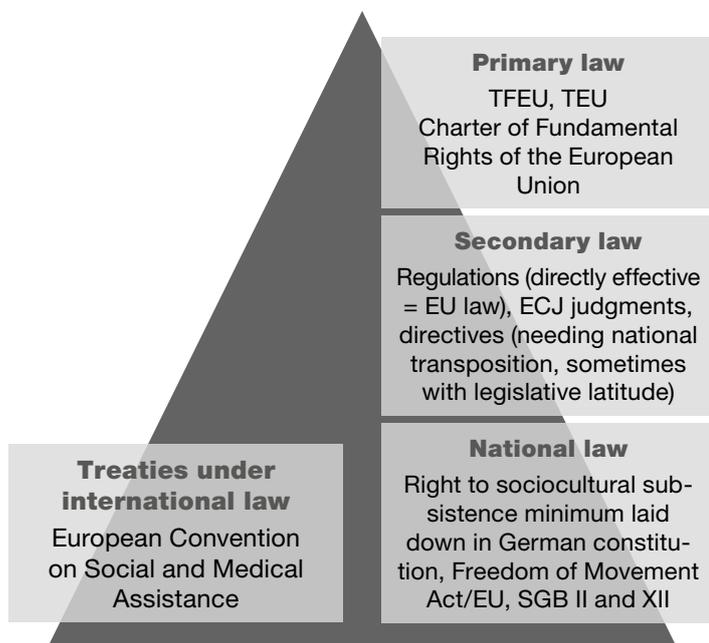
The political and legal framework of the European Union is provided by the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), which are of equal status. The legal foundations of the EU, the right of freedom of movement and the related social rights of EU citizens are laid down in primary law, i.e. in the TEU, the TFEU and the Charter of Fundamental Rights of the European Union. Regulations, directives and decisions, along with the rulings of the Court of Justice of the European Union (ECJ), constitute secondary law.

Please note the clear hierarchy of legal levels: European secondary law is subordinate to EU primary law. National law, even constitutional law, must not contradict primary or secondary law and must be interpreted in the light of them. It may indeed happen that an EU regulation¹² takes priority over Germany's Basic Law.

The national courts and administrative authorities are likewise bound to the case law of the ECJ and to interpret national law in conformity with European law.

¹¹ Prof. Dr. Jürgen Bast, "Unionsbürgerschaft als Migrationsteuerungsabwehranspruch" in *Aufenthaltsrecht und Migrationsteuerung*, Tübingen 2011, p. 52 ff.

¹² An EU regulation has the character of a law and is immediately applicable. A directive is also a legislative act but it normally has to be transposed into national law and is thus not immediately applicable.



Primary law contains the following basic principles that are important for ascertaining the legal status of destitute EU citizens:

- the prohibition of discrimination on the basis of nationality pursuant to Art. 18 TFEU:

“Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.”

Hence all EU citizens residing in another member state have fundamentally the same rights as the nationals of that state, although indirect discrimination may arise because e.g. nationals can fulfil a precondition more easily. A restriction is only justified if it is based on objective considerations and is proportional.¹³

- Specific rights relating to personal freedom of movement: freedom of movement for workers (Art. 45 TFEU) freedom of establishment (Art. 49 TFEU) freedom to provide services (Art. 57 TFEU).

These freedoms are not derived from Union citizenship but from the four fundamental freedoms¹⁴ of the European single

market. The right of residence of all citizens of the Union follows from the right to move freely linked to Union citizenship and the specific rights of free movement. This is set out in the Directive on the rights of Union citizens and their families to move and reside freely within the territory of the Member States.¹⁵ This directive was transposed into German law through the Freedom of Movement Act/EU (hereinafter FreizügG/EU). Since the directive is Community law, the law on free movement must be interpreted so as to harmonise with the provisions of the directive and likewise those of EU primary law, ensuring that freedom of movement can be fully developed. The practical interpretation of this German law is set out in general administrative regulations, which are binding on the authorities but not for the courts in Germany.

2. Right of free movement before acquiring the right of permanent residence

The right to freedom of movement applies to the citizens of all EU member states,¹⁶ the member states of the European Economic Area (EEA), Norway, Iceland and Liechtenstein, as well as Switzerland under a special agreement. The term “citizens of the Union” as used below also covers nationals of the EEA and Switzerland.

2.1 Freedom of movement in the first three months

All citizens of the Union and their family members enjoy an unconditional right of residence regardless of its purpose for the first three months after entering another member state. To this effect they – and, as appropriate, their family members – only need a valid identity card or passport (§2(5) FreizügG/EU).

This unconditional right of residence is revived again after entering another member state and then re-entering the first one, provided that no bar on re-entry was imposed

The unconditional right of residence is subject to one exception: the right to freedom of movement within the first three months exists under European law only if Union residents do not become an “unreasonable” burden on the social assistance system of the host member state (Art. 14(1)

¹³ Cf. EuCJ, 26.10.2006, C-192/05 (Tas-Hagen and Tas) para 33.

¹⁴ The four freedoms are: free movement of workers, services, goods and capital.

¹⁵ Directive 2004/38/EC, 29.04.04

¹⁶ A restriction on freedom of movement for workers applied for Romania and Bulgaria until December 2013. It has now been introduced for Croatia provisionally until June 2015.

Directive 2004/38/EC). This provision has not been transposed into German law in the same terms, however. Instead of including this in the Freedom of Movement Act, the social code book II (SGB II) stipulates an exclusion clause for the first three months. Under FreizügG/EU the right of freedom of movement lapses only in the case of non-employed or non-self-employed people, when they draw subsistence benefits – generally under SGB XII – as their right to move freely is linked to having sufficient means of subsistence and health insurance (see II.2.2.6). At the same time, however, this also means for them that drawing social assistance must not automatically lead to expulsion but must be checked in each individual case (Art. 14(3) Directive 2004/38/EC. For all other persons entitled to move freely, exercising this right does not constitute an obstacle to drawing social benefits. Workers, self-employed persons and job seekers may on no account be expelled (Art. 14(4) Directive 2004/38/EC).

2.2 Freedom of movement after three months

Except for the first three months, the right to move freely before obtaining a permanent residence permit is bound to certain purposes.

Under §2 FreizügG/EU the following are entitled to freedom of movement:

- citizens of the Union intending to reside in Germany as workers or for vocational training, see II.2.2.1
- citizens of the Union residing in Germany to look for work, see II.2.2.2
- citizens of the Union who have established themselves in Germany in order to exercise self-employment, see II.2.2.3
- citizens of the Union who, having completed a period of work in Germany, have the right to remain as an employee or self-employed person, see II.2.2.4
- citizens of the Union who, without establishing themselves, provide services as self-employed persons, see II.2.2.5
- citizens of the Union who receive services, see II.2.2.5
- non-working¹⁷ citizens of the Union and their family members, if they have sufficient health coverage and adequate means of subsistence, see II.2.2.6

Family members of citizens of the Union entitled to move freely have the same rights in this regard as the citizen of the Union they accompany or join afterwards, pursuant to §§3 and 4 FreizügG/EU. This applies regardless of whether they are themselves citizens of the Union or nationals of third states (see II.2.2.7).

Tip for advisors

Check whether the citizen from an EU member state, Norway, Iceland, Liechtenstein or Switzerland has sufficient means of subsistence for three months after entering the country. If this is not the case, check whether there is a purpose of residence entitling freedom of movement. The right to move freely should be checked in the following order as the extent of social rights diminishes accordingly: Has the person a right of permanent residence? Is s/he employed or self-employed and thus entitled to stay? Is s/he a job seeker, non-working, a provider or recipient of services? The respective criteria are explained in the following sub-sections.

2.2.1 Freedom of movement of workers

Freedom of movement of workers is a fundamental freedom laid down directly in Art. 45 TFEU. It grants the right to be employed in another member state under the same conditions as nationals, e.g. for a particular sector of industry. Citizens of the Union do not need a work permit to exercise gainful employment. The transitional rules for the accession states in eastern Europe have since lapsed, in

¹⁷ “Non-working” means under European law that there is no connection between the person and the labour market, i.e. the person is economically inactive. Such persons may be non-working pensioners or students, but not job-seekers. This category, which follows from citizenship of the Union alone, and not from the four fundamental freedoms of the European single market, has secondary status to the other categories.

particular for Romanians and Bulgarians (since 1 Januar 2014). The freedom of workers to move freely is only restricted at present for Croatians, initially until June 2015.¹⁸

The concept of worker is interpreted under European law and thus broadly.¹⁹ "Any person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as completely marginal and ancillary, must be regarded as a 'worker'. The essential feature of an employment relationship is, according to that case law, that a person performs services for and under the direction of another person, for which s/he receives remuneration."²⁰

An essential feature of being a worker is therefore the relationship of subordination, not the amount of remuneration and weekly working hours. Someone with a mini-job (EUR 450 per month) can thus be a worker.²¹ The Court of Justice has not yet laid down a lower limit for the necessary weekly working hours, but has declared five and a half hours per week with earnings of EUR 175 per month, e.g. for cleaning, to be sufficient.²² Part-time employment that does not cover subsistence is therefore enough. A worker is also someone doing vocational training or receiving remuneration for services during an internship.

Workers from the EU – except from Croatia – now have unlimited access to the German labour market. During the ongoing transitional period, Croatian nationals are the only ones to still need a work permit for many jobs; this is issued by the Federal Employment Agency as a work permit for the EU (temporary) or entitlement to work (permanent). Details are laid down in §13 FreizügG in connection with §284 SGB III, in the German work permit ordinance (ArgV) and the employment ordinance.

The application for a work permit for citizens of the Union must be filed with the International Placement Services (ZAV) of the Federal Employment Agency.²³ They conduct the priority examination under §39 Residence Act (AufenthG), which means checking on whether German job seekers (or other Union citizens to be given priority) are available for the particular position, and whether the conditions are typical of the region.

Certain work can be taken up without the approval of the Employment Agency.²⁴

- Croatian nationals and those of their family members who have graduated from a university at home or abroad receive an EU work permit for a post in keeping with their qualifications without priority examination (§12b ArgV).
- Nationals from Croatia who have acquired a recognised German school leaving certificate do not require a work permit for training in a state-recognised or comparable trade or profession (§12c ArgV).
- Croatian nationals already living in Germany, who have been admitted to the German labour market on or after 1 July 2013 or later for an uninterrupted period of at least 12 months, receive a permanent work permit that enables them to have unlimited access to the labour market. Family members of EU workers from these states receive a work permit without waiting (§12a ArgV).

Croatians have secondary access to the labour market under §39 AufenthG for jobs requiring a permit. However, Croatians are free to take up self-employment without any restrictions in the context of freedom of establishment.

18 The restriction on employee freedom of movement for Croatia may extend for a maximum period of seven years from accession (1 July 2013): the 2+3+2 arrangement applies, i.e. after two years, and then another three years, the situation on the German labour market can be examined to see whether restriction needs to be extended at all.

19 See 2.2.1.1 of the administrative regulations for FreizügG/EU: "The legal category of the relationship between recipient and performer of the work is immaterial." Thus the German distinction between a contract for casual work, services or e.g. an internship is not relevant.

20 ECJ, 4.06.2009, C-22/08 (Vatsouras und Koupatantze), para. 26.

21 ECJ, 14.12.1995, C-444/93 (Megner and Scheffel).

22 ECJ, 4.02.2010, C-14/09 (Genc) paras 9, 35. This means that 2.2.1.1 of the administrative regulations for FreizügG/EU is now obsolete in view of recent case law.

23 Zentrale Auslands- und Fachvermittlung (ZAV). Its website also provides useful information for job seekers.

24 Federal Employment Agency, handout 7 on the employment of foreign workers in Germany – questions and answers, plus tips for workers and employers (in German). Status January 2014, p. 21.

Tip for advisors

An essential feature of being an employee is that the work is done under the instructions of an employer and workers receive remuneration. Quantitative features like the amount of pay, number of hours or duration of the work relationship are secondary. The status of worker may be proved by an employment contract. Once this status of worker is reached, there is a right of residence that can only be terminated on grounds of public security, order or health. These grounds must, however, meet very high requirements. Drawing supplementary benefits does not affect the right of residence of a person meeting the definition of worker. Please ensure that you also check whether the status is retained when the work relationship is concluded (see II.2.2.4) or, before the lapse of five years, whether a right of permanent residence has been achieved (see II.3.). The freedom of movement for work is restricted for Croats initially until June 2015. However, they can also have access to the labour market on the basis of a work permit.

2.2.2 The right to seek work as part of freedom of movement for workers

Union citizens may reside in Germany and “not be expelled for as long as the the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged”.²⁵ The European Commission defines the right to seek work as follows: Every EU citizen has the right to seek work in another EU country, and to receive the same assistance from the national employment offices as nationals of the host country, to stay in the host country for as long as is necessary to seek work, apply and be hired. Job seekers may not be expelled if they can show evidence that they are continuing to look for work and have a justified prospect of success.²⁶

Union citizens should thus be registered with the employment agency or local job centre as looking for work. The administrative regulations on FreizügG/EU state in 2.2.1.3:

“It may be assumed that there is a justified prospect of finding a job when the job-seeker – due to his/her qualifications and the current demand on the labour market – will probably be successful with his/her applications. This may not be assumed, however, if the person makes no serious effort to take up work.” Between these two standards

25 Art. 14 (4 b) of Directive 2004/38/EC and ECJ case law, e.g. ECJ. 26.02.1991, C-292/89 (Antonissen) para 24.

26 European Commission, Directorate General for Employment, Social policy and Integration.

lies a broad scope for interpretation that can be used. FreizügG/EU has so far not provided for any time limit on residence to seek work. Even if the right to seek work were initially restricted to six months, with an automatic extension by continuing to present evidence of promising job applications, present practice would not change.

It would be inadmissible to automatically review the freedom of movement to seek work after six months and to place the onus of proof on the Union citizen.

Claiming social benefits is no obstacle to the right of residence of the job seeker, as would be the case for economically inactive citizens of the Union.

Persons able to work but who cannot be expected to seek and take up work pursuant to §10 SGB II are fundamentally still job seekers if taking up work would jeopardise the raising of under-three-year-old children or the care of relatives.

Job-seeking Union citizens who have been in employment or self-employed in Germany for at least one year continue to have the right to remain as workers or self-employed persons under European law and have a right e.g. to benefits for short and longer term unemployment. If they have been employed or self-employed in Germany for less than one year, this status is retained for six months (see II.2.2.4).

Tip for advisors

In practice you should first check whether there is entitlement to stay (see II.2.2.4), whether the job-seeker has already been gainfully employed in Germany (self-employed or not), whether there is a connection with the German labour market or whether a permanent residence permit has already been acquired. Union citizens should register as seeking work with the employment agency or job centre and give evidence of this. That way they will not endanger their right of residence when the immigration authority checks the reason for their freedom of movement. Job-seekers should keep job advertisements, make a list of phone inquiries about jobs and interviews, and note down their own initiatives such as cold calling or telephone acquisition and collect job applications. Drawing social benefits has no effect on free movement to seek work. However, social benefits for job-seekers are not easy to implement as the benefits pursuant to SGB II and SGB XII are excluded by law (see, however, III.1). Important: the right to seek work must not be prevented due to the claiming of social benefits but rather, if at all, only due to a lack of prospects.

2.2.3 Freedom of movement of self-employed persons (right of establishment)

The fundamental freedom of establishment laid down in Art. 49 TFEU also comprises the right to exercise self-employment on the same legal conditions as the nationals of the host country. Unlike an employed worker, a self-employed person is not bound to directions from an employer²⁷ and, unlike a service-provider, has settled down permanently to exercise this economic activity.²⁸ Croatian nationals can also enjoy freedom of movement as self-employed persons without restriction.

Union citizens enjoy freedom of movement even if they cannot guarantee their own livelihood from self-employment. Here too, as with employed workers, utterly marginal and ancillary activities are left out of account. If the person makes a profit from self-employment this status is mostly recognised as such.

However, there must be the intention to make a profit, since in the early days of this occupation a person may not have made a profit yet but still be self-employed. This has to be specifically related to the type of activity. The important thing is that the regulatory, professional and fiscal prerequisites are respected. If someone is self-employed they have a right of residence that cannot be limited except on grounds of public security, order and health; these must meet very high requirements, however. Drawing social benefits does not affect the right of residence.

In the early days of EU accessions in this century, it was sometimes advantageous for nationals of those states to become self-employed, in order to avoid the possibly necessary and disadvantageous examination of priority when they applied to take up employment. However, this often led to pseudo self-employment under precarious and exploitative conditions. For Croatians, access to the labour market in Germany has again been limited since their accession, "in

27 By contrast with an employee, a self-employed person undertakes by contract to perform certain services for a client, receiving payment but not taking instructions. There is a contractual relationship under civil law but no organizational hierarchy. The qualities of the product are agreed but not the organisation of production. The freedom to organize the latter oneself is generally assumed. If the person does not only work for one client and can change clients. The self-employed person must not accept any instructions from a client that resemble those of an employer.

28 2.2.2. of administrative regulations on FreizügG/EU.

order to avoid disturbances of the German labour market". A decision to the contrary by the German upper house (Bundesrat) regrettably did not meet with a majority in parliament.²⁹

Tip for advisors

The immigration authorities can check on self-employment if there are any doubts about whether it actually exists. Evidence can be given through e.g. a tax number, proving the intention to make a profit through a business idea, through an income statement or through commercial book-keeping. Check whether the status is retained at the end of self-employment (see II.2.2.4) or whether a right of permanent residence has already been acquired (see II.3).

2.2.4 Retaining status for former employees and self-employed persons

If Union citizens were employees (see II.2.2.1) or self-employed (see II.2.2.3), their status remains and they are entitled to remain under §2(3) FreizügG/EU :

- if they undergo temporary³⁰ reduction of earning e.g. through accident, illness, pregnancy or maternity – or
- if the employment agency confirms involuntary unemployment or cessation of self-employment due to circumstances on which the self-employed person has no influence, the status of worker remains on a permanent basis after over one year of employment and, after less than one year, for six months – or
- if the Union citizen begins vocational training.

Employee or self-employed status continues here, too, if the person resigns their job or abandons self-employment for training, as long as the vocational training is connected to the previous work.

29 The Bundesrat requested the Bundestag to grant full freedom of movement for workers from Croatia after accession on 1 July 2013. Its arguments: No great flow of migrants was to be expected from Croatia and so no disturbance of the German labour market. Moreover, experience with limited freedom of movement for job-seeking Bulgarians and Romanians showed that this did not stop them from looking for work in Germany. The consequence of restrictions would be an increase in self-employment often without awareness of the legal consequences. This could mean the EU citizens concerned sliding into illegality as they could not pay health and pension contributions as required. BR Drs. 204/13, motion of 15.03.2013.

30 'Temporarily' means, according to 2.3.1.1 of the administrative regulations on FreizügG/EU: "when a medical prognosis anticipates that the person's ability to work will be restored, even if with restrictions. The right cannot lapse merely if there are doubts about this."

Pursuant to 2.2.1.2 of the administrative regulations on FreizügG/EU the status of employee lapses only “when the Union citizen has finally left the German labour market, e.g. because s/he has reached retiring age or has returned to the home state, or has become completely and permanently incapable of gainful employment. In the last case there must be a check on the preconditions for a right of permanent residence” (§4a(2) FreizügG/EU).³¹ The Union citizen, when permanently unable to work or on entry into retirement, may under certain conditions obtain a right of permanent residence even before five years have passed (see II. 3).

Tip for advisors

Check whether the Union citizen had the status of employee in the past (see II.2.2.1) or pursued self-employment (see II.2.2.3). Then s/he can retain this status permanently after having worked for at least one year, and for six months after having worked for less. If the Union citizen becomes unemployed involuntarily s/he should register with the employment agency or job centre, or possibly start vocational training. If permanently unable to work or reaching retirement age you should check whether the Union citizen has acquired the preconditions for a right of permanent residence under §4a(2) FreizügG/EU before five years have elapsed.

2.2.5 Freedom of movement for service providers and recipients

The freedom to provide services set out in Art. 56 TFEU involves the right to enter and reside in a country for the purpose of providing or receiving a service in another member state. Freedom to provide services relates to a cross-border service during a temporary period, as a rule for remuneration.

Unlike an established self-employed person, a service provider retains his/her registered office in the home state.³² The temporary character of an activity is not only assessed in terms of the duration of the service but also in terms of its frequency, regular recurrence or continuity.³³

However, the temporary character of the service does not fundamentally prevent the service provider from setting up a

certain infrastructure in the host member state (e.g. an office, a doctor’s surgery or a law firm), if this is required for providing the service in question.

We must distinguish between self-employed service providers and employees sent by a company to another member state of the EU or the EEA. Directive 96/71/EC concerning the posting of workers is the relevant legal act for such cases, along with the German Employee Posting Act (AEntG).

A restriction on freedom of movement for posted workers from Croatia may also take effect here. The Federal Employment Agency has compiled a new handout on this matter.³⁴ However, ‘one-person firms’ already enjoy unrestricted freedom to provide services. Accordingly, all natural persons have the right to provide services if they perform it themselves and do not use any more staff. However, it is not possible for nationals of these member states to send employees across borders.

Tip for advisors

If the person has the status of service provider or recipient they can enjoy the right of residence for the duration of the service provision. However, if a service is not just provided temporarily, the status may change into one of an established self-employed person, if a branch is founded in Germany. In any case, claiming social benefits has no effect on the right of residence. Generally the preconditions for obtaining social benefits are lacking as the person does not usually reside in Germany.

2.2.6 Freedom of movement of non-workers or non-economically active persons

This freedom of movement not related to economic activity arises directly from Union citizenship in Art. 21 TFEU and does not relate to participation in the European single market. Non-workers are all those who are not economically active and are not looking for work. Examples are pensioners and students if they have no relation to the labour market, as well as persons unable to work (e.g. patients, disabled persons), but also those able to work who give evidence of not seeking

31 2.2.1.2 administrative regulations on FreizügG/EU.

32 2.3.3 administrative regulations on FreizügG/EU.

33 ECJ, 30.11.1995, C-55/94 (Gebhard).

34 Federal Employment Agency, handout 7 on the employment of foreign workers in Germany – questions and answers, plus tips for workers and employers (in German). Status: January 2014.

work or have no link with the labour market. Here, however, the right of freedom of movement only exists on condition that the Union citizen has sufficient means of subsistence³⁵ including sufficient health insurance³⁶ of their own. What must be regarded as adequate will depend on the personal situation of the Union citizen. 'Adequate' must by no means be pitched higher than the "threshold amount" of social assistance (Art. 8(4) Directive 2004/38/EC). Usually this is the standard social benefit rate plus rent and heating, and health insurance contributions that have to be raised by the person themselves. The concept of 'social assistance' used in European law means assistance to balance a shortfall in regular income, but not assistance that would allow for meeting unusual or unforeseen needs.³⁷ Accordingly, benefits pursuant to SGB XII going beyond standard life situations (as set out in chapter 3) are not covered by the European concept of social assistance either and are therefore not to be regarded as funds constituting a precondition for the right to move freely.

Through a person's claiming social benefits to substitute for adequate means of subsistence or health insurance protection, the authorities can determine the loss of the right of free movement (see II.2.6). However, in current ECJ case law based on Directive 2004/38/EC this is not the case when there is no "unreasonable burden" on the social security system of the host state. The ECJ considers that the competent national authorities – after considering all factors and the principle of proportionality – are entitled to base their assessment on the question of whether granting a social benefit is an unreasonable burden on the social assistance system of this member state.³⁸ Applying for social benefit alone must thus not lead to the automatic loss of the right of

freedom of movement on the basis of the required examination of the individual case.³⁹ The examination of whether a claim is 'reasonable' or 'unreasonable', as mentioned at several places in the Directive 2004/38/EC is foreign to the character of German social law and must not even be conducted in the context of a discretionary decision regarding the granting of social assistance. It is only admissible to a limited degree in kind and extent, see §17 SGB XII. Such examination of individual cases and the statement of reasons, in particular providing evidence of the burden on the whole social assistance system, must therefore only be carried out after the fact, when the immigration authority determines the loss of freedom of movement.⁴⁰ In any case, it would probably be very hard to provide justifiable proof of whether someone has overstayed their welcome as a Union citizen and thereby – independently of public opinion – constitutes an unreasonable burden on the whole social assistance system and not just of some regional conurbations. It would also call for a considerable effort to provide such grounds and so this is simply unrealistic.

Moreover, it would be necessary to consider not just an unreasonable burden on social security financing arising from Union citizens residing in Germany but also – to give a full picture – the economic benefit accruing to social insurance funds from immigration of sometimes highly trained skilled workers. Accordingly, it would probably be inappropriate to ascertain a loss of freedom of movement in Germany since a group of German experts detected a "measurable dividend" from freedom of movement in its annual report for 2013. They expressly termed "social tourism" to be more felt than real.⁴¹

35 The administrative regulations on FreizügG/EU state in 4.1.2.1: "Means of subsistence are all legally admissible income and assets in money or monetary value or other own resources, in particular living allowances from family members or third parties, scholarships, training or retraining grants, unemployment benefit, invalidity, pensions for surviving dependents, early retirement, work incapacity or other public funds based on paying contributions."

36 According to 4.1.1 of the administrative regulations on FreizügG/EU this must be regarded as adequate when it covers the following services in the scope of statutory health insurance: medical and dental treatments, provision with medication, bandages, remedies and aids, hospital treatment, medical services for rehabilitation and services in the event of pregnancy and maternity.

37 ECJ, 4 March 2010, C-578/08 (Chakroun) para 49.

38 ECJ, 19.09.2013, C-140/12 (Brey) paras 72, 77, 79.

39 Freizügigkeitsrecht und »Hartz IV« Ist der Leistungsausschluss von Unionsbürgern im SGB II noch zu rechtfertigen? Eva Steffen, Asylmagazin 1-2/2014, p.13, 14

40 Cf. Steffen, footnote 39

41 Expert Council of foundations for integration and migration, Jahrestgutachten 2013, Kernbotschaft 2, p. 17, 18.

Tip for advisors

If your clients are not in work, ask about their health insurance coverage and to what extent they live from their own means. They should be able to provide documentation for this if the immigration authority wants to conduct a check. Free movement for a non-worker can only be considered when there are no other grounds for moving freely, e.g. work as an employee, self-employed or job seeker, or a right of permanent residence. Drawing social benefit is possible but – after a proportionality check in the individual case – this may lead to the loss of the right of residence.⁴² It would be a positive circumstance if social assistance benefit were only claimed on a temporary basis, as otherwise there might be a loss of the precondition for the right of free movement in connection with sufficient means of subsistence and health insurance. Should the person be able to work s/he should give priority to seeking a job, link the right of free movement linked to job-seeking and establish a connection with the labour market. For the required forecast your clients should therefore be able to provide evidence and efforts for later successful integration in the labour market. If in individual cases there are good arguments against unreasonableness they can be presented to avoid a decision ascertaining the loss of freedom of movement.

2.2.7 Family members of Union citizens entitled to freedom of movement

Family members of Union citizens entitled to freedom of movement, independently of whether they come from the EU or are third-state nationals, are defined by §3 FreizügG/EU as

- spouses (even if separated, until they are formally divorced) or life partners in a registered partnership
- children and grandchildren of Union citizens entitled to freedom of movement, and their spouses, who have not yet reached 21 years of age

42 The administrative regulations on FreizügG/EU state in 4.1.2.2 “Owing to the simplified procedure set out in §5 there is generally no check on the precondition ‘adequate means of subsistence’ before issuing the confirmation. (...) If, however, an application for employment benefit is filed afterwards, that presents a special reason under §5(4) for possibly checking on whether the precondition for the right of residence still subsists.”

- Relatives in the line of ascent (e.g. parents, grandparents) and in the line of descent (e.g. children over 21) of Union citizens entitled to freedom of movement or their spouses or life partners, whose support is guaranteed by the Union citizens or their spouses.

Family members also participate in the right of freedom of movement when they depend on social benefits to which they have not contributed. Only with children who are already over 21 and relatives in the line of ascent (parents, grandparents) does their right of free movement depend on their being granted support.⁴³ Their own living costs need not be fully covered with these funds nor do they need to include adequate health insurance. However, the family members exclusively of non-workers (not job-seekers) must, like the main person with entitlement, have sufficient means of subsistence and adequate insurance coverage. For nationals of third states, by contrast with Union citizens, there is a basic prohibition of residence. Therefore third-state nationals must apply for a residence card. This must be issued within six months and is valid for five years. A paper certifying the application is issued immediately pursuant to §5(2) FreizügG/EU. After a lawful residence of five years, nationals of third states as family members of Union citizens have a right to a permanent residence card.

Family members of Germans from third states are, legally speaking, also family members of a citizen of the Union. If there is no cross-border factor, alien law still focuses on §28 AufenthG due to the exclusion of German residents in §1 FreizügG/EU and may therefore have more restrictive preconditions for German nationals than for nationals from other EU countries; that would then produce what is called discrimination against German residents.⁴⁴ This also applies to persons possessing German citizenship alongside that of another member state. The right of residence of family members of Germans thus only depends on the right of freedom of movement when there is a “cross-border connection” of the German member or they themselves are

43 3.2.2.1 of the administrative regulations on FreizügG/EU state: “The relatives named in para 2(2) only have a right of residence as long as their maintenance is guaranteed, cf. ECJ, 18.06.1987, C-316/85 (Lebon). Such granting of maintenance takes effect when the relative actually receives benefit that may be regarded as for his/her livelihood. That includes an ongoing, regular support to an extent enabling the coverage of at least part of the living costs, based on the standard of living in the EU member state in which the family member is permanently resident. It is not necessary for the person granted the maintenance to have a claim to it or not to be able to cover living costs him/herself.”

44 EU law does not prohibit putting one's own nation in a worse position if there is no European cross-border connection, e.g. with family reunification of third-state relatives coming to Germany.

Union citizens.⁴⁵ This is the case e.g. when the German person has already used their right of free movement in another member state and then has moved back to Germany. The extent to which this restriction will be tenable after the recent case law of the ECJ⁴⁶ is hotly debated, since Union citizenship under Art. 20 TFEU and the related rights take priority over the directive and also apply to German residents. If the right of free movement is applied, however, more favourable conditions may arise for third-state family members, also of Germans, than under the Residence Act. For example, partners coming to join their husbands would then no longer be required to understand and speak rudimentary German.

Tip for advisors

The right of free movement is not restricted to the members of the core family. This also applies to family members from third states. In some cases family members must be granted support, however, if they cannot themselves fulfil the grounds for freedom of movement. The right of free movement and right to social benefits focus on the main person with entitlement. That is why there should be clarification on who enjoys the (more favourable) right of free movement and is thus the main person with entitlement, and who is then counted as family members. If, for example, a family member of a Union citizen who is only seeking work is him/herself an employee, the job-seeker as a family member of the worker can claim social welfare, although s/he would possibly not be entitled to do so alone (see III.). In this constellation the worker should pay maintenance to the job-seeker if the latter is over 21. Alternatively the latter may possibly apply for top-up benefit in the case of a joint household.

2.3 More favourable provisions for residence

See German version.

2.4 Certifying the right of free movement is over

See German version.

2.5 Losing the right of free movement

Three basic constellations may lead to a loss of lawful residence for Union citizens:

the loss of preconditions of a right of free movement pursuant to §5(4) Freedom of Movement Act (FreizügG/EU), the loss for reasons of public security and order (as a rule expulsion after a crime) or the non-existence of grounds for free movement pursuant to the newly introduced §7(2) FreizügG/EU on grounds of distorting facts in order to acquire the right to move freely.

An existing right of freedom of movement can generally only be withdrawn on grounds of public security, order and health §6 FreizügG/EU. However, the immigration authorities must use very high standards. Consequently there has to be a current, actual and sufficiently serious threat affecting a basic interest of society (§6(2) p. 3 FreizügG/EU). Only in these cases may a bar on re-entry be imposed pursuant to §7(2) FreizügG/EU.

The non-existence of a right to free movement may – since 29 January 2013 (amendment of FreizügG/EU) – also be determined pursuant to §2(7) FreizügG/EU. This new provision transposed Art. 35 Directive 2004/38/EC, which had not yet been included in FreizügG/EU. This situation may arise when it is found that the person concerned has pretended to possess the precondition for this right through

⁴⁵ Directive 2004/38/EC applies pursuant to its Art. 3(1) only applies to Union citizens who go to another member state or reside there with their family members, who accompany or follow them under Art. 2 No 2.

⁴⁶ ECJ, 8.03.2011, C-34/09 (Zambrano) para 45: This was about whether a Columbian father should be denied residence if he wanted to be with his Belgian child who lived in Belgium. The child had hitherto not made use of his right of freedom of movement. The ECJ states that Art. 20 TFEU must be interpreted as preventing a member state from refusing a third-state national the right to reside in the member state where his children reside and of which they are nationals (...), as such decisions would prevent these children from genuinely enjoying the core of the rights endowed upon them by their status as Union citizens."

using false or faked documents or through presenting wrong facts. This finding is probably rather irrelevant in practice as there have been no new statistics on how often such deception takes place since early 2013.⁵⁴

Determining the loss of the right to freedom of movement pursuant to §5(4) FreizügG/EU is relevant in practice particularly in two constellations: with non-workers or with job seekers.⁵⁵ On no account may workers, self-employed persons and job seekers be expelled on grounds of claiming social benefits (Art. 14(4) Directive 2004/38/EC).

In individual cases the right of freedom of movement of non-workers, or economically inactive persons or their family members may be withdrawn before they obtain a right of permanent residence. This may happen if they claim, or have claimed, social assistance under European law, i.e. do not meet the preconditions of freedom of movement (see II.2.2.6). However, claiming social assistance must not automatically lead to the loss of the right of freedom of movement (Art. 14(3) Directive 2994/38/EC); the individual case must be checked as to whether the loss is proportional.

First it must be ascertained whether social assistance was claimed to provide the required means of subsistence. Social assistance must have been actually granted: the mere application must not automatically lead to a loss of the right to free movement, since the individual case needs to be examined.⁵⁶ The decision on determining loss of the right of residence must be proportional. The personal situation of the migrant concerned always needs to be considered when examining proportionality, in particular whether it was only a temporary drawing of benefit.

Another relevant point is the person's ties with the host state, e.g. through a long period of residence over time. The ECJ has extended the examination scale for proportionality at the individual level by an economic aspect. Accordingly the competent national authorities are entitled, after considering all factors and the principle of proportionality, to base their

54 Reply given by the German government to a question from the left-wing party DIE LINKE, BT-Drs.18/1014, about the conclusions it draws from the interim report of the joint committee on "poverty migration", p.3, 30.04.14.

55 This is shown by the recent questions from Germany to the ECJ in regarding job seekers (Vatsouras, C-22/08 und C-23/08, Alimanovic C-67/14) and economically inactive, non-working Union citizens (Brey C-140/12, Dano C-333/13).

56 ECJ, 19.09.2013 (Brey), C-140/12, para 77.

judgment on whether the granting of a social benefit constituted an "unreasonable burden on the national social assistance system" of this member state.⁵⁷

- With job seekers, the residence is lawful as long as they can show that they are seeking work with a genuine chance of finding it. It is not necessary to give evidence of adequate means of subsistence. Something that has not been finally settled, however, is who is the most competent body to examine the evidence for a possible time-limit on the right to seek work and can forecast the chances well enough to set a time limit.⁵⁸ If necessary this will be the immigration authority, which does not have knowledge of the labour market and the chances of employment. A successful search for work nowadays depends on many individual factors, but also on some that cannot be influenced personally and that even German job seekers can hardly cope with. Foreign job seekers, in addition, need to speak German, and get to know the practices on the German labour market; they may also have to go through a recognition procedure for their vocational qualifications and so take more time to get a job than Germans do. For that reason, objective factors such as registering with the Federal Employment Agency as a job seeker,⁵⁹ documenting the search or making a sworn statement (affidavit) should be enough. There needs to be legal certainty on this matter, since evidence of having a genuine chance of finding work is essential both for the right of free movement and for drawing social benefits.

Union citizens are obliged to leave the country only when the immigration authority has found – in a formal administrative process for the individual case – that the right to entry and residence no longer exists.⁶⁰ It is admissible to appeal against such a finding. Such a decision can no longer be taken after the right of permanent residence has taken effect, even if the preconditions for freedom of movement no longer existed even before, yet no such finding was made.⁶¹ After departure and re-entry the rights of Union citizens are revived. The determining that there is a loss of free movement

57 ECJ, 19.09.2013 (Brey), C-140/12, para 79. See below under 2.2.6.

58 The German government plans to define the right to seek work more clearly (evidence of genuine prospects of finding work after six months residence) pursuant to ECJ case law in the judgment of 26 February 1991, C-292/89 (Antonissen) para 22, on the basis of a provision in the British Immigration Act.

59 This is possible directly with the employment agency even without drawing unemployment benefit (SGB II benefits).

60 German Social Court (BSG), judgment of 19 October 2010, B 14 AS 23/10 R, para 16 ff.

61 See 5.5.1.3 of the administrative regulations on FreizügG/EU.

because of drawing social benefit, or the non-existence of grounds for free movement, is not linked with a restriction on re-entry.⁶²

Finding a loss of the rights of entry and of residence pursuant to §5(4) FreizügG/EU was only decided in 2687 cases from 2009 to 2013 and the figures even declined in 2013 at 696.⁶³ This shows that such a finding is made very rarely.

It is also largely ineffective in the cases of §5(4) and §2(7) FreizügG/ EU since a new status of free movement arises or can be justified everytime until the person leaves the country. Likewise individuals can in principle immediately re-enter the country since that would again give them an unconditional right of residence. In this period of time they can attempt to justify a right of freedom of movement, at least to provide evidence of seeking work with a genuine chance of success.

Tip for advisors

Before a situation arises in which a non-worker has to claim social assistance as a substitute for the required means of subsistence, you should check to what extent other – less significant – benefits may be claimed, e.g. assistance with the rent, parental allowance. Should your client still have received a letter declaring the loss of their right of movement, you can try to show that this lacks proportionality. You should at all cost ensure that an appeal is lodged within the given period and, if it is rejected, that legal action is taken, possibly with the assistance of a lawyer, if a your client so desires and a lawsuit seems promising. By way of preparation, you can together compile a list of benefits the client has claimed and whether there are arguments for indicating that their personal income situation will improve. The time available around the legal action can be used to create a situation in which the charge of a lack of adequate means of subsistence is no longer accurate, e.g. by justifying a new ground for freedom of mobility, active search for work, even achieving worker status or beginning vocational training. Ultimately, it remains true that even if there is an obligation to leave the country, it will be possible to return immediately and stay for at least three months without any conditions.

3. The right of permanent residence

In accordance with §4a FreizügG/EU Union citizens automatically receive a right of permanent residence after five years of lawful residence in a member state. It does not depend on any further conditions. Union citizens reside lawfully within German territory as long as the immigration authority has not definitively found that they have lost the right of freedom of movement pursuant to §2(7), §5(4) or §6 FreizügG/EU. After five years it will no longer be possible to do so on grounds of drawing social benefits, e.g. on the grounds of a lack of means of subsistence for non-workers or the non-existence of a ground for freedom of movement. A document certifying the right of permanent residence may be issued. Once the right of permanent residence has been acquired, it will only lapse following an absence of over two years, if the absence is not just for a temporary reason (§4a(7) FreizügG/EU).

Certain interruptions of residence are without risk for acquiring and maintaining the right of permanent residence, e.g. temporary absences of up to a total of six months or a one-off absence of up to 12 subsequent months for an important reason (§4a(6)3 FreizügG/EU).

Under the preconditions of §4a(2) FreizügG/EU the right of permanent residence may even be acquired before five years have lapsed due to a person's continuing employment or reaching retirement age.

Tip for advisors

Point out to your clients that the right of permanent residence and related rights will be at risk if they leave Germany for over two years.

⁶² A bar on re-entry and prohibition of residence may only be imposed on grounds of §6 FreizügG/EU (grounds for loss due to endangering public security, order or health). Any other relevant plans to amend the Freedom of Movement Act will meet with considerable doubts under EU law.

⁶³ Reply given by the German government to a question from the left-wing party DIE LINKE, BT-Drs.18/1014, about the conclusions it draws from the interim report of the joint committee on "poverty migration", p.7, 30.04.14.

4. Overview of the right of free movement

1. Workers, self-employed persons and job seekers who can show evidence of looking for work always have a right of freedom of movement and cannot be expelled on grounds of drawing social benefits.
2. An essential feature of employee status is that the work is done on the instructions of an employer and the worker receives remuneration. Secondary, quantitative features are the amount of pay, number of working hours or duration of the employment relationship.
3. For Romania and Bulgaria this has been abolished since 1 January 2014, while it has applied for Croatian immigrants since 1 July 2013: freedom of movement for workers is restricted, yet not the other rights of freedom of movement based on freedom to provide services and freedom of establishment. With some exceptions, Union citizens from Croatia currently have a secondary access to the German labour market as employees, i.e. they require a work permit.
4. The status of self-employed person exists in the case of economic activity based on continuity and not bound to instructions. The amount of income is secondary. It can also be declared as loss of earnings in the initial phase if the income does not suffice for a living.
5. Residence to seek work is generally permitted without any time limit if it can be shown that there is a genuine chance of finding work.
6. If the person is a service provider or recipient s/he has a right of residence for the duration of the service.
7. Non-workers (persons who have no connection to the labour market and are not looking for work) are entitled to freedom of movement on condition that they have adequate means of subsistence and health insurance. This condition also applies to their family members. It is possible to claim partial or temporary social benefits without endangering the right of residence. Their residence must be regarded as lawful until the right is found to be lost, taking account of the circumstances of the individual case.
8. The document confirming freedom of movement has been abolished since January 2013. It suffices to supply proof of having registered the address of the new place of residence in Germany.
9. Generally it is assumed that a right of free movement exists for Union citizens. Systematic random checks are inadmissible and the statutory assumption may only be examined if there are concrete reasons for doing so. In such a case, residence is permitted until the immigration authority finds that the right of residence has been lost, which might be only after an appeal and legal action.

III. The right to social benefits

Preliminary comment

Since 2005, the rights to claim social benefits in Germany have been set out in the Code of Social Law Books (SGB) I-XII. People who have worked and paid into unemployment insurance receive unemployment benefit under SGB III for one year (or two years if they are older); this amounts to 60% of their previous income. After that, as for all other needy people, they have an unlimited, tax-financed right to benefits under SGB II or SGB XII, which are at the subsistence level.

The state covers the costs of accommodation, living costs and statutory health insurance. The main difference between the two Law Books is that SGB II covers the claims for people able to work. While they receive this benefit, the job centre provides training and other programmes to help them integrate into the labour market, and they are required to apply for vacant jobs. SGB XII deals with the conventional form of social assistance for non-working people and those of retirement age.

The prohibition of discrimination for all Union citizens on grounds of nationality under Art. 18 TFEU applies generally for social benefits, regardless of the purpose of residence. Particularly regarding the general preconditions for receiving social benefits, the member states must not make any distinctions that could impact negatively on mobility within the EU. Accordingly, all Union citizens in principle have the same claim to social benefits as the residents of the country.

This applies indisputably to

- workers entitled to stay
- self-employed persons
- persons with a right of permanent residence
- and their respective family members.

By contrast, there are extreme legal disagreements at present with respect to the claims of job seekers and non-workers or economically inactive Union citizens and this is creating considerable difficulties in the practice of advisory services.

For persons whose residence derives solely from seeking work, SGB II and SGB XII have provided for exclusions from benefits. However, these exclusion provisions may prove inapplicable in practice. The following sections will outline the exclusion provisions and their consequences, and also arguments against their applicability. If social benefits are still drawn in spite of the exclusion provisions this causes no risk to the unrestricted right of residence for the purpose of seeking work.

Non-workers or non-active job seekers are not explicitly excluded from social benefits in SGB II and SGB XII.

As mentioned above in II.2.2.6 and II.2.6, there may be a risk of losing the right of free movement as a result of claiming benefits as a means of subsistence. However, as long as this has not been found to be lost (considering the criterion of proportionality) they have a right to receive benefits. While the right of residence deriving from a ground for free movement ends immediately under Union law when the preconditions lapse, this right is automatic without a further finding by the host state.⁶⁴ But if a determination of loss can only take place through weighing up the circumstances in the individual case, a decision on whether the drawing of social benefits is reasonable or not is still needed. In case of dispute, this matter can go before the administrative courts.

Because of the temporary nature of providing or receiving a service, service providers and recipients frequently do not normally reside in Germany, which is the precondition of most social benefits. Here too, if there is no right to benefits, it is still possible to get the social security authorities to

⁶⁴ ECJ, 21 June 2011, C-325/09 (Dias) paras 48–55.

check whether they can grant discretionary benefits in individual cases pursuant to SGB XII.

However, the prohibition of discrimination regarding social benefits does not apply to persons whose right of freedom of movement has definitively been found to be lost.

They are no longer covered by the area of application of Community law, although they can sometimes invoke the basic right to a decent minimum subsistence level from Art. 1 in connection with Art. 20 Basic Law, at least an “irrefutable need”.

As of 1 April 2011 with the clarification made with respect to §8(2) p. 2 SGB II it is not possible to exclude Croatian nationals for inability to earn a living under alien law solely on grounds of their secondary labour market access.

Having a genuine chance of getting work is no longer necessary for the granting of a work permit, as has already been clarified for Romanian and Bulgarian nationals.

1. Benefits under SGB III, student grants and child allowance

See German version

2. Benefits under SGB II and SGB XII

Art. 24(1) of Directive 2004/38/EC underlines the prohibition of discrimination from Art.18 TFEU. Accordingly, Union citizens should in principle also have a right to receive means of subsistence pursuant to SGB II for those able to work and SGB XII for those who are not, or no longer, able to work.

By way of derogation, the member states pursuant to Art. 24(2) may make an exception from the principle of equal treatment. In the first three months after entry, and in the subsequent period of seeking work, the host member states are not obliged to grant social assistance to Union citizens.

The German legislator used this option in 2006 and introduced the exclusion clauses §7(1) p. 2 SGB II and §23(3) p.1 SGB XII for job-seeking foreigners (meaning exclusively Union citizens); its applicability is highly disputed and a case is being fought at present in two proceedings before the Court of Justice of the European Union (see below and III.2).

According to the letter of the law, the following have no right to draw unemployment benefit under SGB II (§7(1) p.2 SGB II):

1. Foreigners who are not workers or self-employed or entitled to remain, along with their family members, for the first three months of their residence, except in the case of a humanitarian residence permit under the Residence Act (AufenthG).
2. Foreigners whose right of residence derives solely from the purpose of seeking work, along with their family members.
3. Those entitled to benefits under §1 Asylum Seeker Benefit Act.

The following have no claim to social assistance under SGB XII (§23(3) SGB XII):

1. Foreigners who have entered the country in order to obtain social assistance, along with their families.
2. Foreigners whose right of residence derives solely from the purpose of seeking work, along with their family members.
3. Foreigners who have entered the country for medical treatment or therapy. They should, however, be granted assistance in order to avert a life-threatening condition or a serious or infectious illness, if this seems imperative.
4. Those entitled to benefits under §1 Asylum Seeker Benefit Act. Under §23(1) SGB XII, foreigners who are actually in Germany have in principle a right to assistance with their living costs, assistance with illness, pregnancy and maternity, along with care, basic social security (Grundsicherung) when their earnings decrease and assistance in their old age. Moreover, the benefits must be decided with discretion pursuant to chapter 6 (integration assistance for disabled persons), chapter 8 (assistance to overcome particular social difficulties) and chapter 9 (assistance in other life situations). If foreigners are probably going to remain in Germany and if they possess a residence permit this right applies to all benefits under SGB XII.

Directive 2004/38/EC permits the exclusion from social assistance if the right of residence derives from seeking work, however, not in every case. Only someone who has entered the country directly to seek work can be affected by the exclusion. The exclusion from the claim to social assistance during a residence of over three months may

therefore only apply to Union citizens who have come to Germany for the sole purpose of seeking work.

There may be other purposes for residence that are not expressly named in the law. In accordance with §11(1)5 FreizügG/EU in connection with §7(1)3 AufenthG, residence permits may be issued to Union citizens for such purposes. One example is the case of a pregnant Union citizen, whose child was to receive German nationality. Under Art. 6(1) Basic Law the child had a right to enabling and maintaining a family relationship with both parents from birth. The mother's right of residence was recognised as worthy of protection in advance of the child's birth.

The purpose of residence solely to seek work is likewise no ground for receiving social assistance when the person actually creates a connection with the labour market while looking for work.

Here the still unanswered question arises as to whether the benefit under SGB II is really a benefit that eases the way into the labour market (a hybrid benefit with one part related to the labour market and a social benefit providing means of subsistence) or social assistance pursuant to Directive 2004/38/EC. If SGB II does not fall under social assistance as understood by European law and the labour market-related element prevails, the ground for exclusion set out in §7 SGB II infringes on higher-ranking Union law and is inapplicable (see 3.1).

Tip for advisors

Workers, self-employed persons, those entitled to stay and persons with a right of permanent residence, along with their respective family members, are not affected by exclusions set out in SGB II or SGB XII. Nor are the exclusions from benefit effective if other purposes for residence apply, e.g. to create a marital and family unit that is protected by Art. 6 Basic Law, with victims of human trafficking for the purpose of exploitation at work or sexual exploitation, or when a real connection has been made to the German labour market.

3. The non-applicability of exclusions on grounds of higher-ranking law and case law

3.1 The hierarchy of norms in the European Union

In order to be able to understand the current litigation, we need again to look at the hierarchy of laws and provisions at the various levels of European law.⁷² In all its legal acts, European law takes priority over national law, when it is sufficiently clear and distinct. Primary law (TFEU, TEU and the Charter of Fundamental Rights of the EU) takes precedence over secondary law (regulations, directives, ECJ judgments). Above all, it is important to remember that Union law takes precedence over German law, even over the German constitution (Basic Law). Through its immediate application, an EU regulation is higher than a directive, which contains scope for transposition by the national legislator. A directive is effective only through national implementation that, in turn, has to be measured against primary or secondary law. By contrast, treaties under international law, such as the European Convention on Social and Medical Assistance or other bilateral conventions only have the status of an ordinary federal German law, comparable to the German books of social code (SGBs). They cannot go before Union law that always takes precedence.

3.2 Right to SGB II benefits on grounds of Regulation (EC) 883/2004 on the coordination of social security systems

According to recent case law, the principle of equal treatment set out in the Regulation on the coordination of social security systems of 2004 (EC 883/2004) has repercussions on the current exclusions of job seekers from benefits under the German social code. Art. 4 of the regulation stipulates that nationals of another member state "shall enjoy the same benefits" as the nationals of the state that grants the assistance.

The regulation prohibits all discrimination on grounds of nationality, yet this applies only to persons who move their

⁷² See above under II.1 Legal framework and diagram.

place of residence to another EU country and fall under the scope of application of the regulation. That means that the person concerned must be – or have been subject to the legal provisions pursuant to Art. 2(1) of the regulation.⁷⁵ These provisions relate to laws, regulations, statutes and administrative regulations in connection with the social security benefits listed in Art. 3(1–3) of the regulation. Pursuant to Art. 3(5) the regulation and its requirement of equal treatment is, however, not applicable to social and medical assistance. Yet these are the benefits of classical German social assistance laid down in SGB XII. Accordingly, no social assistance benefits under SGB XII can be derived from Regulation (EC) 883/2004.

For the coordination of benefits in the case of unemployment SGB XII states: pursuant to Art. 64 Regulation (EC)

883/2004, the country of origin is responsible for benefits within the first three months of seeking work in another member state, on condition that the Union citizen was registered as unemployed and available for work for at least four weeks before leaving his/her country and that s/he registered with the competent employment agency within one week of arrival in the host state. Job seekers can, so to speak, export their claim for social assistance in the form of unemployment benefit for this period. Observing these rules can prevent job seekers becoming destitute in the first three months in Germany, as this is precisely the period when they are excluded from receiving benefit under SGB II.

The prohibition of discrimination applies not only in connection with worker status, but also with benefits in case of illness, maternity or paternity, old age, unemployment and other family allowances like child and parental allowance. Social benefits also expressly include cash benefits independent of contributions and thus also German benefits for job seekers to guarantee subsistence from basic social security under SGB II, as set out in in Annex X of Regulation 883/2004 for Germany.

75 The Regulation coordinates the following social security systems under Art. 3: a) sickness benefits; b) maternity and equivalent paternity benefits; c) invalidity benefits; d) old-age benefits; e) survivor's benefits; f) benefits in respect of accidents at work and occupational diseases; g) death grants; h) unemployment benefits; i) preretirement benefits; j) family benefits.

It is remarkable that the Council adopted Regulation (EC) 883/2004 and Directive 2004/38/EC on the same day, and yet the concept of social assistance and the possibility of excluding job seekers from social assistance are not clearly defined. That has led to contradictory secondary EU law. The German division into benefits under SGB II and SGB XII creates an unclear legal situation, which in practice has fatal effects through the complete exclusion from subsistence benefits for job seekers.

Tip for advisors

Check whether a job-seeking Union citizen already receives – or has received – benefits in Germany pursuant to the regulation. Then, referring to case law (see 3.4) and the prohibition of discrimination in Regulation (EG) 883/2004, the client should apply for benefits under SGB II. If necessary the right must be enforced with the aid of a lawyer

3.3 Right to SGB II and SGB XII benefits under the European Convention on Social and Medical Assistance?

The European Convention on Assistance and Medical Assistance (1953) is a convention under international law adopted by the Council of Europe that provides for assistance for nationals of the signatory states legally residing in a country. In its judgment of 19 October 2010 in the case of a French national, the German Social Court found that the equal treatment stipulated in Art. 1 of the Convention⁷⁸ is a more specific legal principle, thus taking priority over the exclusion from benefits under §7(2) SGB II. Thereupon the Federal Republic of Germany declared that its recognition was subject to a proviso.

Whether this was admissible or not is a matter of great dispute⁷⁹ and this is even denied by prominent Länder social

78 “Each of the Contracting Parties undertakes to ensure that nationals of the other Contracting Parties who are lawfully present in any part of its territory to which this Convention applies, and who are without sufficient resources, shall be entitled equally with its own nationals and on the same conditions to social and medical assistance (hereinafter referred to as “assistance”) provided by the legislation in force from time to time in that part of its territory” (Art. 1 Convention on Social and Medical Assistance).

79 *Pacta sunt servanda – Ist der deutsche Vorbehalt zum Europäischen Fürsorgeabkommen wirksam?* Keßler/Steffen ZAR 2012, 245–247.

courts (LSGs).⁸⁰ The German Social Court itself, following its own case law, assumes that the proviso is effective.⁸¹

In our opinion it is not necessary to examine this matter here, since the German Social Court did not contribute to legal clarity anyway by referring to a convention of the Council of Europe from 1953⁸² and not to European law, which is applicable without exception to all EU citizens. The legal path thereby opened up is not very expedient since it contains an old concept of “assistance”, which more recent legislation would define in a more nuanced way. In another view, the benefits under SGB II for Union citizens have been completely upstaged by the higher placed Regulation (EC) 883/2004, in particular by its Art. 8.⁸³ Claims to benefits under SGB II must therefore be assessed exclusively in relation to the Regulation even after the proviso declaration and quite independently of its effectiveness. Benefits therefore depend entirely on ascertaining that a person normally resides in Germany. On no account can the enforcement of EU law depend on whether a state has signed the European Convention on Social and Medical Assistance or a bilateral agreement on assistance.⁸⁴

3.4 Current state of case law in relation to SGB II benefits for job seekers

Whether there is right to subsistence benefits for EU citizens in Germany is highly disputed, due to the unclear relationship between Regulation (EC) 883/2004 and Directive 2004/38/EC, on the one hand, and the lawfulness of permanent and automatic exclusion of job seekers from benefits under SGB II, on the other, which sometimes leads to different assessments by social courts. So far no judicial policy decision has been taken in this important but politically

controversial question to clarify the issues under both German and EU law.

Two German courts, independently of one another, have presented a question to the ECJ – the Leipzig Social Court⁸⁵ in June 2013 and the German Social Court⁸⁶ in December 2013. The latter indicated that there may be a right to SGB benefits under European law for job-seeking EU citizens on the basis of the equal treatment right set out in Regulation (EC) 883/2004. In the Leipzig proceedings the European Commission likewise expressed doubts about the lawfulness of automatically excluding job-seekers from EU member countries.⁸⁷

The German Social Court basically asked the following:

- Does the requirement of equal treatment of Art. 4 Regulation (EC) 883/2004 also apply to SGB II as a non-contributory cash benefit pursuant to Art. 7 of the Regulation?
- If so, are restrictions on the equal treatment stipulated in Art. 4 Regulation (EC) 883/2004 possible in transposing Art. 24(2) Directive 2004/38/EC as with SGB II, which states that social benefit is denied without exception if a right of residence of the Union citizen in another member state is solely for the purpose of seeking work?
- Do the provisions of EU primary law from Art. 45(2) TFEU in connection with Art. 18 TFEU run counter to SGB II's exclusion of a social benefit that serves both to guarantee subsistence and to facilitate access to the labour market, if the social benefit is, without exception, denied for the time of a right of residence solely for seeking work and independent of a connection with the labour market?

80 LSG (social court) Bavaria L 16 AS 568/12 B ER; LSG Berlin-Brandenburg L 19 AS 794/12 B ER: The proviso on the Convention is ineffective as there are doubts as to whether the SGB II is a new legal provision pursuant to Art. 16 Convention on Social and Medical Assistance.

81 BSG 12 December 2013, B 4 AS 9/13 R para 23.

82 Germany has further international obligations from bilateral agreements, e.g. the German-Austrian agreement on assistance.

83 Article 8: Relations between this Regulation and other coordination instruments

1. This Regulation shall replace any social security convention applicable between Member States falling under its scope. Certain provisions of social security conventions entered into by the Member States before the date of application of this Regulation shall, however, continue to apply provided that they are more favourable to the beneficiaries or if they arise from specific historical circumstances and their effect is limited in time. For these provisions to remain applicable, they shall be included in Annex II. If, on objective grounds, it is not possible to extend some of these provisions to all persons to whom the Regulation applies this shall be specified.

85 ECJ, case Danos C – 333/13

86 BSG, 12 December 2013 – B 4 AS 9/13 R – case Alimanovic C – 67/14.

87 Statement by the European Commission of 27 September 2013 on Danos C – 333/13 para 102.

Furthermore, a right to social benefits would close the social security gap that places municipalities and welfare organisations before great challenges in providing emergency assistance for this group of people. Receiving means of subsistence would guarantee adequate health insurance and the covering of appropriate costs for accommodation, offer protection from exploitation and discrimination and enable migrants to integrate into the labour market. In the Dano case (which is about social benefits for a non-worker) the ECJ largely followed Advocate-General Wathelet and declared the exclusion to be lawful.⁸⁸

In the Alimanovic case, which relates to a Swedish job seeker, a decision is still pending.

Until a decision is made by the ECJ and the German Social Court the situation is still unclear and case law is extraordinarily heterogeneous as to whether the exclusion clause of §7(1) p. 2 No 2 SGB II is applicable. It therefore depends on the competent social court in the relevant German state as to whether a claim can be asserted or not.⁸⁹

At present almost all Länder social courts (LSG) in Germany grant subsistence benefits when an emergency appeal is submitted. An evaluation of case law since January 2013⁹⁰ shows that in 61 cases (69 percent) courts found in favour of the job-seeking Union citizen. The statistical evaluation also shows that at present only two state social courts, and here basically three panels of judges, clearly deviate from the general trend: out of 19 negative decisions since early 2013, ten are from LSG Berlin-Brandenburg (mainly the 29th panel⁹¹) and six from LSG Lower Saxony-Bremen (13th panel and 15th panel). The other three negative decisions stem from

LSG North Rhine-Weestphalia and LSG Saxony-Anhalt; meanwhile they have, however, revised their case law.⁹⁴

Unlike the German Social Court, the highest instance, the 13th and 15th panels of LSG Lower Saxony-Bremen plus the 29th panel of LSG Berlin-Brandenburg still have no doubt that the exclusion from benefit for job-seeking Union citizens in SGB II is compatible with European law and German constitutional law.

The state social courts give various reasons for recognizing a legal claim to social benefit, despite the different ways it has been framed in law. They vary greatly in assessing the legal situation and consequently take different paths towards a solution:

- Regulation (EC) 882/2004 and its stipulation of equal treatment takes precedence in practice over the exclusion set out in SGB II and Directive 2004/38/EC, since benefits under SGB II are intended to facilitate employment and so do not constitute social assistance pursuant to Art. 24(2) of the Directive and also it is not possible to distinguish between benefits for integrating into work and benefits to cover living costs.⁹⁵
- The exclusion from benefits in SGB II is not fully covered by Directive 2004/38/EC as it does not provide for the necessary examination of the individual case and proportionality, but rather for automatic exclusion without a time limit.⁹⁶
- The exclusion from benefits in SGB II infringes on higher-ranking law as it requires an additional examination of the real connection with the labour market.⁹⁷

88 In his final request – interestingly published just before the European Parliament elections – the Advocate General comes to the conclusion that an automatic exclusion from benefits on general criteria – contrary to current ECJ case law in the Brey case – is compatible with Union law, in order to “prevent abuses and a certain form of social tourism”. It remains to be seen whether this view will stand up. See critical responses to the Advocate-General’s statements: LSG Hessen 6.06.2014 L 6 AS 130/14 B ER RN 13 and Claudius Voigt, Comments on Wathelet’s final request, 22 May 2014.

89 Claudius Voigt aptly states that securing minimum subsistence depends on where you live. Union citizens find it particularly hard to assert their claims in Lower Saxony and Brandenburg, 27.06.14.

90 Claudius Voigt, Article of 27.06.2014 with link to his recent database of case law (see V. list of resources).

91 LSG Lower Saxony-Bremen (13th panel) 18 March 2014, L 13 AS 363/13 B ER made the remarkable statement: “It reflects the concept of humanity of the Basic Law and its understanding of the human dignity of an individual who decides freely about their way of life that people initially help themselves through all their own efforts and resources when suffering hardship, before claiming assistance from the state. (...) This also applies with respect to the exclusion from benefits for Union citizens who have entered Germany solely to seek work. Ultimately, in view of this exclusion, it would be best for them to return to their homeland and to obtain a living from the social security systems there.”

95 LSG Hessen, 20.09.13, L 7 AS 474/13, LSG Saxony, 30.04.14, L 7 AS 502/14 B ER.

96 LSG NRW, 28.11.13, L 6 AS 130/13, LSG Bavaria, 19.06.13, L 16 AS 847/12. The German Social Court expressed doubts on 30.01.13, B 4 AS 54/12 R.

97 LSG Saxony, 14.04.14, L 7 AS 239/14 B ER, LSG Saxony-Anhalt, 18.02.14, L 5 AS 63/14 B ER.

- the exclusion from benefits must be interpreted in conformity with European law in favour of the job seeker.⁹⁸
- the German proviso against the European Convention on Social and Medical Assistance in December 2012 is ineffective and therefore there is a claim to benefits under SGB II.
- Due to the complex legal question, the necessary consideration of consequences must be decided in favour of applicants, in urgent procedure. If their applications for benefits are not granted there would be a risk to their livelihood and only financial disadvantages for the opponent in the lawsuit.¹⁰⁰
- In considering the consequences, guaranteeing a minimum subsistence level takes priority in an urgent procedure pursuant to Art. 1(1) and Art. 20(3) Basic Law.¹⁰¹
- The exclusion from benefits applies only to job seekers: for Union citizens without the right of freedom of movement (e.g. because of non-working without personal means of subsistence) a right to subsistence benefits on grounds of normal residence in Germany applies until the immigration authority finds that it has been lost pursuant to SGB II (!).¹⁰²
- If there the person is seeking employment but there is a lack of connection with the labour market, spite their ability to work, they have a right under SGB XII to means of subsistence through assistance with living costs.¹⁰³

Tips for advisors

It is meanwhile very promising for job-seeking Union citizens to apply for benefits under SGB II at least after three months of residence, or alternatively as a provisional grant by the job centres. In case of rejection, an appeal should be lodged and, as appropriate, preliminary legal protection requested, with an auxiliary request against the social security authority that is also to be summoned.

Depending on the individual case and the path chosen by the court, a precondition is that there is a connection to the labour market or the scope of application of Regulation (EC) 883/2004. The Union citizen should ideally be registered with the employment agency as seeking work and actively do so.

3.5 Current state of case law on the exclusion of non-workers from social assistance

The German legislator has not laid down any exclusions in the social codes for non-workers or economically inactive Union citizens. Non-employed persons without their own means of subsistence including health insurance do not fulfil any grounds for residence under FreizügG/EU. Economic inactivity may exist for different reasons: inability to earn, reduction of earnings or reaching retirement age. However, it also applies to those who are economically inactive under European law, who cannot give evidence of looking for work although they continue to be able to do so and have no connection with the labour market. The ECJ, in its judgment

⁹⁸ LSG NRW, 12.04.14, L 7 AS 106/14 B ER.

¹⁰⁰ LSG NRW, 20.12.13, L 12 AS 2266/13 B, LSG Baden-Württemberg, 21.6.13, L 12 AS 1432/13 ER-B, LSG Thuringia, 25.04.14, L 4 AS 306/14 B ER, LSG Schleswig-Holstein, 1.03.14, L 6 AS 29/13 B.

¹⁰¹ LSG NRW, 8.05.14, L 19 AS 678/14 B ER, LSG Bavaria, 2.07.14, L 16 AS 419/14 B ER.

¹⁰² LSG NRW, 10.10.13, L 19 AS 129/13 (appeal admitted), LSG Hessen, 6.06.14, L 6 AS 130/14 B ER, LSG Sacony-Anhalt, 1.11.13, L 2 AS 889/13 B ER.

¹⁰³ LSG Hamburg v. 14.01.2013, L 4 AS 332/12 B ER. The LSG interprets § 7 SGB II in conformity with European law and checks on a connection to the labour market, negating this although the person had done prior seasonal work and was currently attending an integration course. The LSG does not deal with Regulation (EC) 883/2004 or Directive 2004/38/EC and considers the German proviso regarding the Convention on Social and Medical Assistance to be effective, then concluding there is a right to subsistence under chapter 3 of SGB XII, as it does not relate to the proviso.

of 7 September 2004 (Trojani) on the question of whether subsistence benefits may be withheld, states “that the member states are permitted to make the residence of a non-economically active Union citizen dependent on the availability of adequate subsistence, but it does not follow that such a person, during their lawful residence in the host state, should not benefit from the fundamental principle of equal treatment as laid down in Art. 18 TFEU”.¹⁰⁴

Therefore granting social benefits to non-workers must involve a differentiation from the right of residence. They are allowed to draw social benefits free of discrimination and of the loss of the right of residence. For this reason case law generally tends to find that social benefit is to be granted until a formal determination of the loss of the right of residence – because of the continuation of the principle of equal treatment from Art. 18 TFEU.

Consequently it affirms a right to SGB II for those who are actually able to work but have no connection with the labour market and are not seeking work. Here the question is at most whether, because of lack of grounds for residence, the normal residence required under §7(1) p. 1 No 4 SGB II exists at all as a basic precondition for drawing social benefits. However, this has been confirmed at the highest level by the Federal Social Court.¹⁰⁷

Tip for advisors

Non-workers (see II.2.2.6) fall under the prohibition of discrimination of Art. 18 TFEU and can draw social benefit. By contrast with job seekers, however, they are not excluded from benefit. However, the right of freedom of movement may be lost on grounds of drawing social assistance (see II.2.5). Benefits under SGB XII or SGB II (for those able to work) must be granted at least until the formal determination that the right of free movement has been lost and until the person leaves the country. The right of freedom of movement must not lapse automatically, but involve an individual examination and checking of proportionality. Those able to work should in any case give evidence of looking for work and really strive to build up a connection with the job market.

¹⁰⁴ ECJ, 7 September 2004, C-456/02 (Trojani) para 40

¹⁰⁷ The residence is open-ended under §30 SGB I until the decision of the immigration authority (in this case even under §6 FreizügG/EU, loss on grounds of risk to public security and order) on the loss of the right of entry and residence (BSG, 30 January 2013, B AS 54/12 R, para 20.)

3.6 Basic right to a decent subsistence minimum in Germany

The Federal Constitutional Court in 2012 handed down a fundamental judgment on the basic right to a decent existence minimum for foreigners.¹⁰⁸ Union citizens who are residing not just temporarily in Germany are also holders of this basic right. The absolute nature of German exclusions from social benefits have thus also infringed on German constitutional law. In its judgement the court defined the principle: The human dignity guaranteed in Art. 1(1) Basic Law must not be watered down in terms of migration policy. The highest court has granted the basic right to a decent subsistence minimum to asylum seekers and even to persons with a stay of deportation, who are obliged to depart and no longer reside lawfully in Germany. This can apply no less to Union citizens who are lawfully seeking work in Germany, even when after a proportionality check they have been found to have lost the right of residence.

The permanent exclusion from benefits set out in §7(1)2 SGB II for Union citizens lawfully residing in Germany is not compatible with these principles. Even if European law in Regulation 2004/38/EC contains an option for an exclusion from benefits, the including of exclusions in SGBs in 2006 clearly pursued the policy of preventing a supposed immigration by Union citizens into the social security systems. This is, however, inadmissible when it comes to granting the socio-cultural subsistence minimum, since the subsistence is not based on the needs of the Union citizens lawfully residing here. The fact that Art. 24(2) Regulation 2004/38/EC expressly allows the member states to exclude Union citizens from social benefits is irrelevant, at least from the angle of the obligation on the German legislator deriving from the Basic Law.

3.7 What legal steps should be considered?

Current case law shows contradictions in the national legal situation with its exclusions from benefits, on the one hand, and the European legal situation, on the other – with its principle of equal treatment and possibilities of exceptions and constitutional law. Consequently, applications for social benefits have a good chance of success at present, both for job seekers and for economically active Union citizens – as

¹⁰⁸ BVerfG, judgment of 18 July 2012 – 1 BvL 10/10, 1 BvL 2/11.

long as adequate grounds can be submitted for economic inactivity. When anyone applies for benefits for job seekers or non-Union citizens they should make sure to apply for a “provisional decision” at the same time.¹⁰⁹

That way, in the cases in which the job centre has automatically rejected SGB II benefits, they can be provisionally and separately approved – even without appealing to the social court – pursuant to §328(1) SGB III in connection with §40(2) No 1 SGB II.

(...)

Through the two preliminary requests for decision currently pending at the ECJ¹¹⁰ on the topic of SGB II rights for job-seeking Union citizens, and several likewise undecided proceedings at the German Social Court, the precondition for a provisional decision is fulfilled. Meanwhile, some social courts have recognised the possibility of relieving their workload and even refer the opponents of the applications to the possibility of provisional approval by the job centres, on the argument that it is unfair to continue to leave the applicant to rely on litigation. A provisional approval is a discretionary decision. In a recent decision, the Berlin-Brandenburg social court sees the discretion of job centres as reduced to zero and thereby even justifies a right to granting provisional benefits.¹¹¹

Care must be taken to note, however, that provisional benefits (as also in the urgent legal protection proceeding) are granted subject to reimbursement. After the final ECJ decision in 2014 in the Dano case and the decision expected in 2015 in the Alimanovic case the social security authorities may have the right to demand the benefits back under §328(3) p.2 SGB III. In practice, however, this is rarely implemented. An automatic compensation with current social

benefits is inadmissible in such a case. With continuing hardship the claim of the social benefit authority can also be paid in instalments or reduced, i.e. the claim continues to exist but is not dunned this is clearly pointless. Pursuant to §44 SGB II, job centres could drop claims if it would be unfair to implement them in the individual case.

Tips for advisors

When in doubt, apply for SGB II benefits, or alternatively a provisional grant, due to the pending decision of the ECJ. See model application for SGB II benefits IV. Diagram II. At least by then it should no longer be admissible for job centres to automatically reject applications for SGB II benefits by job seekers.

3.8 Obstacles for applications to job centres in practice

Cases of job centres refusing to accept applications are known from time to time. Likewise applications for social benefits are rejected orally or dealt with very slowly, in particular from people from EU member states. However, they are not sufficiently well documented. For example, difficulties can even arise when registering an address if a person is homeless or in precarious living conditions; likewise if they cannot present a lease or live in overcrowded accommodation. Or an existing claim to SGB benefits cannot be asserted owing to inadequate German language skills. An application likewise often fails due to the increased bureaucratic effort e.g. to check the level of hardship when drawing supplementary SGB II benefits, in particular for self-employed persons, or through the foreign connection of the case. For good reason, information should be given on existing laws connected with the submission of the application.

¹⁰⁹ Freizügigkeitsrecht und »Hartz IV« Ist der Leistungsausschluss von Unionsbürgern im SGB II noch zu rechtfertigen? Eva Steffen, lawyer, Cologne, Asylmagazin 1-2/2014, Praxistipp p.18.

¹¹⁰ ECJ, case Dano C – 333/13 and BSG, 12.12.2013 – B 4 AS 9/13 R – case Alimanovic C – 67/14.

¹¹¹ LSG Berlin-Brandenburg, 27 May 2014, L 34 AS 1150/14 B ER, para 13. “Inasmuch as §328 SGB III leaves the provisional granting of benefits in the discretion of the benefit authority, the panel – and the social court – assumes that this discretion has been reduced to zero. Since it has been highly disputed in appeal courts whether the exclusion from benefits for subsistence for job seekers provided for in §7(1)2 N 2 SGB II is in conformity with European law, the German Social Court – the highest instance – submitted essential questions to the ECJ. The situation is thereby that provided for in §328(1)1 No 1 SGB III in which, in view of the subsistence character of the benefits in suit, it would be contrary to duty not to grant them.”

3.8.1 Statutory and bureaucratic principles: right to submit the application

Applications for social benefits by Union citizens must in every case be received and answered in writing. It is not possible to exclude someone solely on grounds of a lack of the right of freedom of movement until the immigration authority has definitively found that this is the case.

(..)

3.8.2 Covering costs for interpreting and translation

A lack of language skills in German is often a great obstacle to lodging an application for benefits under SGB II. Some job centres set the example of offering interpreting services. However, they are mostly only used when the persons concerned rightfully insist on it.

Regulation (EC) 883/2004 states in Art. 76(7):

“The authorities, institutions and tribunals of one Member State may not reject applications or other documents submitted to them on the grounds that they are written in an official language of another Member State, recognized as an official language of the Community institutions in accordance with Article 290 of the Treaty.” Theoretically it is possible to submit a request for SGB II or XII benefits in another EU official language than German.

It is a reasonable and low-cost arrangement for the employment agencies and job centres to assume the costs of translating and interpreting for Union citizens and their family members in cases when no other suitable persons are available. These can be advisors themselves at the job centre or persons known to the applicants with the appropriate skills.

To quote a guide to this recommendation and instructions from the Federal Employment Agency:¹¹³

“In the context of freedom of movement within the European Union workers can take up employment without restrictions in every member state. Thereby clients without sufficient knowledge of German avail themselves of the services of the Federal Employment Agency. However, access to the

advisory and social services of the federal agency should not be hampered by language barriers for this group of people. Hence interpreting and translation services may be used to the necessary extent. (...). Pursuant to Regulation (EG) No 883/2004 of the European Parliament and the Council on the coordination of social security systems, the employment agency or respective job centre may not disadvantage these clients. Even if the facilities named above are not available there is still an obligation to make translations and offer interpreting services; that applies particularly to the translation of applications for persons entitled to this according to the Regulation. During the first contacts (written and oral) with the federal agency or job centre the necessary translation and interpreting services must be arranged and reimbursed. The costs for translating documents (...) and the costs of appropriate interpretation services will be covered in all cases (including further contacts) through official channels.”

In practice the job centres argue that they are not obliged to provide interpreting services for Union citizens as the instructions (HEGA) is only binding on the federal employment agency and thus effective in the laws contained in SGB III, whereas it is only a recommendation for SGB II. However, the instruction goes back to Art. 76(7) Regulation (EC) 883/2004 that is naturally binding for every job centre. There is therefore a legal claim to translation.

Tips for advisors

If the application is rejected, have that confirmed in writing in the entrance area of the job centre and take legal action by filing an appeal. An application for language services is contained in the model application und IV. below.

3.9 Discretionary benefits under SGB XII for destitute Union citizens in case of “irrefutable need”

3.10 Benefits for victims of human trafficking and labour exploitation

See German version.

4. Assistance in case of illness

The following questions must be urgently checked through in the case of claims to sickness benefit:

- Is there health insurance through compulsory insurance in Germany or the country of origin, or can that be justified; do(es) the person(s) concerned belong to a group of persons entitled to benefits?
- Can assistance in case of illness be applied for under §48 SGB XII (“Application for cost coverage”)?
- is it an emergency pursuant to §25 SGB XII?

Only if the answer is negative is it wise to resort to humanitarian assistance through local NGOs, emergency funds and contact points for people who have no access to

the health service, e.g. the Medi offices active across Germany, MalteserMigrantenMedizin or other centres at the local level.

(...)

4.1 Health insurance benefits

4.2 Assistance in case of illness via social assistance under SGB XII

4.3 Emergency assistance under SGB XII

4.4 Humanitarian assistance through local contact centres

See German version.

5. Overview of social benefits

1. Basically the prohibition of discrimination for Union citizens also applies to the area of social benefits received by German nationals.
2. According to the German legal situation, workers (also those with entitled to remain), self-employed persons and Union citizens with a right of permanent residence plus their families are in no way affected by the exclusion from SGB II and SGB XII.
3. Only claims to social assistance as defined by European law may be excluded on grounds of Directive 2004/38/EC.
4. There are strong arguments showing that all the benefits under SGB II are not social assistance in the definition of European law as they are at least to promote access to the labour market and therefore must not be excluded for job seekers either.
5. A non-applicability of the exclusion in SGB II can also follow from the equal treatment principle of Regulation (EC) 883/2004 on the coordination of social security systems.
6. On the basis of the questions to the ECJ about the very controversial legal situation, job seekers making the application must be granted provisional SGB II benefits by the job centres and employment agencies.
7. Drawing social benefits can lead to a loss of the right of freedom of movement solely for non-workers, if they serve as a substitute for the subsistence and health insurance needed for the right of freedom of movement. However, a determination of loss would be unproportional whenever these benefits are drawn foreseeably for a temporary period, or if the Union citizen has developed close relations in the host state. Up until the determination of loss and departure there is, however, a right to social benefits, as here there is no ground for exclusion.
8. For the persons for whom the exclusion still remains, there are still always discretionary benefits to be checked under SGB XII and at least “irrefutable benefits” can be granted. Referring to benefits under the Asylum Seeker Benefit Act is incompatible with the prohibition of discrimination.
9. Job seekers who have no other claim to security in the case of illness, or have not had any statutory or private insurance, are compulsorily insured pursuant to §5(1) No 13 SGB V in Germany when they have their normal residence there.
10. When there is no health insurance, assistance is granted in case of illness under SGB XII in the framework of a legal right or in discretionary fashion. In an emergency, the cost coverage need not have been settled before.

IV. Diagram I

Checklist for advising Union citizens

1. What grounds for freedom of movement under European law does the Union citizen have?
Is there an entitlement to remain as employee or self-employed person, a right of permanent residence after five years residence or a right as a family member of a person entitled to freedom of movement?
2. If not, is there another purpose of residence for the Union citizen than “only looking for work”?
Can s/he take up at least a marginal employment as worker or self-employed activity?
3. If not, it is necessary to register with the employment agency as seeking work. Evidence of actively looking for a job should be given.
4. At the latest after three months of seeking work, and in case of hardship, the Union citizen should apply to the job centre for SGB II benefits. At least until the decision of the ECJ in the case Alimanovic C-67/14 the application for benefits should be linked to an auxiliary request for a provisional decision by the job centre. If the application is rejected – also with a provisional decision – an appeal and legal action should be taken also against the social security authority, as the present exclusion for job-seeking Union citizens is regarded by most Länder social courts as not complying with European law. Usually the main complaint to the social courts will take a long time so an urgent request must be addressed to the court, which then has to decide on it in very few weeks.
5. The loss of the right of residence under FreizügG/EU on grounds of drawing inappropriate social benefits is only important for non-job seekers and non-workers and may be determined by the immigration authority within the first five years (thereafter the person will have an unconditional right of permanent residence). Re-entry is always possible, however.
6. With the few remaining cases of legal exclusion from SGB II and SGB XII benefits, the social security authority must meet the “irrefutable need” of subsistence by means of discretionary benefits in individual cases.
7. If there are signs of wage or labour exploitation with a former or existing job specialist advisors should also be contacted, or the client referred to them. Such signs may be wage arrears, extremely low wages, poor working conditions, precarious accommodation from the employer, a lack of health insurance, irregular work or threats from the employer.

Diagram II

Model application for SGB II benefits for needy Union citizens

First application and application for provisional benefits from the job centre

To the
Job Centre _____

by FAX:

place _____, date _____

Dear Sir/Madam,

With this letter I hereby file a request for benefits for basic social security for job seekers under SGB II, as my reserves and income do not suffice to cover the needs of myself (and my family).

An auxiliary request is for provisional benefits pursuant to §§40(2) No 1 SGB II in connection with §328(1) p. 1 No 1 SGB III.

Statement of reasons:

I am a Union citizen from _____, have resided in Germany since _____ and am looking for work (enclose evidence, as appropriate). I am currently looking for a job as _____ (trade, profession) in the field of _____ (sector).

Since I myself do not speak German well enough to fill out the form applying for unemployment allowance II correctly I request an appointment in order to explain my need for assistance at which I can use and be advised in the _____ (language (official EU language) pursuant to Art. 76(7) Regulation (EC) 883/2004 and HEGA 05/11 - 08.

I am unable to bring a suitable person with a knowledge of German with me and so I ask you to provide staff who speak my language for the appointment or engage an interpreter.

On the grounds of my right of freedom of movement as a job-seeker I refer to the decision of the Federal Social Court of 12 December 2013 (B 4 AS 9/13 R).

Through the question by the German Social Court to the European Court of Justice the opinion was recently expressed by the LSG Berlin-Brandenburg (L 34 AS 1150/14 B ER) of 27 May 2014 that, in view of the nature of the benefit, namely to guarantee subsistence, your discretion has been reduced to zero and it would be "contrary to duty" not to approve benefits pursuant to §328(1) SGB III in connection with §40(2) No 1 SGB II.

Yours truly,

V. List of resources

Zugang zu Kindergeldleistungen für EU-Zuwanderinnen und EU-Zuwanderer

Hinweise für die Beratungspraxis vom Paritätischen – Gesamtverband, März 2014

Handreichung zu Ansprüchen auf Hilfe zur Überwindung besonderer sozialer Schwierigkeiten

nach §§ 67. SGB XII von Personen ohne deutsche Staatsangehörigkeit, BAG Wohnungslosenhilfe e. V.

Online-Formulare der Bundesagentur für Arbeit

mit Ausfüllhinweisen in verschiedenen Fremdsprachen, Stand 2. Juli 2014 (Achtung: Das Online-Formular wird in einigen JobCentern nicht akzeptiert)

Ausgeschlossen oder privilegiert?

Zur aufenthalts- und sozialrechtlichen Situation von Unionsbürgern und ihren Familienangehörigen. Herausgegeben vom Paritätischen Gesamtverband. Autor: Claudius Voigt (Projekt Q). Aktualisierte 2. Auflage, August 2013

„Hartz IV für Unionsbürger_innen: Jetzt Anträge auf vorläufige Leistungen stellen!“

Hinweise für die Beratungspraxis des Paritätischen Gesamtverband Claudius Voigt (GGUA e. V.), März 2014

Die Sicherung des Existenzminimums hängt vom Wohnort ab – Unionsbürger und Unionsbürgerinnen in Niedersachsen-Bremen und Berlin-Brandenburg haben es schwer, Ansprüche durchzusetzen

Claudius Voigt, GGUA Münster, Juni 2014

Aktuelle Rechtsprechungsübersicht SGB-Leistungen für Unionsbürgerinnen und Unionsbürger

Claudius Voigt Projekt Q, GGUA, Juni 2014

Gesundheitsversorgung für EU-Bürgerinnen und EU-Bürgern in Deutschland

Handreichung zu den rechtlichen Grundlagen. Herausgegeben vom Deutschen Roten Kreuz, Juli 2013

Orientierungshilfe zum Krankenversicherungsschutz für Personen ohne ausreichende Absicherung im Krankheitsfall

Deutscher Caritasverband, September 2012

Grundsicherungsleistungen für Unionsbürger unter dem Einfluss der VO (EG) Nr. 883/2004

ZAR 9/2012, S. 317-327, Prof. Dr. Dorothee Frings, Köln

Freizügigkeitsrecht und »Hartz IV« Ist der Leistungsausschluss von Unionsbürgern im SGB II noch zu rechtfertigen?

Eva Steffen, Köln, Asylmagazin 1-2/2014

ALG II und Sozialhilfe für Ausländer, aktueller Leitfadens

Georg Classen, Mai 2013

»Armutsimport«: Wer betrügt hier wen?

Christoph Butterwegge, Blätter für deutsche und Internationale Politik, Heft 2/2014

Schmarotzen auf Deutsch – Arbeitsmigranten, die in Deutschland Hartz IV abgreifen? Von wegen. Sozialmissbrauch findet nicht bei ihnen statt, sondern bei deutschen Unternehmen

Dominique John, tageszeitung, 1.6.2014

VI. Addresses of important advice centres for Union citizens in Germany

Migration advice centres

Basically all specialist migration services offered by welfare organizations in the voluntary sector are competent contact points for Union citizens seeking advice. They include advisory centres for both adults and young people. The brochure *Diakonie in der Einwanderungsgesellschaft – Migrationsfachdienste* with its directory lists the advisory services available in almost 600 church-related and diaconal organisations.¹³²

In addition, however, there are a number of specialist advice centres run by trade unions and other civil society groups.

Fair work for EU workers

DGB (German Trade Union Confederation) advice centres for mobile employees can be found a part of the DGB project „Fair Mobility“ in Berlin, Frankfurt/Main, Hamburg, Munich, Stuttgart and Dortmund.

Overview of advice centres for mobile workers across Germany: <http://www.faire-mobilitaet.de/beratungsstellen>

DGB advice office for posted employees in Berlin: <http://berlin-brandenburg.dgb.de/beratung/eb>

Victims of human trafficking for the purpose of labour exploitation

Bundesweiter Koordinierungskreis gegen Menschenhandel e.V. (KOK)

This is an association of 37 specialised advice centres for victims of human trafficking; it also includes other human rights organisations. It engages in networking, lobbying and public relations for the rights of victims of human trafficking.

Overview of the member organisations and specialist advice centres:

www.kok-buero.de/mitgliedsorganisationen-fachberatungsstellen.html

Bündnis gegen Menschenhandel zur Arbeitsausbeutung (BGMA)

This body sets up support structures for victims of human trafficking for labour exploitation in Brandenburg. It offers advice in cases of suspected human trafficking for labour exploitation, support for advice centres and training programmes.

Overview of advice centres across Germany: www.buendnis-gegen-menschenhandel.de/organisationen

Medical emergency aid

Network of Medi offices

<http://medibueros.m-bient.com/standorte.html>

Malteser Migrant Medicine

<http://www.malteser-migranten-medizin.de/mmm-vor-ort.html>

¹³² The directory lists the different advisory services for migrants and refugees with their work priorities, support programmes and contact details:

<http://www.diakonie.de/diakonie-stellt-migrationsarbeit-vor-13884.html>

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