Fitness Check Report for Germany

A review of the state of compliance of Germany's implementation of Directive 2004/38 on residence rights of EU citizens and their family members

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1. Introduction

This document examines the German implementation of the European right to freedom of movement. The focus in this respect is on looking at the barriers for homeless mobile EU citizens and their options with regard to accessing social benefits. The current Fitness Check for Germany serves to illustrate the current implementation of European law concerning the freedom of movement of homeless mobile EU citizens in Germany and their chances of gaining access to social benefits. The entitlement to social benefits in Germany for EU citizen depends in general terms on their residence status.

We begin by setting out the transposition of the European freedom of movement directive into German law and the rights of residence resulting from this (Section 3). In doing so, we address the problems that can arise for destitute and homeless EU citizens at this point. This is followed by describing how the right to residence can be lost and the consequences that can ensue (Section 4). As access to the German social security benefit system is especially important to destitute EU citizens to ensure their means of subsistence, we then present the conditions and restrictions affecting access to subsistence benefits, paying particular attention to homeless and destitute EU citizens (Section 5). We then consider the possibilities of using the German legal system to enforce residence and social rights for destitute EU citizens in particular (Section 6). To enable a better understanding of the paper, all of this is preceded in the section below by a compilation of the terms used (Section 2).

2. Definitions

In order to facilitate reading and understanding of individual national structures and decisions, the abbreviations and specific national terms that are used in this document are set out in full or explained in the following.

Institutions:

Ausländerbehörde (Immigration Office) (authority responsible for issues relating to the entry, exit and residence of foreigners in Germany)
BSG – Bundessozialgericht (Federal Social Court) (highest court with jurisdiction for disputes concerning social rights in Germany)
District Office / Social Welfare Office (local authority administration responsible for decisions concerning social rights for economically inactive persons)
ECJ – European Court of Justice
Job Centre (working group comprising the local authority administration and the Federal Labour Office to rule on social rights for economically active persons)
LSG – Landessozialgericht (Regional Social Court) (courts of second instance responsible for ruling on social rights, review the decisions taken by the Social Courts)
SG – Sozialgericht (Social Court) (courts of first instance responsible for ruling on social rights)
VG – Verwaltungsgericht (Administrative Court) (courts of first instance responsible for ruling on general and specific administrative law, including rights associated with the entry, exit and residence of all foreigners in Germany)

Statutes and other rules and regulations:

TFEU – Treaty on the Functioning of the European Union
AufenthG – Aufenthaltsgesetz (Residence Law) (contains the essential statutory fundamentals concerning the entry, exit and residence of foreigners in Germany; the Freedom of Movement Law/EU has priority for EU citizens; only individual provisions of the Residence Law, referred to separately in the Freedom of Movement Law/EU, apply to mobile EU citizens)
Specialist instructions (binding rules and regulations for public authority staff)
FreizügG/EU – Freizügigkeitsgesetz von Unionsbürgern (Law governing the Freedom of Movement of citizens of the European Union [Freedom of Movement Law/EU]) (regulates the entry and residence of nationals from other Member States of the European Union and their family members)
FMD – Directive 2004/38 EC, the so-called "Freedom of Movement Directive"
SGB I – Sozialgesetzbuch I (Social Security Code I) (Generally regulates the fundamental provision of social security in Germany)
SGB II – Sozialgesetzbuch II (Social Security Code II)
SGB V – Sozialgesetzbuch V (Social Security Code V) (regulates the statutory health insurance benefits)
SGB X – Sozialgesetzbuch X (Social Security Code X) (regulates, among other things, the administrative procedure under social welfare law)
SGB XII – Sozialgesetzbuch XII (Social Security Code XII)
VwGO – Verwaltungsgerichtsordnung (Administrative Court Procedures Code) (contains the provisions for court proceedings under administrative law)
VwVfG – Verwaltungsverfahrensgesetz (Administrative Procedure Act) (contains the rules for public law administrative work of the authorities of the individual federal states or the federal government)

Terminology:

Arbeitslosengeld II (Unemployment Allowance II) (Job Centre cash benefits for economically active persons)
Erwerbsfähige (fit to work) (pursuant to § 8 SGB II, those who are fit to work at least three hours per day up to retirement age or the drawing of their pension)
Grundsicherung (basic provision) – (social benefits to guarantee means of subsistence)
Subsistence benefits (social benefits to cover the costs of the minimum subsistence level in Germany, awarded by social welfare authorities according to needs-orientated and means-testing criteria)
Eligible for benefit (people who have an entitlement to social benefits)
EU citizens (describes mobile EU citizens within the framework of this paper)
Destitute EU citizens (to be understood here as mobile EU citizens in need in accordance with § 9 of SGB II, i.e. who cannot or cannot sufficiently cover their subsistence costs from the income or assets to be taken into consideration and do not receive anything from anyone else, with the result that they would be entitled to basic provision if they were German)
Unfit to work (anyone who is incapable for the foreseeable future, due to illness or disability, of working at least three hours per day up to retirement age or the drawing of their pension).
Homeless (people with no fixed abode who spend their nights in public spaces, on the streets or in emergency shelters)
Social assistance (social benefits for economically inactive persons)

Social benefits (pursuant to § 11 SGB I, the sum of all the services, benefits in kind and cash benefits generally provided for under SGB I for assistance with special needs)
Jurisdiction (legally prescribed authorisation or obligation of a particular public authority court to take sovereign action).

3. Implementation of the Freedom of Movement Directive (FMD) in Germany

Today, the Freedom of Movement Directive is implemented in Germany via the law on the general freedom of movement of European Union citizens (Freedom of Movement Law/EU). The resulting residence status of the mobile EU citizen is decisive for the social rights of a mobile EU citizen in Germany (see section 5 below). Reference is made to the general law governing foreigners, the Residence Law, in limited cases only.

3.1 Freedom of Movement Law/EU – overview

Directive 2004/38 sets out the conditions under which mobile EU citizens and their family members can enjoy the right to freedom of movement and residence in another Member State. The German **Freedom of Movement Law/EU** regulates the right to entry and residence, as well as the loss of the same and its consequences for mobile EU citizens and their family members in Germany. It is a separate, independent and conclusive set of regulations for this category of individuals. The Residence Law, which regulates residence rights for foreigners in general, does not apply in principle by virtue of the Freedom of Movement Law/EU being the more specific statute.

When creating the Freedom of Movement Law/EU, the German legislator was guided by the Freedom of Movement Directive alone. He made an attempt to simplify the provisions of the Freedom of Movement Directive and formulate these in a compact manner. Insofar as this simplification gives rise to any implementation deficiencies in practice, the basic principles of the primacy of application of EU law and interpretation in accordance with the Directive shall apply.

3.2 Overview of the provisions concerning the right to freedom of movement and residence

The central tenet of the statute is formed by **§ 2.** This implements the contents of **Art. 7 of the FMD** to the greatest possible extent. However, the classification of Art. 7 of Directive 2004/38 is departed from, with the result that § 2 of the Freedom of Movement Law/EU appears somewhat unclear from the perspective of the provision under European law.

§ 2 Para. 1 highlights the general right to freedom of movement and residence as the basic principle. In **§ 2 Abs. 2**, the legislator has pooled the categories of individuals with the different rights of residence stipulated by the Directive into one category.

The categories of individuals entitled to freedom of movement under primary and secondary Community law can be found here. The terminology of the standard norm, such as “employees” or “self-employed persons”, is not independently defined or modified by the German norm in this regard but, rather, is assumed to be known under Community law.

In this way, the terminology used to ensure specificity by the case law of the national courts and for review by the European Court of Justice remains open.

This case law plays a very significant role in practice. The formation of the definitions is thus subject to change and increasing specification by the courts. This impacts directly on the legal positions of mobile EU citizens. Their residence status is questioned over and over again on the basis of the developments in case law for individual facts of cases and situations in the category referred to. For example, the requirements are now more stringent than they were just a few years ago. We address the associated problems when dealing with the residence rights relevant to homeless mobile EU citizens:

The short-term residence for the first three months arising from Art. 6 of Directive 2004/38 is regulated separately under **§ 2 Para. 5**.

3.3 General right of residence – § 2 Para. 1

§ 2 Para. 1 emphasises in general that EU citizens are entitled to freedom of movement and their family members have a right to enter and reside in Germany, the details of which are provided for in the Freedom of Movement Law/EU. This important right is a direct result of Community law and its placement at the beginning of the statute indicates the significance of this right.

The standard norm describes the **essence of the right to freedom of movement**. It makes it clear that, when the requirements of § 2 Para. 1 are met, European Union law immediately grants each EU citizen and his/her family members the right to enter, reside in and freely chose his/her domicile on the territory of the Member States of the European Union. This applies regardless of whether the person is economically active or not and includes the right to seek employment free of national hindrances.

3.4 Residence of up to 3 months – § 2 Para. 5

The legislator has standardised the short-term residence provided for in **Art. 6 of the FMD** in **§ 2 Para. 5**.

The provision has systematically failed for the reason that the right of residence under Art. 6 of the Freedom of Movement Directive concerns a right to freedom of movement which should been included systematically in the catalogue of § 2 Para. 2, as it is there that the requirements of the rights to freedom of movement are set out in conclusive terms.[1]

This results in the problem that the national standard concerning the determination of loss of the right to freedom of movement in § 5 Para. 4 refers only to the catalogue of § 2 Para. 2. This could lead to the authorities unlawfully determining the loss of such right within the first 3 months of residence.

However, this "flawed" statutory provision does not yet play any role in practice. The current administrative practice and, in particular, the duration of administrative

[1] Bergmann in Bergmann/ Dienelt/ Dienelt, FreizügG/EU, § 2 para. 142, beck-online

decisions, at present only concern loss assessments after a period of 3 months from entry.

The right to residence for up to three months is, according to Art. 6 Para. 1 of the FMD, tied to the possession of a valid identity card or passport. The mobile EU citizens or their family members do not otherwise have to fulfil any further conditions or formalities.

3.5 Residence for more than 3 months for jobseekers – § 2 Para. 2 no. 1a

The provision contained in § 2 Para. 2 no. 1a was standardised independently by way of the statute dated 02.12.2014.

The current provision contained in **§ 2 Para 2 no. 1a** follows on from the provision under **Art. 45 of the TFEU**. It does not include a fixed period of residence for the purpose of jobseeking. It is, however, stipulated that mobile EU citizens may then, after the expiry of a six-month period, only reside in Germany for the purpose of jobseeking if they can also prove that they are actually looking for work and have reasonable prospects of being recruited. This means, theoretically, that the requirements, i.e. providing proof of seeking employment with reasonable prospects of success, increase considerably for EU citizens to obtain the right of residence after expiry of the six-month period.

However, this factor has not yet become particularly noticeable in practice. There is an important reason for this.

The provisions for granting social benefits to cover subsistence costs as provided for in § 7 Para. 1, Clause 2 no. 2 c) of the SGB II and in § 23 Para. 3, Clause 1 no. 2 of SGB XII (see section 5.1.3 below for details) exclude benefits for foreigners who reside in Germany solely for the purpose of seeking employment.

This exclusion is clearly provided for in the law and also acknowledged by the ECJ[2]. For social authorities and social courts that must decide on whether EU citizens are entitled to social benefits, the easiest thing is therefore to reject this claim on the grounds that the person concerned is residing in German purely for the purpose of seeking employment, without having actually verified that this is the case.

However, staying for the purpose of finding work does **not** represent an **omnibus offence** that applies when there is no other purpose of residence. The widespread practice, with reference to the exclusion situation meanwhile established under § 7 I 2 no. 2 b) of SGB II and § 23 Para. 3, Clause 1 no. 2 of SGB XII, of assuming the purpose of residence as seeking employment in cases of doubts fails to recognise that the freedom of movement for the purpose of jobseeking is subject to specific conditions.

To have a right of residence beyond 3 months for the purpose of seeking employment, the EU citizen must earnestly seek a job and such efforts may not be without prospects in objective terms. This endeavour must be directed towards the goal of obtaining work that meets the status of an employee within the meaning of European

[2] ECJ case no. C 67/14 (Alimanovic), judgement dated 15.09.2015

Union law.[3] The assumption that there are reasonable prospects of being recruited is only met if the person concerned is able to demonstrate that he/she is looking for work seriously and with prospects of success. Registering with the employment office is not sufficient for this. Intensive personal initiative is required and it must be possible to verify that the individual is actively seeking a position, e.g. through correspondence with potential employers[4] or by way of job interviews and newspaper advertisements.[5]

Reasonable prospects of being recruited can also be assumed when the EU citizen seeking work is likely to be employed on the basis of his/her qualifications and actual labour market demand.[6] On the other hand, however, a poor labour market situation and current lack of employment opportunities in a particular sector may not be used as the sole reason for denying status as a jobseeker[7].

Nor may the existence of objectively recognisable prospects of success be denied on the grounds that the EU citizen does not have sufficient language skills, given that the labour market offers many job opportunities for which little or no language proficiency is required. For example, a superior or work colleague who speaks the EU citizen's language can give instructions and explain the work activities.

Nor may the residence period of up to 6 months be automatically reduced on account of the EU citizen applying for social assistance while seeking employment. Under Art. 14 (3) of the FMD, even actually availing oneself of social assistance benefits may not automatically lead to one's deportation. Recital 16 of the FMD expressly states that deportation should not take place as long as beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system". To this end, the host Member State must closely examine the individual circumstances (difficulties, length of stay, amount of assistance, personal circumstances).

After the 6-month period, greater demands are placed on the credibility of the promise of the job search[8]. Residence after 6 months does not automatically become illegal, as the non-existence of the right to freedom of movement first must be established in accordance with § 6. In addition, it must also be considered whether a different right to freedom of movement exists, e.g. under § 4 for economically inactive persons (see section 3.6 below).

It should be noted that, after expiry of the 6-month period, the immigration office is entitled, even without there being any special cause to do so, to examine whether or not the right of residence for the purpose of finding work still exists and can, where applicable, determine the loss of the right to freedom of movement under § 5 Para. 4 (see section 4.2 below).

3.6 Economically inactive persons – § 2 Para. 2 no. 5 in conjunction with § 4

[3] ECJ case no. 53/81 (Levin), [1982], 1035, 1052 = InfAuslR 1983, 102
[4] Bergmann in Bergmann/ Dienelt/ Dienelt FreizügG/EU, § 2 para. 62, beck-online
[5] Advocate-General Lenz in ECJ case no. 316/85 (Lebon), [1987], 2811, 2829
[6] General administrative regulations concerning the Freedom of Movement Law/EU, no. 2.2.1a.2
[7] Hailbronner, Ausländerrecht, FreizügG/EU, § 2 para. 44
[8] Cf. e.g. ECJ, case no. C-292/89 (Antonissen), [1991], I-745

The provision set out in **§ 2 Para. 2 no. 5** grants economically inactive EU citizens and their family members a right of residence if they have sufficient means of subsistence and adequate health insurance cover. This implements **Art. 7 (1) (b) of the FMD**.

This right of residence can apply in particular to homeless EU citizens who do not have the opportunity to earn income for various reasons.

What is meant by **sufficient means of subsistence** is not quantified in the statute, though this would be inadmissible under the provisions of Art. 8 (4) (1) of the FMD. However, the principle for the administration is such that the existence of sufficient means of subsistence can be assumed if no application is made for social benefits under SGB II or SGB XII[9]. Under the provision of § 5 Para. 2, Clause 1, the immigration office can, however, require proof of the existence of sufficient means of subsistence after a stay of 3 months. Such verification will be problematic for a homeless EU citizen on practical and administrative grounds.

Equally problematic is the requirement of **adequate health insurance cover**. Homeless EU citizens occasionally have a European health insurance card from their country of origin. It is much more commonly the case, however, that the individual lacks adequate health insurance cover. Although health insurance is mandatory in Germany, homeless EU citizens are either not covered by the national statutory health insurance schemes, or their insurance cover is suspended because the persons affected cannot afford the monthly contributions from their financial resources.

3.7 Employees and self-employed persons – § 2 Para. 2 no. 1 and no. 2

The right to freedom of movement and residence for employees and self-employed persons arising from **Art. 7 (1) (a) of the FMD** is implemented in **§ 2 Para. 2 no. 1 and no. 2**. The continued existence of the right of residence as an economically active person despite the loss of one's job or in the event of temporary incapacity for work is provided for in § 2 Para. 3 (see section 3.8 below).

If such a right of residence exists, EU citizens in Germany are also entitled to subsistence benefits (see section 5.1.3 below). Hence the importance of these rights of residence for homeless EU citizens.

The vast majority of homeless EU citizens enter Germany for the purpose of finding work[10]. And the right of residence as an economically active person can result from different sets of circumstances for homeless EU citizens: after entering the country, a trade is registered or a person starts work via contacts he/she has, looking for somewhere to live at the same time. Accommodation can also be lost while in existing employment because of personal misfortunes, or due to a critical situation on the housing market. Furthermore, homeless EU citizens try to improve their livelihood through regular activities, such as collecting bottles or selling newspapers for the

[9] General administrative regulations concerning the Freedom of Movement Law/EU, no. 4.1.2.2; also the Higher Administrative Court of Berlin-Brandenburg, judgement dated 28.04.2009, OVG 2 B 23.07, recital. 26

[10] Frostschutzengel annual report, 2017, 84.7% of the homeless EU citizens questioned travelled to Germany for the purpose of finding work

homeless, as well as marginal employment and labouring (e.g. on construction sites). Furthermore, previous jobs may be important for the determination of status.

The provisions governing the right of residence for employees and self-employed persons thus offer a possibility, which should not be underestimated, for homeless EU citizens to justify residing in Germany. However, they also offer a considerable potential for conflict and feature significantly in legal disputes.

3.7.1 Employees

There is no uniform "employee" concept that is codified in primary and secondary law. The content of the concepts determining the employment relationship has to be established on the basis of EU law and, in particular, the objectives of the TFEU.[11] This approach has been adopted by the ECJ in a large number of rulings. The "employee" concept is thus determined via European Union law. The individual Member States would otherwise be able to determine the content of the freedom of movement through their own definitions of the elements characterising an employment relationship, and the scope of freedom of movement would then differ in the EU from one country to another.[12]

According to the ECJ, the **employee status** is characterised by three cumulative properties. These are the permanent nature of the activity, the existence of a superior-subordinate relationship and the receipt of pay.

In practice, the biggest problem faced by homeless EU citizens in pursuit of employment is that they are taken on for temporary work, with short working hours and at low pay. In these cases, because of the low number of weekly working hours, the authorities tend to classify these activities as being so negligible that they are **completely marginal and insignificant** and are therefore not capable of justifying an employee status[13].

According to the ruling by the ECJ in the Genc case, an overall assessment of the facts of the case is required to evaluate an employee status, with due regard for

- working hours
- remuneration level
- entitlement to paid holidays,
- continued payment of wages in the event of illness,
- application of the collective labour agreement and
- duration of the employment relationship.

Despite the findings of the ECJ and the obligation for an **official examination under § 20 Para. 2 of SGB X** for the German social welfare authorities, the employee status is, in the experience of German social workers, refused for homeless EU citizens in a very large number of cases with low pay or working hours on the

[11] ECJ case no. 75/63 (Unger), [1964], 353; case no. 53/81 (Levin), [1982], 1035,1048

[12] ECJ settled case law, cf. e.g. case no. 66/85 (Lawrie-Blum), [1986], 2121; case no. C-340/94 (de Jack), [1997], I-461).

[13] ECJ case no. C-357/89 (Raulin), [1992], I-1027 = EuZW 1992, 315; ECJ case no. 53/81 (Levin), [1982], 1035, 1050 (It is, however, not incumbent on the national court to establish that the extent of the activity is not entirely marginal and insignificant.)

grounds that the working hours are not sufficient[14] and the work is of an entirely marginal nature only.

The **specialist instructions of the Federal Labour Office**[15] include the statement that working time of less than eight hours per week, or when the activity is only performed sporadically, is an indication of there not being in employee status[16].

These instructions are, in my view, aimed at a results-orientated assessment by the staff of the social welfare authorities. These requirements are not consistent with the case law of the ECJ, which also qualifies an "on call" activity as a real employment relationship. Similarly, although an employment relationship in which only very few hours are worked is marginal and insignificant[17], an employment relationship of 5 ½ hours per week can justify an employee status in the context of the overall assessment[18].

It is also important that a **minimum duration** is not required for the existence of an employment relationship. For example, jobs lasting 2 ½ months[19] or little more than one month also establish the employee status[20].

The remuneration can also comprise of benefits or payments in kind (board and lodging), as long as these can be regarded as consideration for the services performed[21]. However, the job centre did not, for example, recognise the employee status for a homeless Bulgarian woman who was employed by a German pensioner to care for him in return for food, accommodation and small cash payments[22].

Nor is the employee status ruled out in relation to remuneration because of this being **below the minimum wage**[23] or the income earned being below the minimum subsistence level and, where applicable, being supplemented by one's own assets, maintenance payments from third parties or support paid from public funds[24].

However, if the pay is far below the amount to cover basic needs, this can lead to refusal of the employee status[25]. Employee status is likewise rejected if the employment is used for the purpose of availing oneself of social benefits, as this represents an abuse of the provisions of a worker's right to freedom of movement[26]. The Federal Labour Office has also established examination criteria for its staff in this case[27].

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[14] cf. e.g. proceedings before the Social Court of Berlin, S 189 AS 12042/17
[15] The "specialist instructions" are instructions issued by the Federal Labour Office for certain laws to be applied by the staff of the social welfare authorities, for whom these are binding.
[16] https://con.arbeitsagentur.de/prod/apok/ct/dam/download/documents/dok_ba015897.pdf, § 7, Rn. 7.11
[17] ECJ, judgement dated 26.02.1992 – case no. C-357/89 -, Raulin, recital 14
[18] ECJ, judgement dated 04.02.2010 – case no. C-14/09 -, Genc, recital 27f
[19] ECJ, judgement dated 06.11.2003 – case no. C-413/01 -, Ninni-Orasche, recital 24
[20] Case no. C-22/08 and 23/08 (Vatsouras and Koupatantze), [2009], I-4585 = EuZW 2009, 702
[21] ECJ case no. 196/87 (Steymann), [1988], 6159 = NVwZ 1990, 53).
[22] cf. e.g. Regional Social Court of Berlin-Brandenburg, ruling of 28.11.2014, L 10 AS 2993/14 B ER
[23] ECJ case no. C-27/91 (Le Manoir), [1991], I-5531)
[24] ECJ case no. 157/84 (Frascogna), [1985], 1739: case no. C-22 and 23/08 (Vatsouras and Koupatantze), [2009], I 4585 = EuZW 2009, 702)
[25] cf. ECJ case no. C-188/00 (Kurz), [2002], I-10691 = BeckRS 2004, 74793
[26] ECJ, judgement dated 21.06.1988 – case no. 39/86 -, Lair, [1988], 3161
[27] https://con.arbeitsagentur.de/prod/apok/ct/dam/download/documents/dok_ba015897.pdf, § 7, para. 7.11: "When third parties organise the application for social benefits via a strikingly large

Nor does **age** (81 years) preclude the granting of employee status (Higher Administrative Court of Hamburg 3 BS 197/11, DÖV 2012, 367). This has to be the case on account of the rise in the cost of living and more and more people finding it no longer possible to live on their pension alone[28].

3.7.2 Self-employed persons

The residence status as a self-employed person can be considered for homeless EU citizens. Particularly in the context of the most recent EU enlargement measures and the associated restriction of access to the labour market in Germany, mobile EU citizens from the new Member States have been able to access the German labour market by setting up their own business.

In the meantime, some of these EU citizens have been affected by homelessness. For these people, the question arises as to whether they can still continue to pursue their self-employment or whether, if they give this up, the previous activity will secure them the employee status. In other cases, EU citizens new to Germany, who very often do not have their own living space, see registering a business as a real chance to earn an income and become integrated. Other homeless EU citizens who have already been living in Germany for some time and have been exploited by employers see self-employment as an opportunity to earn some money.

However, as with the employee cases, problems can occur with the recognition of self-employed work:

Registration of the company alone is not sufficient; rather, proof has to be provided that the work is actually performed[29].

"Indications for the carrying out of self-employed work include sharing in profit and loss, free determination of working hours, freedom of instructions, selection of staff, appropriate qualifications and experience for the work, presence of the necessary equipment and presence on the market (especially order acquisition)."[30,]
If the company is (initially) working for a client, it is frequently examined whether this is a case of **so-called "bogus self-employment"**.

Intensive **checks of** invoice details are carried out by the authority in this context. The invoice numbers, assignment locations and clients are checked and additional information concerning clients requested from the persons concerned.

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number of people within a reasonably short period of time, this is a significant indication of an activity having been started solely for the purpose of drawing supplementary social benefits (Regional Administrative Court of Berlin-Brandenburg dated 04.046.2015, L 29 AS 1128/15 B ER; Higher Administrative Court of Saxony dated 02.02.2016, 3 B 267/15)."

[28] https://www.zeit.de/gesellschaft/zeitgeschehen/2018-04/erwerbstaetigkeit-alter-rentner-bundesinstitut-bevoelkerungsforschung

[29] Federal Social Court, judgement dated 19.10.2010, B 14 AS 23/10 R, recital. 18; judgement dated 16.12.2015, B 14 AS 15/14 R, recital. 25, among others

[30] Specialist instructions § 7 SGB II, para. 7.12

The specialist instructions issued by the Federal Labour Office include the following statement:

"If there is doubt as to whether the specified employment or self-employed activity is performed at all, the procedure to be followed is that according to the guideline entitled "Combating ***organised abuse of benefits by EU citizens****"."*[18]

This may be an indication of discrimination against EU citizens because of their nationality. On the other hand, an abuse of benefits also takes place[31]. No further information was available when requested[32].

If a self-employed EU citizen becomes homeless and thus loses his/her **registered address**, this means that the company address no longer exists. If the tax office becomes aware of this, the tax number will be blocked. The work that the homeless EU citizen still continues to perform is no longer recognised by the authorities.

In the case of one homeless EU citizen who wanted to work for herself commercially in the cleaning industry and had accommodation and a registered address in an initial reception centre for homeless people and could be reached there, the tax office responsible did not issue a tax number, with the result that the commercial activity could not be performed as invoicing was not possible without a tax number.

The official registration represents a major problem in practice as the new registration law in force since 01.11.2015 requires the submission of confirmation from the landlord in order to prevent unauthorised subletting. According to reports by EU citizens affected in this regard, this has now led to registration addresses being sold and substantial amounts being paid for them as the basis of future professional activity.

Multiple rulings have also been handed down by the courts regarding activities frequently carried out by destitute and homeless EU citizens, i.e. collecting bottles[33] and selling newspapers for the homeless[34]. This was not considered sufficient for obtaining employee status because "no participation in the economic exchange of goods" takes place.

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[31] https://www.wp.de/staedte/hagen/hartz-iv-betrug-121-000-euro-durch-kontrollen-gespart-id214018511.html

[32] Email reply from the Federal Labour Office dated 26.03.2018: *"The working guidelines give a detailed description of the usual M.O.'s and distinguishing features and provides the Federal Labour Office's staff responsible for combatting benefit abuse with guidelines regarding the procedure for conducting their checks and reviews. Seen against this background, this concerns working guidelines that may <u>not</u> be released to third parties within the context of the public interest in the protection of contributions and tax revenues. If the contents were to become common knowledge, this could jeopardise or thwart the fight against benefit abuse by informing the perpetrators of the "obstacles". This is unfortunately not changed by the fact that you need the working guidelines for a comparative legal study."*

[33] Among others: Regional Social Court of Berlin-Brandenburg, ruling dated 27.01.2010, L 29 AS 1820/09 B ER, recital 14; Regional Social Court of Hesse, ruling dated 02.03.2015, L 7 AS 59/15 B ER; Regional Social Court of Berlin-Brandenburg, ruling dated 26.09.2016, L 25 AS 1938/16 B ER; Regional Social Court of North Rhine-Westphalia, judgement dated 09.03.2017, L 7 AS 2250/15

[34] Among others: Federal Social Court, judgement dated 03.12.2015, B 4 AS 44/15 R, recital. 27, 28; Regional Social Court of Berlin-Brandenburg, ruling dated 26.09.2016, L 25 AS 1938/16 B ER

On the other hand, sex workers[35] can meet the requirements for self-employed work, though this raises the difficulties already referred to above of providing proof of the performance of self-employed work to the relevant authority.

3.8 Retaining the status of worker – § 2 Para. 3, Clause 1 and 2

Continued entitlement to a residence permit as an economically active person under **§ 2 Para. 3** is derived from the active residence situation and grants economically active persons limited protection of their legal position even after losing their source of income. The provisions of **Art. 7 (3) of the FMB** are implemented in this manner.

This right of residence is of the utmost importance in the legal profession because a work activity performed previously grants the homeless EU citizen a right of residence, which confers an entitlement to receive social benefits.

§ 2 Para. 3, Clause 1 no. 1 implements the provisions of Art. 7 (3) (a) of the FMD. It stipulates that **the status is maintained** for cases of **accident and sickness**. This should also be interpreted broadly in terms of application, with due regard for the case law of the ECJ, when a female employee can or may no longer pursue her work activity due to **pregnancy**[36].

§ 2 Para. 3, Clause 1 no. 2 corresponds to Art. 7 (3) (b) of the FMD and provides for continuation in the event of *"voluntary unemployment or discontinuation of a self-employed work activity, confirmed by the relevant Job Center, as a result of circumstances beyond the control of the self-employed person after working for more than one year".*

This provision gives rise to **several problems** that can result in the right to freedom of movement being denied:

(a) Determination of "involuntary unemployment"

The employment agency is responsible for this. The job centre where you have to apply for benefits determine the fact of involuntary unemployment.20 This increases the **bureaucratic hurdles** for EU citizens.

(b) "unforeseeable circumstances" leading to self-employed people giving up their business

With the provision for continuation of the right of residence in the event of a **business being given up for reasons beyond the control of the self-employed person,** the legislator wanted to guarantee that the realisation of an entrepreneurial risk on the market would not necessarily have consequences with regards to the right of residence.

However, the wording in Article 2, Paragraph 3, Clause 1, no. (2) of the Freedom of Movement Law/EU requires interpretation. As a result, it is difficult to prove that the

[35] ECJ, judgement dated 20.11.2001, case no. C-268/99 (Jany)
[36] ECJ, judgement dated 19.06.2014, case no. C-507/12 (Saint Prix), recital. 40ff

self-employed activity was given up involuntarily because most of the reasons can be declared as being an entrepreneurial risk with the consequence of conscious (therefore voluntary) discontinuation of the activity. And this **possibility of interpretation** is "happily exploited by the courts **to the detriment of the Union** citizen" 21

"after activity of more than one year"

The statute links the acceptance by default to the EU citizen **working for more than one year** in Germany. It was questionable in this case whether this work had to have been carried out continuously or may have been interrupted. This legal uncertainty is likely to have arisen following the ruling handed down by the Federal Social Court that the sum of the interrupted individual activities must have amounted to more than one year[37].

What is particularly problematic in these cases is providing proof of work activity lasting for more than one year. The authority requires the submission of company documents, which have frequently been lost in the event of homelessness. The income tax assessments issued by the tax office are usually not sufficient for the authority to recognise self-employed work activity over a period of more than one year[38].

Duration of continuance after working for one year

In contrast to Article 2, Paragraph 3, Clause 2 of the Freedom of Movement Law/EU, no maximum duration of the residence simulation is determined in the case of Article 2, Paragraph 3, Clause 1 of the Freedom of Movement Law/EU, with the consequence that sticking to the wording would lead to a permanent residence status.

In the case law, however, the duration of the simulation is limited to **two years** with different solution approaches.[39].

The reasoning behind this restrictive interpretation is the development of the law. The legal status enjoyed by an EU citizen after the previous directive repealed by the FMD should not be made worse in the same situation. The ECJ has emphasised in several rulings that the codification of secondary EU law must not lead to any deterioration of the legal position of EU citizens. "The purpose of Directive 2004/38/EC, as stated in its third recital, is to simplify and reinforce the right to freedom of movement and residence of all Union citizens, meaning that it is not possible for EU citizens to derive fewer rights from this directive than from the secondary legislation amended or repealed by it."

Art 7 of Directive 68/360/EEC contained the provision that a valid residence permit could not be withdrawn from an employee solely "on the grounds that he is no longer in employment, either because he is temporarily incapable of work as a result of illness or accident, or because he is involuntarily unemployed, this

[37] Federal Social Court, judgement dated 13.07.2017, B 4 AS 17/16 R
[38] cf. Social Court of Berlin, ruling dated 19.02.2018, S 124 AS 362/18 ER (pending final judgement)
[39] Administrative Court of Düsseldorf, ruling dated 30.03.2017, 7 L 3267/16; Regional Social Court of Bavaria, ruling dated 20.06.2016, L 16 AS 17/16 R

being duly confirmed by the competent employment office." For such cases, Art. 7 II of Directive 68/360/EEC stipulated that: "When the residence permit is renewed for the first time, the period of residence may be restricted, but not to less than twelve months, where the worker has been involuntarily unemployed in the Member State for more than twelve consecutive months." The provision provided for a right of residence of one further year if the EU citizen was involuntarily unemployed for longer than twelve consecutive months.

This means, in terms of the current legal situation, that an EU citizen who was employed for more than one year will retain his/her employee status over a total period of two years if he/she is involuntarily unemployed during that period. The employee must therefore not only make him/herself available to the employment agency during this time; he/she must also make the personal effort required to find a job. After two years of unemployment the status switches to residence for the purpose of job-seeking.

The employee status after **less than one year of working** is retained for 6 months. **§ 2 Para. 3, Clause 2** implements the provision contained in **Art. 7 (3) (c) of the FMD**.

What is striking in these cases is that the social welfare authorities, in particular, calculate the relevant period to the exact day for the recognition of this right of residence and then refuse their assistance. As a rule, this is done without the persons concerned being informed about the loss of their right of residence, with the result that they are suddenly faced with a situation where their welfare support is withdrawn.

3.9 Permanent right of residence – § 2 Para. 2 no. 7

§ 2 Para. 2 no. 7 in conjunction with § 4a implements the provisions of **Art. 16 ff of the FMD.** The permanent rights of residence are grouped together in § 4a.

Acquiring the permanent right of residence leads, for EU citizens and their family members, to a substantially improved legal position, regardless of their nationality. They can no longer lose their right of residence, even if they no longer meet the requirement of § 2 Para. 2. For example a spouse of an EU citizen loses their original derived status by divorce. But if the spouse was for 5 years lawfully a resident in Germany, they acquire their own permanent right of residence.

The permanent right of residence can be of enormous importance when examining the right of residence for homeless EU citizens, especially those who have been in Germany for a number of years. Without being aware of it, a homeless EU citizen may have acquired a permanent right of residence in previous years through his/her own lawful residence or deriving the same from an EU citizen entitled to residence as a family member.

What has proven problematic in these situations, especially for homeless EU citizens, is whether proof can be provided regarding the **requirement of "lawful" residence for self sufficients pursuant to § 4 Clause 1**, the existence of

sufficient means of subsistence[40] and adequate health insurance cover. The insurance history can be requested from the health insurance fund/company for this purpose.

Occasionally, the social welfare authorities request proof of the existence of a permanent right of residence. The right to the issuance of such a document arising from Art. 19 of the FMD is implemented by way of § 5 Para. 5 Clause 1.

In Berlin, it is at present virtually impossible to obtain such proof, despite instructions given by the City of Berlin[41]. Homeless EU citizens are openly being discriminated against by the immigration office there. Due to the confusion of terminology and the exploitation of a lack of knowledge of the rights on the part of the people affected, the immigration office refuses to examine or verify permanent residence and to issue a permanent residence certificate[42].

3.10 Family members pursuant to § 2 Para. 2 no. 6 in conjunction with §§ 3 and 4

The Freedom of Movement Law/EU conclusively regulates the right to residence of family members of mobile EU citizens.

§ 3 Para. 1 makes it clear that family members of an EU citizen enjoy a right of residence derived from that person. The aim of the provision is to facilitate the freedom of movement for EU citizens.

The status of family member is defined legally in § 3 Para. 2. The definitions correspond to the provisions of Art. 2 (2) a), c) and d) of the FMD.

The term **"spouse"** is interpreted by the ECJ in purely formal legal terms. This means that life partnerships between partners who are not married to each other do not come under the category of spouses.

§ 3 Para. 2 no. 2 lists relatives who have a derived right of residence as long as they **receive maintenance**[43]. Crucial in this respect is actual and regular support ensuring a basic subsistence level. The benchmark for this is the standard of living in the EU Member State in which the family members permanently resides. It is not necessary for the person receiving maintenance to have an entitlement to a maintenance allowance or to be in a position where he/she would not be able to support him/herself. Nor are the reasons for the support of any consequence.

The social welfare authorities repeatedly disregard the fact that parents joining EU citizens entitled to freedom of movement who provide such maintenance are also entitled to freedom of movement, and this regularly leads to **legal disputes** concerning their access to supplementary benefits in order to ensure means of subsistence[44].

[40] Federal Administrative Court, judgement dated 16.07.2015 – 1 C 22.14, recital. 21; Higher Administrative Court of Berlin-Brandenburg, judgement dated 28.04.2009 – OVG 2 B 22.07, recital. 21

[41] https://service.berlin.de/dienstleistung/324284/

[42] The author is in possession of documentary evidence, which can be requested

[43] ECJ, judgement dated 18 June 1987, case no. 316/85 – Lebon

[44] cf. proceedings before the Social Court of Berlin, S 92 SO 2922/15; SG Berlin, S 88 SO 789/17

Similarly, the drawing of social benefits by persons entitled to maintenance is not a factor for not recognising the provision of maintenance. A right of residence can also be established under § 3 Para. 2 no. 2 when the EU citizen does not provide maintenance for his/her relative but, rather, the other way around[45].

Paragraphs 3 – 5 regulate the residence rights for surviving dependents of an EU citizen and in the event of divorce. Knowledge of the derived residence rights for family members can help homeless EU citizens to acquire a right of residence.

4. Loss of right of residence and possible consequences

The provisions for establishing that a right to entry and residence does not exist or no longer exists and the associated consequences are laid down throughout the statute.

4.1 Loss of residence rights on account of abuse of rights – § 2 Para. 7

§ 2 Para. 7 was only introduced on 21.01.2013.

The provision sets out a procedure for determining the loss if the apparent right of residence was possibly acquired by the individual concerned through an abuse of the law. Germany has thus availed of the power provided for in **Art. 35 of the FMD** to initiate measures to penalise the obtaining of the legal status as an EU citizen entitled to freedom of movement under false pretences.

The nature of the provision contained in § 2 Para. 7 Clause 1 sanctions **acts of deception** that lead to obtaining an alleged right to freedom of movement. Despite the presumption of an act of deception, the right shall, however, continue to exist for as long as the deception has not been established[46]. Loss of residence right can only be determined once it has been established, i.e. it is clear that deception was used in relation to meet the requirement of the right to freedom of movement.

§ 2 Para. 7 Clause 2 relates to so-called **"marriages of convenience"**. The provision is supported by the repeated case law of the ECJ, according to which the regulations governing the right of freedom to movement may not be used in a fraudulent manner in abuse of the law[47].

The judges assess case by case if there is case of fraud or a marriage of convenience.[48]

The wording of the provision requires that the authority must prove that a situation and facts exist as set out in § 2 Para. 7. There is no obligation on the part of the individual concerned to assist in the determination of his/her true legal status. This follows from the statute by virtue of § 82 of the Residence Law not applying to EU citizens pursuant to § 11.

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[45] ECJ, judgement dated 19 October 2004, case no. C-200/02 – Zu/Chen, recital 42 ff
[46] See Justification of the law, FG printed matter 461/12, 14
[47] cf. re marriage of convenience: ECJ, judgement dated 23.09.2003, case no. C-109/01 (Akrich)
[48] Administrative Court of Bavaria, ruling date 04.09.2017, 10 ZB 16.569, recital. 14, which allows doubt concerning the information provided by an affected party to be sufficient

If the authority succeeds in establishing non-existence of the right to freedom of movement, it has to make a discretionary decision on whether and what non-existence declaration is issued. The reasons for this must be given, weighing up all the arguments for and against.

What is also particularly crucial in these cases is the date from which the non-existence declaration is retroactive. If another valid right of residence exists in the meantime, there is no longer any need for legal protection for the authority in relation to the determination of the loss of the previous right of residence.

4.2 Determination of loss due to the absence of a residence right – § 5 Para. 4

The provision forms, in addition to § 2 Para. 7 (see section 4.1 above) and § 6 (see section 4.3 above), the basis of an obligation to leave the country under § 7 and presupposes that, within five years of the establishment of the permanent lawful residence, the requirements for the rights under § 2 Para. 1 have lapsed or do not exist.

In such cases, the immigration office has the option to determine the loss of the right in a discretionary decision.

The prerequisite for this is that none of the aforementioned rights to freedom of movement under § 2 is relevant to the individual concerned[49].

In this case too, the statute provides for the determination of loss of the right as a legal consequence through a discretionary decision by the authority, which must provide its discretionary considerations for the specific case in a statement of grounds in a manner that is comprehensible. This means that all public concerns with a bearing on the termination of the residence must be weighed up against the private interests of the EU citizen in continuing to reside in Germany. The procedural principles of Art. 30 and 31 of the FMD, particularly written, comprehensible grounds and procedural guarantees, such as legal remedy and the suspensive effect of interim measures, must also be observed in accordance with Art. 15 of the FMD.

The determination of loss of the right pursuant to § 5 Para. 4 terminates the lawful residence of the EU citizen, irrespective of whether he/she has lodged an appeal or is pursuing his/her rights in preliminary legal protection proceedings. The suspensive effect leads, as in the right of expulsion under the Residence Law, to a suspension of enforcement only, but not to suspension of the operative effect[50]. The legal position of the EU citizen corresponds, until the appeal is ruled on, to that of an expelled foreigner under § 84 Para. 2 Clause 1 of the Residence Law, whose stay is merely tolerated.

[49] cf. e.g. Federal Administrative Court, judgement dated 16.07.2015, 1 C 22.14; Regional Administrative Court of Berlin-Brandenburg, judgement dated 28.04.2009, 2 B 24.07

[50] Administrative Court of Dresden, judgement dated 18.08.2016, 3 K 3320/14, recital. 24; Dienelt in Bergmann/Dienelt, AuslR, § 4a Freedom of Movement Law/EU, recital. 18

4.3 Loss on grounds of public order, security or health – § 6

The loss of the right to entry and residence on grounds of public order, security or health under § 6 takes on greater significance both in the statute and also in practice.

Just as in the Freedom of Movement Directive, protection against the state's entitlement to interfere in the right to residence of the person concerned gradually increases with the length of stay. This reflects the intention of the Freedom of Movement Directive, under which protection against expulsion is supposed to increase as the EU citizens and family members become more integrated in the host Member State (Freedom of Movement Directive, recital 24).[51]

At a first stage, mobile EU citizens and their family members can (only) lose their right of residence on **general** grounds of public order, security or health. This corresponds to the provison within the meaning of Art. 39 (3) and Art. 46 (1) of the EC Treaty and Art. 27 ff. of the FMD (public order clause).

For persons entitled to permanent residence, there have to be **serious** public order and security reasons for the right to be lost.

For EU citizens and their family members who have either resided in Germany for the last ten years or are minors, the reasons must be **compelling**.

The reasons for losing the right are a threat to public order, security or health.

As restrictions of the principle of the freedom of movement, the grounds of public order and security must be interpreted strictly and can be verified as terms under Community law.

§ 6 Para. 1 Clause 2 makes it clear that **refusal of entry** can also be declared on grounds of a threat to public order, security and health.

§ 6 Para. 2 regulates the loss of the right to freedom of movement in the event of a **criminal conviction**. This implements Art. 27 and 28 of the FMD, which have been clarified by the case law of the ECJ.

The fact of a criminal conviction alone may not automatically be used to determine the loss of rights. The decisive factor is whether a **danger of re-offending** can be assumed on the part of the offending EU citizen, which would represent a serious threat to public order and be contrary to the fundamental interests of society. Whether the “fundamental interests of society” are affected has to be examined and determined for the specific individual case. The indefinite legal concept outlines that the danger emanating from the EU citizen affects generally recognised and legally established values and norms to such an extent that the State has to intervene. This includes, for example, combatting drug trafficking, human trafficking and the sexual abuse of children.

[51] Dienelt in Bergmann/Dienelt, Ausländerrecht, 12th Edition 2018, § 6 Freedom of Movement Law/EU

If more serious offences are concerned, a careful and future-orientated examination must be conducted by the immigration office. The reasons for the prediction of future danger must also be given by the authority, though only those offences may be used in relation to which the entries of the criminal convictions have not yet been deleted from the Federal Central Criminal Register. The danger of re-offending required for the justification cannot automatically be concluded from the gravity of the offence previously committed.

§ 6 Para. 3 implements **Art. 28 (1) of the FMD.** It lists factors that have to be heeded by the authority when deciding on the loss of rights in the context of its **discretionary considerations**. These include, among other things, age, health, as well as social and cultural integration.

The loss of the right after acquiring a permanent right of residence in **§ 6 Para. 4** implements the provisions of **Art. 28 (2) of the FMD**. As already pointed out above, more serious reasons are required for the loss of the right of residence after establishment of the permanent right of residence than for purposes of residence contained in the catalogue under § 2 Para. 2 no. 1 – 6.

Whether these **"more serious reasons"** required under § 6 Para. 4 exist has to be decided on the basis of the circumstances of the individual case and means that the fundamental interests of society must indicate an even greater need for the withdrawal of the right of residence from the individual concerned.

For the sake of completeness, it should be mentioned here that determining the loss of permanent residence does not require a certificate to have been issued to the person concerned under § 5 Para. 5 Clause 1 because the status of permanent residence is not established by the certificate but, rather, by the actual lawful residence.

For **minors and mobile EU citizens residing for 10 years,** the highest level of requirements applies to the determination of loss of the right to freedom of movement[52].

Under § 6 Para. 5, the loss of rights can only be established for **compelling reasons** of public safety and, in accordance with no. 24 of the recitals of the Freedom of Movement Directive, such compelling reasons may only be assumed under exceptional circumstances.

There is, however, a restriction to this powerful right in § 6 Para. 5 Clause 2, whereas compelling rights do not have to exist for minors if the loss of the right of residence is necessary for the child's well-being. This provision can be used if, for preserving the family unit, the return of the child to its parents or together with its parents or one parent is considered necessary.

4.4 Obligation to leave the country – § 7 Para. 1, § 11 Para. 1

[52] ECJ, judgement dated 17.04.2018, case no. C-316/16 and C-424/16

The provision contained in § 7 Para. 1 stipulates that EU citizens are obliged to leave the country if the immigration office has determined the non-existence of a right to freedom of movement and residence pursuant to § 6. The requirement for the obligation to leave is therefore a notice of determination issued by the immigration office.

However, an obligation to leave the country does not (yet) exist if an application for interim legal protection has not yet been ruled on, § 7 Para. 1 Clause 4.

The obligation to leave the country begins with the announcement of the decision of determination. Under. § 7 Para. 1 Clause 2, the threat of deportation is to be given and, under § 7 Para. 1 Clause 3, a departure period of one month granted.

For the sake of completeness, it should be mentioned that a number of general provisions on the obligation to leave the country arising from § 50 Para. 3 – 6 of the Residence Law are also declared applicable to mobile EU citizens and their family members entitled to freedom of movement. The reference can be found in § 11 Para. 1 Clause 1. The enforcement of the obligation to leave the country, so-called termination of residence, is directed at cases where the immigration office has effectively determined the loss or non-existence of the right to freedom of movement in accordance with the Residence Law by virtue of § 11 Para. 2 providing for application of the same for this purpose.

4.5 Re-entry restriction – § 7 Para. 2

§ 7 Para. 2 Clause 1 provides for a re-entry restriction in the event of the loss of rights being determined under **§ 6 Para. 1** on grounds of public order, security or health and a permanent right of residence certificate being revoked.

This means that expulsions under § 2 Para. 7, § 5 Para. 4 or Para. 6 do not trigger any automatic re-entry restriction.

The wording of the German provision ("have lost") and the contents of the provision contained in Art. 32 Para. 1 of the FMD ("of the final exclusion order which has been validly adopted") indicate that the re-entry restriction must have become incontestable[53].

§ 7 Para. 2 Clause 2 makes it possible for the immigration office to impose a re-entry ban in the event of infringements under § 2 Para. 7 (fraudulent acquisition of a right of residence in abuse of the law, see section 4.1 above).

§ 7 Para. 2 Clause 3 stipulates that the immigration office shall impose a re-entry ban in the event of a particularly serious violation under § 2 Para. 7 having occurred.

The provisions set out in **§ 7 Para. 2 Clauses 2 and 3** were first introduced by way of a law dated 02.12.2014 and could well be **contrary to European Law**.

First of all, the provision already infringes the **wording of Art. 15 (3) of the FMD**, under which an expulsion order may not be accompanied by a re-entry ban.

[53] Brinkmann in Huber, Residence Law, 2nd Edition, 2016, Freedom of Movement/EU, § 7 recital. 10

Furthermore, the principle of proportionality, as demonstrated in Art. 35 of the FMD, is not respected[54].

According to the organisations involved in the social sector, this tightening up of the law carried out in 2014 was not necessary. The "employment rates of new arrivals of EU citizens (also from Romania and Bulgaria) [are] higher and the dependence on transfer benefits and child benefit is lower than for the resident foreign population as a whole."[55] The number of rights of residence obtained fraudulently in abuse of the law is unknown but is most likely low and does not have any relevant effect due to the residence documents rarely being used in practice[56]. Surveys for 2015 revealed only 6 court cases in this area. However, the successful actions were not based on the argument of "inappropriateness" and the infringement of EU law was not addressed by the national courts[57].

§ 7 Para. 2 Clause 4 refers to the provisions of § 6 Para. 3, 6 and 8 in the context of the discretionary decision.

The provisions of § 7 Para. 5 – 8 set out details of the limitation of the official re-entry ban. An unlimited ban is contrary to European Law[58].

4.6 Hamburg departure initiative

In 2017, in an unprecedented action, the Hamburg Ministry of Internal Affairs and Sport had official demands distributed to a large number of homeless EU citizens by the police to present themselves for interviews at the immigration office[59]. In this, they were urged to provide documents proving their right of residence under § 2 Para. 2 no. 1, 2 or 5. The city's course of action and the use of official forms in the relevant languages show that this was aimed at homeless EU citizens in a targeted way.

What has already been said above in relation to § 2 Para. 7 (see section 4.1 above) also applies here, i.e. that there is no obligation for EU citizens entitled to freedom of movement, contrary to what is stated in provison of § 82 of the Residence Law for third-country nationals, to assist in the determination for their true legal status. They

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54 An overview of the debate is seen by Prof. Dr. F. Wollenschläger in among things "Obstacles for EU citizens and their families in exercising the right to freedom of movement and freedom of residence, National Report for Germany", 2016 S. 30f

55 German Trade Union Federation position on the draft legislation for amending the Freedom of Movement Law/EU and other regulations, 18.09.2014, German Parliament printed matter 18(4)164 A, Internal Affairs Committee, p. 44; Dr. Klaus Dienelt in "Stellungnahme zur Sitzung des Innenausschusses des Deutschen Bundestages am 13.10.2014 zum Gesetzesentwurf…", 05.10.2014, BT-Drs 18(4)164 A, Internal Affairs Committee, p. 82ff; a. A.: Dr. I. Vorholz for the German Rural District Association, 09.10.2014, German Parliament printed matter 18(4)164 A, Internal Affairs Committee, p. 78

56 also C. Voigt in the position of the Paritätischer Gesamtverband (Joint General Association) on the draft legislation…, 09.10.2014, German Parliament printed matter 18(4)164 A, Internal Affairs Committee, S. 66

57 cf. in this regard the detailed statements in Prof. Dr. F. Wollenschläger among others "Obstacles for EU citizens and their families in exercising the right to freedom of movement and freedom of residence, National Report for Germany", 2016 p. 35

58 cf. ECJ case no. C-348/96 (Calfa), [1999], I-11; case no. C-297/12 (Filev aqnd Osmani), ECLI; EU:C:2013:569 = ZAR 2014, 128

59 The author is in possession of documentary evidence, which can be requested

do not have to make any statements in this regard or produce documents that facilitate the determination of a negative status by the authority.

After expiry of the deadline period for the interview, a notice of determination of the loss of their right of residence was issued against the individuals concerned[60]. This also contained the threat of deportation at their own expense if they did not leave the country of their own accord. The reasons stated in the decision forego any examination of all the rights of residence to be considered. It is merely an attempt to exercise the discretion prescribed by law. In this case, the decision-making takes place partially on the basis of assumptions. It is stated, for example, that their livelihood is secured solely through violations of the law in the form of criminal offences and that the individual concerned is evidently not willing to adhere to the country's applicable laws and social norms[61]. This indicates the erroneous exercising of discretion by the authority.

The decision determining the loss of rights is followed by the obligation to leave the country[62] imposed by the authority and the issue of a form to cross the border[63], which can serve to provide proof that the individual concerned has left the country.

The action taken by the Hamburg authorities has caused consternation amongst those engaged in caring for homeless EU citizens. Although isolated cases of determination of loss of rights and obligations to leave the country have been identified in the past, the course of action in Hamburg includes a new dimension of widespread discrimination against homeless EU citizens and an attempt to restrict the right to freedom of movement of homeless EU citizens through deterrents.

According to talks held with German Charities and social welfare organisation in Hamburg and among other nationwide providers of care for homeless EU citizens, contact normally ceases after the individual concerned has left the country, meaning that no details can be given with regard to possible entry restrictions. Nor is any similar procedure known from other municipalities or local authorities in Germany.

5. Access to social benefits for mobile EU citizens

Compared with 2016[64], there is now somewhat more legal certainty regarding access to social benefits for EU citizens through landmark rulings[65] and the new provisions of SGB II and XII which entered into force on 29.12.2016. At the same time, new problems have been created, as will be seen later. It can already be said at this juncture that access to the German social benefits system has not become easier for homeless and destitute EU citizens.

[60] The author is in possession of documentary evidence, which can be requested
[61] The author is in possession of documentary evidence, which can be requested
[62] The author is in possession of documentary evidence, which can be requested
[63] The author is in possession of documentary evidence, which can be requested
[64] Prof. Dr. F. Wollenschläger among other "Obstacles for EU citizens and their families in exercising the right to freedom of movement and freedom of residence, National Report for Germany", 2016 p. 21
[65] Among others, Federal Social Court, judgement dated 13.07.2017, B 4 AS 17/16 R (ruling on "after more than one year of work activity" in § 2 Para. 3 Clause 1 no. 2 of the Freedom of Movement Law/EU)

5.1 Subsistence benefits in accordance with the law

Destitute people in Germany can receive benefits to cover their subsistence costs.

These are calculated according to need and basically include:

- Standard needs (money for food, clothing, etc., currently a flat rate of €416.00 per month)
- Accommodation and heating costs
- Health and nursing care insurance costs
- One-off special benefits and additional needs (initial fittings/equipment for apartment or in the event of pregnancy)

5.1.1 Structure of regulations for subsistence benefits

The German regulations for access to social benefits to cover subsistence costs are set out in the various legal codes. Anyone who is unable to work more than 3 hours per day for health or physical reasons or has reached retirement age or is drawing a pension changes from SGB II to SGB XII.

5.1.2 Origin of the current statutory regulations

The case law of the ECJ regarding entitlements of economically inactive EU citizens[66], for those whose right of residence resulted solely from the purpose of looking for work[67] or during the first three months or residence[68], with which the ECJ moved away from its earlier case law concerning the FMD and European social citizenship[69], initially led to greater legal certainty between 2014 and 2016. Regrettably, these rulings considerably restrict the rights of destitute and homeless EU citizens.

The Federal Social Court has deemed the exclusions of benefits associated with these rulings to be unconstitutional and awarded economically inactive EU citizens subsistence benefits for persons fit or unfit to work under SGB XII in several separate judgements.[70].

These judgements handed down by the highest social court were based on the minimum subsistence level guaranteed under the Constitution and were applicable to destitute EU citizens if they had consolidated their residence after 6 months in Germany.

The rulings of the Federal Social Court were welcomed by social welfare organisations and heavily criticised by parts of the judiciary, authorities and the government. On

[66] ECJ, case no. C-333/13 (Dano), judgement dated 11.11.2014
[67] ECJ, case no. C-67/14 (Alimanovic), judgement dated 15.09.2015
[68] ECJ, case no. C-299/14 (Garcia-Nieto), judgement dated 25.02.2016
[69] Brandmayer in Rolfs/ Giesen/ Kreikebohm/ Udsching, BeckOK Sozialrecht, 48th Ed., 01.03.2018, SGB II, § 7 para. 9
[70] Federal Social Court, judgement dated 03.12.2015, B 4 AS 44/15 R, recital. 36 ff; Federal Social Court, judgement dated 20.01.2016, B 14 AS 15/15 R among others.

the one hand, they led briefly to an easing of measures for the persons concerned[71], but they also caused renewed legal uncertainty. The court appeared in this regard to breach the structure of § 21 Clause 1 of SGB XII in a manner not intended by the legislator. These judgements are still the subject of controversial discussion.

The legislator took this ruling handed down by the Federal Social Court as a reason to introduce new provisions concerning social benefits for EU citizens and which entered into force on 29.12.2016. The purpose of this was to counteract the burden on the municipalities caused by the social benefits payable and bring about reduced expenditure in the future[72].

5.1.3 Exclusion provisions – § 7 Para. 1, Clause 2 of SGB II and § 23 Para. 3, Clause 1 of SGB XII

The subsistence benefits for **economically active** foreigners can be found in **§ 7 Para. 1 Clause 2 of SGB II**. The competent authority is the **"Job Centre"**. An adequate provision for **economically inactive** foreigners can be found in **§ 23 Para. 3 Clause 1 of SGB XII**. The administration that decides on these benefits is the **"Social Welfare Office"**.

Both regulations contain similar provisions.

Accordingly, no benefits are awarded to foreigners who:

- are not economically active, for the first 3 months of their residence,
- are residing purely for the purpose of finding work
- do not have any right of residence.

These grounds for exclusion have been declared compatible with European law by the ECJ in the "game-changing" rulings cited[73].

- Although the additional reason for exclusion, provided for in § 23 Para. 3 Clause 1 no. 4 of SGB XII, i.e. entering the country for the purpose of obtaining social benefits, can be relevant to homeless and destitute EU citizens, the drawing of social assistance must represent the distinct motive for entering the country. This reason can be accompanied by other considerations.
  The social assistance institution must provide proof of the existence of the grounds for exclusion. Destitute EU citizens have repeatedly described how, during the application interview with the authority providing the benefits, attempts are made to make it look as though this reason was also the purpose behind entering the country. This also complies with European law according to the ECJ[74].

[71] Prof. Dr. F. Wollenschläger among others "Obstacles for EU citizens and their families in exercising the right to freedom of movement and freedom of residence, National Report for Germany", 2016 p. 22

[72] Federal Parliament printed matter 18/10211 dated 07.11.2016 p. 1 and 2

[73] ECJ, case no. C-299/14 (Garcia-Nieto), judgement dated 25.05.2016; ECJ, case no. C-67/14 (Alimanovic), judgement dated 15.09.2015; case no. C-333/13 (Dano), judgement dated 11.11.2014

[74] Case no. C-333/13 (Dano), judgement dated 11.11.2014, recital. 78

- Both § 7 of SGB II (in this case § 7 Para. 1 Clause 2 no. 2 c of SGB II) and § 23 of SGB XII (in this case § 23 Para. 3 Clause 1 no. 3 of SGB XII) contain grounds for exclusion insofar as the right of residence of an EU citizen is derived only from the children attending school, pursuant to Art. 10 of Regulation (EU) no. 492/2011.[75]

  This new provison was introduced on 29.12.2016 and excludes children and their parent providing the parental care from support benefits to cover basic subsistence costs, although they have a right of residence on the basis of the European provisions under Art. 10 of Regulation (EU) 492/2011 despite a lack of sufficient means of subsistence in the country of residence.

  However, this exclusion provision may well be contrary to European law. Although the ECJ has not yet had to expressly rule on this question, it is to be expected that the German provision will be presented to the court. The right of the child would otherwise be in vain if the right of residence were not also accompanied by minimum social security benefits for the child and its parent exercising custody[76].

  The grounds for exclusion under § 7 Para. 1 Clause 2 no. 2 c of SGB II and § 23 Para. 3 Clause 1 no. 3 of SGB XII violates the principle of equal treatment pursuant to Art. 4 of Regulation (EC) 883/2004. This stipulates that persons to whom the Regulation applies, and unless provided for otherwise in this Regulation, have the same rights and obligations under the legislation of a Member State as the nationals of that State.

  The infringement of the principle of non-discrimination under Art. 4 of Regulation (EC) 883/2004 leads, due to the primacy of application, to the non-applicability of the relevant discriminatory feature of the national law, with the result that the entitlement to subsistence benefits exists provided all of the other requirements are met[77].

  My view is that this exclusion provision constitutes open, direct discrimination because the decisive criterion of distinction is solely nationality and Regulation (EC) 883/2004 itself does not contain any explicit provision that allows such different treatment.

  For destitute EU citizens that do not have any other right of residence or only for the purpose of seeking employment (and therefore have no entitlement to social benefits), an entitlement to such assistance for themselves and their children can be found in European law via Art. 10 of Regulation (EU) no. 492/2011.

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[75] Article 10 of Regulation (EU) no. 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (ABl. L 141 vom 27.5.2011, S. 1), regulation (EU) 2016/589 (OJ L 107 dated 22.4.2016, p. 1

[76] Groth in BeckOK Sozialrecht, Rolfs/ Giesen/ Kreikebohm/ Udsching, 48. Ed., 01.03.2018, SGB XII, § 23 recital. 16n

[77] also Regional Social Court of Schleswig-Holstein, ruling dated 17.02.2017, L 6 AS 11/17 B ER; Regional Social Court of Saxony-Anhalt, ruling dated 06.09.2017, L 2 AS 567/17 B ER; LSG NRW, ruling dated 26.09.2017, L 6 AS 380/17 B ER; Regional Social Court of NRW, ruling dated 10.11.2017, L 6 AS 1256/17 B ER; Regional Social Court of NRW, ruling dated 21.12.2017, L 7 AS 2044/17 B ER among others

The exclusion provision under § 7 Para. 1 Clause 2 no. 2 c of SGB II is also part of the decision of the Social Court of Mainz referred to the Federal Constitutional Court[78]. This can, if it also does not regard the provision as being compatible with European law, have the disputed issue clarified by the ECJ in accordance with Art. 267 of the TFEU.

However, as long and insofar as it has to be assumed that the national provision is in breach of EU law, the Member States are obliged to interpret the national law in the light of EU law in order to avoid a conflict of laws. This requires the primacy of application of EU law over national law[79].

The conclusion must be, therefore, that problem-free access to subsistence benefits only exists where there is a right of residence as an economically active person or proven permanent residence, since the exclusion provisions are not relevant in these cases.

5.1.4. Exceptions from exclusion after more than 5 years' residence

With the new provisions contained in **§ 7 Para. 1 Clause 4 of SGB II** and **§ 23 Para. 3 Clauses 7-10 of SGB XII** concerning entitlement to benefits for foreigners (actually) residing in Germany for more than five years, it is not only homeless EU citizens that have the possibility to receive (at least temporarily) subsistence benefits. With these provisions, the legislator goes against the aforementioned case law of the Federal Social Court and finds that it is not a 6-month period that is needed to consolidate the residence but, rather, a period of five years.

Although the individuals concerned are granted benefits, this can be short-lived as the entitlement is terminated by the determination of loss of the right of residence pursuant to § 7 Para. 1 Clause 1 (see section 4.2 above). For destitute EU citizens, this means that, as a result of availing of assistance, they run the risk of being deported by the immigration office if they do not obtain a right of residence by the time the loss of rights is determined.

The only requirement for the granting of benefits is (actual, habitual) residence in Germany for five years. Unlike the acquisition of the permanent right of residence (see section 3.9 above), for which lawful residence is required, periods in prison are also to be taken into account in this case, for example. The period begins, at the earliest, at the time of registering with the relevant authority and must not have been interrupted to any significant extent.

In practice, however, relying on this provision proves for the individuals entitled to be **problematic for two reasons:**

[78] Decision of the Social Court of Mainz of 18.04.2016 referred to the Federal Constitutional Court, p. 3 AS 149/16

[79] Becker in Eicher/ Luik, SGB II, 4th Edition, 2017, § 7 recital. 51

1. The **proof of actual residence** is, especially for homeless EU citizens already living in Germany for a long time, difficult to provide as they do not normally have continuous registration in Germany[80].

2. There is a risk of authorities making **increased efforts** to have the **loss of the right of residence** determined so as not to have to pay the benefits applied for. The specialist instructions issued by the Federal Labour Office expressly point out to their staff, for example, that, under § 87 Para. 2 Clause 1 no. 2a of the Residence Law, the social welfare office is obligated to inform the Immigration Office when foreigners apply for benefits to cover their subsistence costs who do not have a right of residence, have a right of residence solely for the purpose of seeking employment, or do so on the basis of Art. 10 of Regulation (EU) 492/2011. The provison contained in § 11 Para. 1 Clause 1 expressly declares the provision of the Residence Law to be applicable.

5.1.5 Temporary benefits – § 23 Para. 3, Clause 3 of SGB XII

In order to accommodate the case law of the Federal Social Court and the Federal Constitutional Court concerning the duty of the state to guarantee a humane level of subsistence, the legislator provides in a detailed manner in § 23 Para. 3 Clause 3 to Para. 3a Clause 3 of SGB XII for the benefits to cover the basic subsistence requirements. To do this, he took up the aforementioned court ruling and standardised the **so-called bridging or temporary benefits** for economically active and economically inactive foreigners under SGB XII[81].

The benefits include funds for food and personal hygiene, currently set at a maximum amount of €186.09. In addition, accommodation and heating are paid for to a reasonable amount. Medical needs for acute illnesses and pain, as well as corresponding medical and dental treatment, medicines and dressings are also paid for, cf. § 23 Para. 3 Clause 5 no. 1-3 of SGB XII.

These benefits are granted until departure from the country, though for a maximum period of one month. The reason given for this narrow restriction is that it can be assumed that a reasonable return journey within the EU is feasible within a period of one month. Those availing themselves of this option cannot receive such benefits again in the event of repeated entry within a subsequent period of two years, cf. § 23 Para. 3 Clause 3 of SGB XII.

Under § 23 Para. 3 Clause 6 of SGB XII, the temporary benefit can be modified by the authority in cases of hardship in terms of both time and content, as well as quality. This decision is left to the discretion of the authority and concerns, for example, further medical need or further requirements for clothing in winter. The extension of the period is conceivable in the case of being unable to travel, in the case of school-age children who should not have to change to a new education system in the middle

[80] e.g.: Regional Social Court of Berlin-Brandenburg, ruling dated 30.06.2017, L 34 AS 1201/17 B ER

[81] Groth in BeckOK Sozialrecht, Rolfs/ Giesen/ Kreikebohm/ Udsching, 48th Edition, 01.03.2018, SGB XII, § 23 Rn. 17

of the school year and therefore lose one grade level[82]. A poor social situation in the country of origin is not recognised as suffering from hardship[83].

Finally, the social welfare office will also grant a loan for reasonable return travel costs under § 23 Para. 3a of SGB XII.

The aim of the new rules is obvious. They are designed to encourage the individuals concerned to return to their country of origin. In a circular dated 26.06.2017, the City of Berlin summarised the information concerning temporary benefits, in addition to further details of the legal position for EU citizens in general from the perspective of the authority[84].

Although the wording of the provision does not make the granting of temporary benefits contingent on making the return journey within one month, the production of a travel ticket is demanded by the social welfare office in practice, according to social workers caring for homeless EU citizens. This administrative action is unlawful. The problem in this case is being able to prove the content of a verbal decision and gaining access to lawyers for the destitute EU citizens affected.

5.2. Entitlements arising from multilateral and bilateral agreements

Simply for the sake of completeness, it should be mentioned here that subsistence benefits are granted to destitute EU citizens from Austria (SGB II and SGB XII benefits) and the signatory states of the European Convention on Social and Medical Assistance (CETS) (benefits under SGB XII) under the CETS and the agreement between Germany and Austria on Welfare and Youth Social Welfare Work (DÖF).

In practice, in addition to several favourable court rulings[85], there are also some that nevertheless reject the granting of benefits in these cases[86]. Consequently, there is also a degree of legal uncertainty in this area.

5. 3 Access to health care

Access to the German health system is based on the principle of insurance. The outpatient and inpatient medical care of the individual affected is paid by his/her private or state insurance. He/she chooses one of these health insurance schemes and pays monthly contributions to his/her insurance.

When drawing subsistence benefits, the contributions are paid by the job centre or the social welfare office from the first day of drawing benefit[87]. On ceasing to receive benefits under SGB II or XII, the individual in question has to pay the membership contributions him/herself. This often leads to destitute EU citizens becoming over-

[82] Regional Social Court of Berlin-Brandenburg, ruling dated 20.06.2017, L 15 SO 104/17 B ER
[83] Regional Social Court of Hesse, ruling dated 20.06.2017, L 4 SO 70/17 B ER
[84] http://www.berlin.de/sen/soziales/themen/berliner-sozialrecht/kategorie/rundschreiben/2017_04-613035.php
[85] Regional Social Court of Saxony-Anhalt, ruling dated 07.03.2017, L 2 AS 127/17 B ER; Regional Social Court of Berlin-Brandenburg ruling dated 14.03.2017, L 15 SO 321/16 B ER among others
[86] Regional Social Court of NRW judgement dated 22.06.2010, L 1 AS 36/08
[87] e.g. § 186 Para. 2a of SGB V for the Statutory Health Insurance Scheme

indebted, with medical care no longer guaranteed because the insurance relationship with the Statutory Health Insurance Scheme is suspended under § 16 Para. 3a Clause 2 of SGB V. In the case of membership being suspended, the only benefits that are paid are for the treatment of acute illnesses and for pain, pregnancy and maternity. The health insurance must also issue an electronic insurance card for this[88]. It should be noted, however, that the insurers shy away from issuing the insurance card in such cases.

Many homeless EU citizens, in particular, do not have any health insurance cover. This is also very common among new arrivals from other EU countries. In most cases, there is a lack of resources to fund the monthly contributions or a lack of knowledge of the health system. Often, the question of how to finance medical care only arises in the case of illness and poses a major problem at that time. All that exists in these cases is limited access to emergency medical care.

For this reason, access to subsistence benefits under SGB II and SGB XII is of huge importance for homeless and destitute EU citizens.

Some mobile EU citizens also have a European health insurance card. Occasionally, cases come to light where this insurance card has not been recognised.

6. Legal protection

In day-to-day practice, destitute EU citizens in particular, but also others, are confronted with administrative acts that negatively affect them. These can include decisions taken by the authorities in relation to right of residence (see section 4 above), as well as social benefits that have been applied for (see section 5 above). The only option then left for the individuals concerned is to take legal action.

The immigration authorities and the administrative court are responsible for matters concerning the right of residence, while the job centre or social welfare office and the social court decide with regard to social benefits.

Legal protection under administrative law and social law is, in principle, comparable. The authority decides on an affected person's right, facts/circumstances or application.

The decisions made by the immigration authority constitute administrative acts pursuant to § 35 of the VwVfG (Administrative Procedure Act) (of the individual federal states), against which an objection (insofar as the relevant individual federal state law provides for this) can be lodged and legal action can be taken, cf. § 42 Para 1 and 68 of the Administrative Procedure Act. Decisions regarding the determination of loss of rights can be suspended pursuant to § 80 Para. 1 of the Administrative Procedure Act.

Interim legal protection proceedings under § 80 Para. 5 of the Administrative Procedure Act can prevent immediate deportation pursuant to Art. 31 (2) of the FMD until a ruling has been made.

[88] Regional Social Court of Berlin-Brandenburg, ruling dated 22.05.2014, L 9 KH 112/14 B ER

With regard to procedures under social law, it is also possible to lodge an objection against a negative decision within a period of one month. This will result in a renewed examination by the authority. If another negative decision is made (ruling on the objection), the individual concerned has the option to take legal action at the social court within a period of one month.

Experience over the past few years has shown, for example, that a good third of the assessments of notifications undertaken by the job centre were flawed[89]. As court proceedings can take several years, the possibility exists in urgent cases to request the court to initiate summary proceedings, which can take from a week to a few months.

If the person concerned does not agree with the court's decision, it is possible, in principle, to have such ruling reviewed by competent higher courts.

Although it is advisable to enlist the help of a lawyer for the proceedings, this is not absolutely necessary.

The problem for socially disadvantaged people in this context is how to fund legal protection.

For out-of-court activity by a lawyer, it is possible to obtain a certificate of entitlement for a lawyer to enable the latter to represent the person concerned vis-à-vis the authorities at virtually no cost to that person.

In the court proceedings, the judge decides whether the plaintiff is granted assistance for the case. This decision by the judge only takes place during the court proceedings. This means that, in an above-average number of the cases, destitute EU citizens, including Germans, must bear the cost of the lawyer until a decision is taken on legal aid.

It is therefore difficult for homeless EU citizens to find low-threshold access to competent legal representation of their interests.

A cooperation arrangement of language-based street social work[90] with specialist lawyers has proven to be a successful model. In this way, the individuals concerned can be given detailed information in their native language and the lawyers are assisted in obtaining the necessary information and documentation. Linking such cooperation arrangements with homeless assistance organisations and facilities (homeless shelters, railway missions and advice centres) would appear to be best suited to this.

And even when taking recourse to the courts, it must be stated, however, that it is not possible to predict success or draw a clear line when dealing with situations and facts involving contentious assessment criteria. What decision is reached by the courts on whether a particular employment is recognised as an entitlement to residence then

[89] https://www.focus.de/finanzen/recht/medienbericht-wegen-eigener-fehler-jobcenter-muessen-immer-mehr-hartz-iv-bescheide-kassieren_id_8287970.html

[90] e.g.: http://www.frostschutzengel.de/unsere-arbeit/kooperationspartner_innen

depends on the **personal appraisal of the individual judge**[91]. Although this is problematic for the persons affected, it is deliberately established in the legal system in this way so that the judge can reach his/her decision free of any influence. As a corrective measure, there therefore remains the possibility of having the decision of the court of first instance reviewed by a court of second instance.

It remains to be noted, however, that the cost risk for the persons concerned remains a significant criterion for deciding whether to contest the decision reached by the authorities or enlist the assistance of a lawyer to this end. A remedy for such cases could be created by a fund that, for example, supports special procedures serving to promote the development of the law and legal certainty.

7. Closing remarks

The situation for homeless and destitute EU citizens in Germany is difficult due to access to social benefits being made problematic for them. To exercise their rights, they are often dependent on the help of social workers. The possibility of enlisting the assistance of a lawyer is limited, something that is inherent in the system. The activities undertaken by the immigration authorities to determine the loss of rights of residence should be viewed critically since these activities are characterised by discretion. There is too little knowledge available concerning mobile EU citizens that have been expelled, with the result that no statements can be made about their fate. A more far-reaching project would be meaningful in this regard in order to analyse the impact of national procedures and practices in the EU.

[91] Adminstrative Court of Stuttgart judgement dated 08.12.2011, 11 K 2142/11; Higher Administrative Court of Lüneburg, ruling dated 21.06.2017, 13 LA 27/17; Regional Social Court of Berlin-Brandenburg, ruling dated 19.07.2017, L 31 AS 1318/17 B ER