

Prof. dr. Herwig Verschueren
University of Antwerp
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Non-discrimination and
social rights under Reg.
492/2011 and Dir.
2004/38

Overview

- Recent legislative developments
- Regulation 1612/68 (now 492/2011)
 - ▣ Equal treatment and social rights
- Directive 2004/38
 - ▣ Link between residence rights and social benefits
 - ▣ Equal treatment provisions
- Relationship with Reg. 883/2004 (former Reg. 1408/71)

Recent legislative developments

- Reg. 1612/68 replaced by Reg. 492/2011 of 5 April 2011
 - Codification of previous modifications
 - More specifically the provisions on the clearance of vacancies and application for employment (Eures-system)
 - Former Articles 10 and 11 repealed by Dir. 2004/38
 - Provisions on equal treatment remained untouched
 - Article 12 on access to education became Article 10
 - OJ L 141 of 27 May 2011
 - Reg. 492/2011 entered into force on 16 June 2011

Regulation 1612/68 (492/2011)

- Article 7(1): Abolition of any discrimination based on nationality as regards employment, remuneration and other conditions of work/employment
- Article 7(2)
 - ▣ Same “social advantages”
- Article 8: “trade union” rights
- Article 9: access to housing
- Article 12 (now Article 10 Reg. 492/2011): access to education for the children

Article 7(2) Reg. 1612/68

(492/2011): personal scope

□ Workers

- Broad concept of workers: even if the worker has a low income

 - see paras 26-29 of *Vatsouras & Koupatanze* (C-22/08 and C-23/08)

- Migrant workers are guaranteed certain rights linked to the status as a worker even when they are no longer in an employment relationship (*Meints; Leclere,*)

□ Members of the family

Article 7(2): personal scope

- First time migrant jobseekers
 - ▣ “old” case law: no right to equal treatment for social advantages under Article 7(2) Reg. 1612/68 (*Lebon*; 316/85)
 - ▣ However: they come under the scope of Article 45 TFEU ... and may claim equal treatment in the host state for benefits intended to facilitate access to employment in the labour market;
 - Real link with the employment market required (*Collins*; C-138/02; UK jobseeker’s allowance)
 - *Vatsouras & Koupatanze* (German “Grundsicherung für Arbeitsuchende”)

Article 7(2): material scope

- CJ: broad concept
 - ▣ Examples:
 - travel reductions for large families
 - minimum subsistence allowances;
 - maintenance grants and tuition fees for children;
 - childbirth loans;
 - housing benefits;
 - social security rights covered or not by Reg. 883/2004
 - ▣ Instrument of integration of the worker's family into the host country (see recital 6 to Reg. 492/2011)

What it benetit is also covered by 883/2004?

- Social security rights covered by 1408/71 or 883/2004
 - ▣ see recently *Com v. D*; C-206/10): Länder benefits for blind, deaf and disabled persons
- Art. 42(2) of 1612/68 (now Art. 36(2) Reg. 492/2011) : *“This Regulation shall not affect measures taken in accordance with Article 51 of the Treaty”*
 - ▣ now 48 TFEU

What it benefit is also covered by 883/2004?

- *Com. v France (C-35/97)*
 - “in accordance with Article 42(2) of Regulation No 1612/68, the provisions of Regulation No 1408/71 take precedence over those of Regulation No 1612/68”
- See *Meints (C-57/96)*; *Fahmi et al (C-33/99)*: only after the CJ had concluded that the benefit was not covered by 1408/71, it proceeded to examine the applicability of 1612/68

Possible contradictions between Reg. 1612/68 and Reg. 883/2004

- Unemployment benefits for unemployed frontier workers
 - ▣ 883/2004: state of residence
 - ▣ 1612/68: benefits inextricably linked to occupation (such as unemployment benefits): equal treatment under the legislation of state of former employment
- Part-time frontier workers working in two MS
 - ▣ 883/2004: only subject to the social security legislation of MS of residence
 - ▣ 1612/68: equal treatment in each state of employment

Possible contradictions between Reg. 1612/68 and Reg. 883/2004

- Special non-contributory benefits
 - 883/2004: residence based coordination system: no export
 - long and difficult political negotiations
 - CJ fine-tuned and confirmed the political agreements
 - 1612/68: access to all social advantages in MS of employment

Hendrix (C-287/05)

- On a Dutch special non-contributory benefit (WAJONG): not exportable under Reg. 1408/71
- CJ: residence clauses in 1408/71 should be justified objectively and be proportionate in each case and specifically for active migrant workers
- Precedence of the objective of Article 7(2) of Reg. 1612/68 over 1408/71 – 883/2004 coordination methods

Social security rights not covered by Reg. 883/2004

- Reg. 1612/68 (492/2011) also covers social security rights not covered by Reg. 1408/71 or 883/04
 - ▣ Advances of maintenance payments; child birth and adoption allowances excluded from the scope of Reg. 1408/71 and of Reg. 883/2004
 - ▣ *Leclere* (C-43/99): application of Art. 7 of Reg. 1612/68 to waive residence clause in Luxembourg legislation

Social security rights not covered by Reg. 883/2004

- ▣ Career-interruption benefits: not considered unemployment benefits under Reg. 1408/71 – 883/2004
 - *Com. v Belgium* (C-469/02): social advantage under 1612/68: waiving of residence clauses
- ▣ Occupational schemes
 - Pre-retirement benefits: *Com. v France* (C-35/97): waiving of residence clauses on the basis of Reg. 1612/68
 - Occupational pensions schemes: *Casteels* (C-379/09): direct application of Article 45 TFEU

Directive 2004/38

- Residence rights for EU citizens and the members of their family
- Sufficient resources conditions for economically inactive persons
 - ▣ But not for economically active persons (Art. 7(1))
 - ▣ Or “former” economically active persons (Art. 7(3))
 - Ill, incapacitated, unemployed persons or persons on vocational training

Self-sufficiency requirement for economically inactive persons

- During the first period of six months
 - ▣ Article 6 *juncto* Article 14(1) Dir. 2004/38
 - ▣ *“As long as they do not become an unreasonable burden on the social assistance system of the host Member State”*

Self-sufficiency requirement for economically inactive persons

- Between three months and five years
 - ▣ Sufficient resources so as not to become a burden on the social assistance system of the host Member State
 - ▣ However: expulsion not automatic after recourse to the social assistance system (Article 14(3))
 - ▣ Proportionality test in each individual case

Self-sufficiency requirement for economically inactive persons

- after five years: right of permanent residence (Article 16 Dir. 2004/38)
- no self-sufficient requirement any more
- see discussion on the calculation of the five year period in *Lassal*, C-162/09 and *Dias*, C-325/09

Article 24(1) Dir. 2004/38: equal treatment

- Article 24(1) of Dir. 2004/38
 - ▣ Equal treatment in the host state for all matters within the scope of the Treaty
 - *Martinez Sala* (C-85/96): benefits falling under Reg. 1408/71 as well as under Reg. 1612/68 are matters within the scope of the Treaty

Article 24(1) Dir . 2004/38: equal treatment

- For Union citizens residing on the basis of this directive, and the members of their family
 - ▣ residence right under this directive must precede right to equal treatment

Article 24(1) Dir . 2004/38: equal treatment

- What if the right to reside is not based on this directive?
 - ▣ On the Treaty: *Singh* (C-370/90), *Carpenter* (C-60/00), *Eind* (C-291/05)
 - ▣ On other EU secondary law instrument (Reg. 1612/68; 492/2011; *Teixeira and Ibrahim*)
 - ▣ On national law
- Equal treatment on the basis of the Treaty: *Trojani* (C-456/02), including proportionality test

Article 24(2): exceptions

- No entitlement to social assistance during the first three months
- No entitlement to social assistance for first time jobseekers
- No maintenance aid for studies to economically non-active persons (in first five year of residence)

Concept of social assistance in Dir. 2004/38

- In Articles 7, 14 and 24
- Narrow definition in *Vatsouras & Koupatanze*
- *“benefits intended to facilitate access to the labour market cannot be regarded as constituting ‘social assistance’”*

Concept of social assistance in Dir. 2004/38 and in Reg. 883/2004

- see narrow definition of “social assistance” under Reg. 1408/71 and 883/2004
- The special non-contributory benefits listed in Annex X: not considered as “social assistance” under 883/2004
 - ▣ For Germany:
 - ▣ „a) Leistungen der Grundsicherung im Alter und bei Erwerbsminderung
 - ▣ b) Leistungen zur Sicherung des Lebensunterhalts der Grundsicherung für Arbeitssuchende“
- Are these benefits “social assistance” under Dir. 2004/38?

883/2004: coordination of special non-contributory benefits

- Residence-based coordination
 - Subject to an “EU” habitual residence test
 - See Article 11 Reg. 987/2009: centre of interest
 - No reference to “genuine link” with the employment market of the host state
 - No reference to the legal status of the residence
- 883/2004 guarantees entitlement from the first day a person transfers his/her “habitual residence” to a MS
- “habitual residence” under 883/2004 is more narrow than “residence” under Dir. 2004/38 which also includes situations of “stay” under 883/2004
 - See first 3 months of “residence” under 2004/38 may be “stay” under 883/2004

“Sufficient resources” requirement in 2004/38

- What about special non-contributory benefits?
 - ▣ Would it be unreasonable to rely on 883/2004 in order to claim a special non-contributory benefit, even when it is qualified in the host state as “social assistance”?
 - ▣ Or would claiming the right to special non-contributory benefits under 883/2004 jeopardize the right to reside under 2004/38
 - ▣ and consequently the right to special non-contributory benefits under 2004/38, because the person has not “the right to reside” in the host MS?
- *Effet utile* and *lex specialis*: 883/2004 should take precedence over 2004/38

To conclude

- Reg. 1612/68 (now 492/2011)
 - ▣ Equal treatment for social advantages
 - ▣ Broad material and personal scope
- Dir. 2004/38
 - ▣ Residence right may be linked to self-sufficiency
 - ▣ Equal treatment also for social benefits, including social assistance
 - Exceptions
- Relationship with Reg. 883/2004 not always clear



Thank you for your attention