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DEVELOPMENT OF EDUCATIONAL RIGHTS OF MIGRATING CHILDREN IN THE LIGHT OF FINANCIAL SOLIDARITY OF EUROPEAN UNION MEMBER STATES

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Abstract
The right of residence of children during education doesn't depend on keeping the status of worker by the parent, what is necessary in all other cases. This right doesn't depend on economic independence neither, although that is a general rule. Children have the right to education and also the right to be cared of by their parents or other relatives. It gives the right of residence to the adult which is also independent of the requirement of financial self-sufficiency. It also means a social assistance to be provided by the host country which is not limited by the criteria of unreasonable burden on the social assistance system of that country. The use of these rights may take many years (by the child to complete the education and by the adult until the child reaches the age of majority). What is more, after 5 years of legal residence it is possible to obtain a permanent residence permit or at least long-term resident status. The rights of workers' children have developed widely. Financial solidarity of European Union Member States has become a challenge then. However, children of self-employed persons are not in the same position as those being descendants of workers. Self-employed persons have been paying social security contributions and other applicable taxes during their economic activity. Thus they earned for their social assistance when needed. However their children during education are not privileged as much as children of EU workers.

Keywords: *the right of permanent residence of children and their parents, education in the host country, access to the general education system, the requirement of financial self-sufficiency during education of children, financial solidarity*

1. Introduction

Directive 2004/38 / EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the European Union and their family members to move and reside freely within the territory of the Member States[1] has defined rights related to the stay of Union citizens in another Member State. It applied, among others, the requirement of holding

[1] DIRECTIVE 2004/38/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, 30.4.2004, Official Journal of the European Union, L 158/77.

sufficient resources for maintenance during their stay in the host country if they are economically inactive. However, art. 10 of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 November 2011 on the free movement of workers within the Union[2] grants the right of residence to children during education regardless of the need to be financially independent. The text presents the relation of these two provisions in the light of the right to access to education of children. Financial solidarity of the Member States in the context of access to education of children was also recalled. It also pointed out the possibility of obtaining a permanent residence permit by children and their parents after 5 years of legal stay due to education of children in the EU host country. The differences in shaping the rights of children of employees and children of self-employed persons were also indicated.

2. Legal basis for children's stay during education in the host country

Based on article 10 of Regulation No. 492/2011 of 05/04/2011 children of citizens of European Union Member States - who work now or have worked in the past in the European Union - have access to general education system under the same conditions as nationals of the host country. However, these children must live on the territory of the host country. In addition, Member States are to support initiatives allowing these children to participate in educational activities in the best possible conditions. "The best possible conditions", being not a clear concept, had to be clarified by the case law of the Court of Justice of the European Union. This case-law established the best possible conditions for the education of children even before the entry into force of Regulation No. 492/2011, based on previously valid article 12 of Council Regulation No. 1612/68 of October 15, 1968 on the free movement of workers within the Community[3]. The article mentioned was giving identical rights to migrant workers as current article 10 of Regulation No. 492/2011. However, the rights related to the stay of Union citizens in another Member State are subsequently set out in Directive 2004/38 / EC.

It was apparent from the wording of the Directive that migrant Union citizens who are not employed must meet the requirement of sufficient resources to support themselves and their family members. This requirement was intended as a safeguard against the burden on the welfare systems of host countries. Migrant citizens of the Union therefore had to be covered by full health insurance. The Directive partially repealed that Regulation No 1612/68, but left unchanged art. 12. The relation between the two provisions became the subject of two judgments delivered on 23/02/2010 in the Teixeira case[4] and in the Ibrahim case[5].

[2]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, 27.5.2011, Official Journal of the European Union, L 141/1.

[3] REGULATION (EEC) No 1612/68 OF THE COUNCIL of 15 October 1968 on freedom of movement for workers within the Community, No L 257/2 Official Journal of the European Communities 19.10.68.

[4] Case C-480/08 Maria Teixeira v London Borough of Lambeth and Secretary of State for the Home Department, EU:C:2010:83.

[5] Case-310/08, London Borough of Harrow v Nimco Hassan Ibrahim and Secretary of State for the Home Department, EU:C:2010:80.

3. Relation of regulations on the right of residence for studying children of EU migrant workers

Before that in the Baumbast case[6] the Court of Justice specified that children of a European Union citizen who have settled in a Member State, while their parent had a right of residence as a migrant worker in that State, are allowed to reside there in order to take a part in education process within the general education system (in accordance with Article 12 of Regulation 1612/68). For the interpretation given it doesn't matter the situations in which, for example, spouses divorced in the meantime or only one of the parents is a Union citizen or the parent is no longer an employee in the host Member State. It does not matter either if the child is not a citizen of the European Union. This judgment meant that children have an individual right to education in the host country and the related right of residence. These rights are independent of maintaining the status of a migrant worker by their parent. However, it should be emphasized that in the Baumbast case, both families had sufficient funds for their existence and did not benefit from social assistance in the host country. Therefore, the national courts recognized that the basis for the Baumbast case was the fact of economic independence. Therefore, they refused to apply the sentence in cases of persons who applied for social assistance[7].

In the Teixeira case, the subject of the dispute was refusal to grant housing assistance due to the lack of a right of residence resulting from the status of a migrant worker. An additional reason was the lack of sufficient funds for maintenance. Court of Justice considered art. 12 of Regulation No. 1612/68 in terms of independent basis for the child's right of residence. Perhaps it would be more legitimate to say that art. 12 of Regulation No. 1612/68 contains only the right to continue education, while the right of residence must be derived from Directive 2004/38 / EC. However, in the opinion of Advocate General Kokott[8], art. 12 of Regulation No 1612/68 does not give children the right to first provide residence in the host Member State, since they can use their right of access to education only if they already reside in its territory. The right of access to education finds its source in the circumstances in which a child has followed a father or mother to a host Member State in connection with their status as migrant workers. However, if the child has already resided in or was born in the host country, his legal status becomes independent.

Thus, the right of access to education doesn't depend then on the fact whether his parent will keep the status of a migrant worker. Such a right is also provided to a child whose parent has only been employed in the host country in the past. This means that the use of the right of access to education cannot depend on the child's preservation of a special right of residence under art. 10 paragraph 1 lit. a of Regulation No. 1612/68 for the period of its education. Therefore, it cannot depend on having a right to live with a parent who is a migrant worker. Otherwise, the right of access to education would be largely ineffective, in particular with regard to the children of former migrant workers. These workers often leave the host country after leaving employment, and consequently it is impossible to live in a shared household with

[6] Case 413/99, Baumbast and R. v Secretary of State for the Home Department, EU:C:2002:493.

[7] O'Brien, C., *Case C-310/08 London Borough of Harrow v. Nimco Hassan Ibrahim and Secretary of State for the Home Department, Judgment of the Court (Grand Chamber) of 23 February 2010, Case C-480/08 Maria Teixeira v. London Borough of Lambeth and Secretary of State for the Home Department, Judgment of the Court (Grand Chamber) of 23 February 2010,* „Common Market Law Review" 2011/48, p. 204, 211.

[8] Opinion of J. Kokott to C-480/08, Maria Teixeira v. London Borough of Lambeth and Secretary of State for the Home Department, EU:C:2009:642, points 38–46, 5 8–62, 67 –71, 80– 85, 90–96, 102–107.

a child. In this context, making the use of the right of access to education dependent on the existence of a separate right of residence for the child under other provisions would be contrary to the spirit and purpose of art. 12 of Regulation No 1612/68. This article grants an independent right of residence to the child during education. This right has not been changed by Directive 2004/38 / EC, as it lacks a wide-ranging right of residence for study purposes. This is proof that also after the entry into force of this directive there is still room for the application of art. 12 of Regulation No. 1612/68 as the legal basis for the right of residence.

The Court of Justice reminded that access to education depends only on the earlier settlement of a child in the host Member State. He stated that in relation to the right of access to education, the child has an independent right of residence. Therefore, the execution of this right has not been made conditional upon the child's retention during the entire period of study of a special right of residence under article 10 paragraph 1 lit. a of the regulation mentioned, when this provision was still in force. In the event of the acquisition of the right to education on the basis of art. 12 of Regulation No 1612/68, for the purpose of settling in the territory of a Member State in which one of its parents is or has been employed, the child is permanently entitled to a right of residence. This right cannot subsequently be challenged in the event of non-fulfillment of the grounds listed in art. 10 of Regulation No 1612/68. The right of children to equal treatment in access to education does not depend on the circumstances in which their father or mother retains the status of a migrant worker in the host Member State. Article 12 of Regulation No 1612/68 also applies to children of former migrant workers.

According to previous case-law, this provision only requires that the child lives with his parents or one of them in a Member State if at least one of his parents has resided there as a migrant worker. Such an interpretation of art. 12 of Regulation No 1612/68 was not challenged by the entry into force of Directive 2004/38 / EC. The Court stressed the fact that, unlike Article 10 and 11, art. 12 of Regulation No 1612/68 has not been repealed or even amended by Directive 2004/38. The EU legislature did not therefore intend to introduce a restriction on the scope of application of art. 12, the use of which has been extensively interpreted in the case-law of the Court of Justice. Another interpretation of the directive would lead to a situation in which art. 12 of Regulation 1612/68 would be a dead provision. Article 24 paragraph 1 of Directive 2004/38 / EC provides that all EU citizens residing on the territory of a host Member State are treated on an equal footing with nationals of that State to the extent established in the TEC, including access to education. The Court also referred to the recitals of Directive 2004/38 / EC, according to which its purpose is, in particular, to simplify and strengthen the right to free movement and residence of all Union citizens. However, the dependence of the application of Article 12 of Regulation No 1612/68, on the basis of the requirements imposed by Directive 2004/38 / EC, would result in a restriction of the right to education after the entry into force of this directive. This is unacceptable. In this context, the Court has ruled that a national of a Member State who has been employed in the territory of another Member State where his child is still in education may rely, in the main proceedings (as the parent who actually seeks to protect that child) of the right of residence in that State on the basis of Article 12 of Regulation No 1612/68. There is no need to meet the conditions set out in Article 7 of Directive 2004/38 / EC.

4. The reguirement of holding economic independence or financial solidarity of Member States in terms of children's education?

The condition of economic independence, according to Advocate General Kokott, does not result either from the wording of art. 12 of Regulation No. 1612/68, which cannot be interpreted narrowly or from previous case-law. The EU legislature assumed that family members of a migrant worker living with him in the host Member State, as a rule, have sufficient resources. This is due to the fact that they are either self-employed in this country or are being paid by the employee. The lack of the requirement of economic independence in Regulation No 1612/68 is a significant difference between this regulation and later Directive 2004/38 / EC. In the directive, the freedom of movement and the right of residence of Union citizens who do not carry out a professional activity is subject to the explicit reservation of having sufficient resources and full health insurance. Kokott noted that such a wide interpretation of art. 12 of Regulation No 1612/68 may result in the fact that persons such as M. Teixeira and her daughter, who are not themselves economically independent, will benefit from social assistance in the host Member State. However, in normal circumstances, this cannot result in any unreasonable burden on national budgets and social assistance systems. As part of current or past gainful employment as a migrant worker, the father or mother of a child who has been studying has already contributed to the financing of the public budget and the social welfare system. Then they were paying taxes and social security contributions.

In addition, there is a certain level of financial solidarity between the host Member State and the citizens of other Member States in the free movement of persons, including persons who do not work during a certain period of time. While the Member States clearly retain the right to prevent abuse, the fact of abuse must be objectively checked on the basis of an overall assessment of all the circumstances of the individual case. The claim of abuse cannot therefore be derived from the fact of invoking the rights conferred by Article 12 of Regulation No 1612/68. In the Teixeira case no abuse was found because the mother had been in the United Kingdom continuously for 18 years, and her daughter was born there and had all her education. Therefore, their situation has been characterized by a relatively high level of integration in the environment of the host Member State, which was the justification for financial solidarity.

It is worth mentioning here that Philippe Van Parijs[9] defined solidarity in the European context as a concept that finds its place between charitable activity and an insurance policy. In theory, the charitable activity is not motivated by any particular economic interest. Financial support results from a deep understanding of the situation of the individual in need or the desire to improve their image. However, it does not bring any direct financial benefits. The insurance policy is the exact calculation of the risk of incurring a given damage. It is also not its purpose to support others who have bought policies in the same insurance company. Solidarity in the European Union is neither one nor the other, but, according to van Parijs, it is situated between these forms. The closest it is to collective insurance schemes, such as unemployment, where there is no relationship between expenditures and payments. Payment is made to the joint cash register on the assumption that it is possible that we will never obtain funds from it. However, it is known that the one who loses his job and gets money would finance an allowance for others who would find themselves in a similar situation.

In the mentioned Baumbast case, the Court adopted an interpretation according to which it is not required to have sufficient means of subsistence, which was confirmed by Directive

[9] van Parijs, P., *Basic Income And the Left – A European Debate*, Social Europe Edition, 2018, p. 12.

2004/38 / EC itself. Article 12 paragraph 3 of the Directive provides that the departure of an EU citizen from the host Member State or his death shall not result in the loss of his or her right to stay by his children or the parent who effectively take care of them. Nationality is not relevant in this case if the children reside in the host Member State and are enrolled in an educational institution. The Court's answer to the question referred in this case was therefore that the right of residence of a parent actually caring for a child in the host Member State is not dependent on sufficient financial resources. If the child benefits from the right to receive education in accordance with art. 12 of Regulation No. 1612/68, it does not have to be fully covered by health insurance in that country like in other cases. In addition, the scope of application of art. 12 of Regulation No 1612/68 is not limited to cases in which the parent of the child during education had the status of a migrant worker at the time of admission. It gives the child and his guardians the right to stay in order to continue education whenever the child has lived in the host Member State since the parent's right of residence as a migrant worker. Even sporadic work makes sufficient criteria for the application of EU law. This allows the child to continue learning in the host Member State and, as a consequence, forms the basis of the right of residence for his or her actual guardian.

In the case of Ibrahim, in which the cause of the dispute was refusal to grant a housing allowance to a non-working woman with four children, Advocate General Mazák said that children have a right of residence resulting directly from Article. 12 of Regulation 1612/68 to ensure the practical effectiveness of the right to education in the host Member State[10]. The precondition for the creation of this right is the settlement of the children of the employee or former employee at the time when he used the right of residence of the migrant worker. Therefore, Directive 2004/38 / EC is not the sole basis for the right of residence of Union citizens and their family members in the territory of the Member States. No repeal of art. 12 of Regulation 1612/68 indicated that the EU legislator clearly wanted to maintain the right of access to education and its continuation in the case of children of employees as well as former employees. If the children of a Union citizen - a former migrant worker - were effectively prevented from continuing education in the host Member State due to the lack of attendance at school for a certain period of time, this could dissuade the citizen from using the right established in art. 45 TFEU freedom of movement. It would therefore be an obstacle to the effective exercise of this freedom. The mother - being the main guardian of children - is (regardless of her nationality) entitled to stay with the children in order to facilitate the use of their right to education. Economic independence is not justified by EU legislation or the Court's case law. In the judgment in Echternach and Moritz[11], the Court decided that on the basis of 12 of Regulation 1612/68, the child must be able to benefit from scholarships to enable him to integrate into the society of the host country. Thus, a fortiori, this requirement also exists for students who have arrived in the host country before they reach school age. Therefore, for the rights arising from art. 12 of Regulation No 1612/68, it is irrelevant that a parent who was a Union citizen ceased to be a migrant worker and then left that country. It is also irrelevant that children and their main guardian benefit from social assistance from the host Member State. Finally, the length of children's education in the general education system

[10] Opinion of J. Mazák in C -310/08, London Borough of Harrow v. Nimco Hassan Ibrahim and Secretary of State for the Home Department, EU:C:2009:641, points 22–24, 30 –44, 49.

[11] Cases 389/87 and 390/87, G.B.C. Echternach and A. Moritz v. Minister van Onderwijs en Wetenschappen, EU:C:1989:130.

of the host Member State is also irrelevant. By analogy with the Teixeira judgment, the Court of Justice ruled that the children of a national of a Member State who works or worked in the host Member State and the parent who exercises effective care can rely on the right of residence in that State only on the basis of Article 12 of Regulation No 1612/68. This right is not dependent on their having sufficient means of subsistence and full health insurance in that country. It is also interesting that the Court referred in both judgments to the right of residence of children of migrant workers seeking to take up or continue education in a Member State, although Article 10 of Regulation No. 492/2011 only refers to children already enrolled in an education institution. It seems doubtful, however, that the Court will, therefore, extend the scope of this article to children who have not yet reached school age. It was rather the result of the thesis that children do not have to start education while their parent was an employee. The only condition is that they settle in the host country during this period.

5. The possibility of acquiring permanent residence permit as a result of living during education of children in the host country for a period of 5 years

The Court of Justice did not address the issue the possibility of acquiring the right of permanent residence by the child during education and a parent taking care of the child. There are doubts whether in the case of a right of residence based on art. 10 Regulation No. 492/2011, and not Directive 2004/38 / EC, they can get a permanent residence permit after 5 years of residence in the host country. This status allows to continue temporarily unlimited stay in the host country without having to meet conditions regarding activity economic or having sufficient resources and full health insurance. A person with permanent residence rights can be expelled only for serious reasons of public order and public safety. Before making a decision on that, the host country takes into account the length a person's stay in its territory, its age, state of health, family and economic situation, as well as the current level social and cultural integration and its bond with the country origin. In addition, when the expulsion decision applies an EU citizen who resided in the host country for the previous 10 years or if he is a child, this decision must be justified by overriding security reasons defined by the Member State. If the period of stay based on art. 10 of Regulation No. 492/2011 count to the required 5-year period, it would mean lifelong right of residence for a large group of people - without meeting condition of economic independence and full access to social benefits. Children's education usually takes many years, so most of the learners and their parents will meet the requirement of a 5-year stay. On the other hand children are those whose education takes usually the most of their previous lives what makes the reason to keep them in the host country after that[12].

6. Children of self-employed people

The questions referred for a preliminary ruling on the possibility of extending the theses from the decisions of Teixeira and Ibrahim to children of persons conducting business activity have been sent to the Court of Justice by the courts of the United Kingdom. In the combined cases of Czop and Punakova[13], the basis was the refusal to grant a social allowance to mothers of

[12] Starup, P., Elsmore, M.J., *Taking a logical or giant step forward? Comment on Ibrahim and Teixeira*, „European Law Review" 2010/35, s. 571–588; C. O'Brien, *Case C-310/08…*, p. 221–222.

[13] Case 147/11, Secretary of State for Work and Pensions v Łucja Czop and Margita Punakova, ECLI:EU:C:2012:538.

children, the oldest of which in both cases started education in the host country in the system of general education during the period when the mother pursues business activities on its own account. The refusal to grant the supplement was justified by the national court for the recognition of both mothers as "foreign". The Tribunal, on the basis of facts, deduced that it is not appropriate to recognize both mothers as unauthorized to receive a social allowance for the aforementioned reason. However, this judgment did not equal the rights of children of hired workers with the rights of children of self-employed persons. In those cases, the Court held that Article 12 of Regulation No 1612/68 gives the right to reside in the territory of the receiving State to the person who effectively looks after the child during education. However, the child must be a child of a migrant worker or former migrant worker. On the other hand, this article does not confer such a right on a person who has actual custody of a child who is self-employed.

In the Punakova case, the right of residence of the mother of a child running a self-employed activity at the time when her oldest child took up education was derived from the fact that the father of the child was at that time employed as an employed person. In the case of the Chop is refused to recognize the right of residence to the mother, who ran a business at the time when her eldest child took up education. However, it was considered that she had the right to stay on the basis of art. 16 sec. 1 of Directive 2004/38. According to the Court, a citizen of the Union who is a national of a Member State which has recently acceded to the Union may, on the basis of that provision, rely on the right of permanent residence. The condition is to reside in the host Member State for a continuous period of five years, part of which took place before the accession of that first State to the Union. This residence must also be consistent with the conditions provided in art. 7 paragraph 1 of Directive 2004/38. Therefore, the children's mothers were not denied the right to social benefits based on the right of residence enjoyed by Union citizens. However, the position of a parent of children during education who is or was an employee migrating to the situation of a parent - an employee running a self-employed business – is not equal. There is no valid reason why the employees' children would be guaranteed a wide range of education-related rights, and children of self-employed persons would be deprived of this. As Advocate General Geelhoed rightly observed in the Baumbast opinion when making decisions, whether to take up employment abroad, the confidence in the education of children plays an important role. Difficulties affecting the stay of family members may stop from taking up economic activity in another Member State. The right of residence of children during education is independent of the status of a migrant worker by his or her parent and independent of the fulfillment of the economic independence criteria. Children have the right to care for their parents or other adults, which results in the derived right of residence of their guardians, also independent of the requirement of financial self-sufficiency. It also means the possibility of using social assistance from the host country, which is not limited to the level of unreasonable burden on the finances of that country. The use of these rights may take many years (by the child to complete his or her education and the guardian at least until the child reaches the age of majority), and after 5 years, it is possible to obtain a permanent residence permit or at least long-term resident status. Obtaining such a status secures the interests of the child and his guardian in the host country even for the rest of his life. Such a wide range of rights puts children of migrant workers in a privileged position. The Tribunal did not state in the case of Czop and Punakova that art. 49 TFEU guaranteed the same rights for children of self-employed persons. Although, according to the Kokott's reasoning in the Teixeira case, self-employed persons also paid social security contributions and applicable

taxes. Is the lack of privilege for children who are not children of migrant workers justified? It is not. In particular, taking into account the fact that (in the light of Ibrahim's ruling) the so-called protective period does not apply, there is no requirement to work for some time before the rights from art. 10 of the Regulation. It's enough to do it for only a few months.

Conclusions:

1. The right of residence of children during education doesn't depend on keeping the status of worker by the parent. It is enough that the parent worked in this country in the past and for a very short time so that there was a connection with the EU law which was based on the migrant worker's status.
2. This right doesn't depend on economic independence neither. When the parent moved to work in the host country, being employed, was able to make for a living and maintain the family.
3. Children have the right to education and also the right to be cared of by their parents or other relatives. It gives the right of residence to the adult which is also independent of the requirement of financial self-sufficiency. On top of everything, a child during education must be able to execute this right.
4. It also means a social assistance to be provided by the host country which is not limited by the criteria of unreasonable burden on the social assistance system of that country. The use of these rights may take many years (by the child to complete the education and by the adult until the child reaches the age of majority). What is more, after 5 years of legal residence it is possible to obtain a permanent residence permit or at least long-term resident status.
5. In addition, there is a certain level of financial solidarity between the host Member State and the citizens of other Member States in the free movement of persons, including persons who do not work during a certain period of time. While the Member States clearly retain the right to prevent abuse, the fact of abuse must be objectively checked on the basis of an overall assessment of all the circumstances of the individual case.
6. Children of self-employed persons are not in the same position as those being descendants of workers. Self-employed persons have been paying social security contributions and other applicable taxes during their economic activity. Thus they earned for their social assistance when needed. However their children during education are not privileged as much as children of EU workers who are protected from the first day of their worker's status.

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