



EUROPEAN COMMISSION

Employment, Social Affairs and Equal Opportunities DG

Social Protection and Integration

Coordination of Social Security Schemes, Free Movement of Workers

Brussels, 23.12.09 [REDACTED]

Dear [REDACTED]

Further to your emails of 13 November and the reminder of 18 December 2009 I can inform you as follows.

EU law leaves it to Member States to determine the details of their social security schemes and social assistance schemes, including the conditions on awarding benefits. However, when making use of this competence Member States have to comply with the fundamental principles of EU law, such as the right to equal treatment on the basis of nationality.

Having examined the 'Right to Reside Test' for the homelessness assistance and income support, also on the basis of further information provided by the UK government, I think it is not compatible with different legal provisions of EU law, depending on the benefit.

Where the benefits are social security benefits that are covered by Regulation 1408/71 on the coordination of social security schemes – such as income support - the Right to Reside Test is in my view contrary to its Article 3 when it is the reason that a person who is covered by this Regulation - non-active EU national and EU-8 former worker alike - is ineligible for the benefit (Article 3 prohibits the application of national conditions for the award of social security benefits which are directly or indirectly discriminatory on the basis of nationality). I had already received numerous complaints of non-active EU nationals and of EU-8 former workers on this matter and I will therefore propose to the Commission to address a formal letter to the UK. If agreed, it means that the additional matter you raised – your ineligibility for income support as of having ceased employment – will be addressed to the UK in the framework of a different procedure (2009/4535).

Where the benefits concerned are not social security benefits covered by Regulation 1408/71, such as the homelessness assistance, and are not granted to EU-8 nationals who stopped working for not having a right to reside, an important element to consider is the fact that EU-8 workers do not yet enjoy the right under EU law to work freely in the UK. Rather, in accordance with the transitional arrangements of the Accession Treaty, they must comply with national law on labour market access. According to these transitional arrangements Member States may also derogate, to the extent necessary for the application of national law on labour market access, from EU law on the right to reside.

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In the UK, the Worker Registration Scheme (WRS) regulates access to the labour market (by requiring registration of work within one month so as to work for an authorised employer) and provides that EU-8 workers who worked for an authorised employer and who are in a situation of Article 7(3) of Directive 2004/38 (e.g. who cease to work because they are temporarily incapable of work as a result of illness or accident, or who are involuntarily unemployed and registered with the employment offices) do not retain the status of worker as foreseen by Article 7(3) and consequently do not have a right to reside as a worker, as long as they need registration. It is this derogation from Article 7(3) of Directive 2004/38 that results in such EU-8 former workers not having a right to reside as a worker, and consequently not being eligible for those benefits like homelessness assistance that include a Right to Reside Test.

This derogation from Article 7(3) of Directive 2004/38 is in my view not covered by the transitional arrangement in the Accession Treaty (paragraph 9) as it is not necessary for the application of the WRS and I will therefore also propose to the Commission to send a formal letter to the United Kingdom on this aspect, albeit in a separate procedure from the one mentioned earlier.

I will of course keep you informed about further developments in both procedures.

However, I must again recall that the aim of a formal procedure against a Member State is to ensure compliance with, and correct application of, EU law by that Member State in general. It does not aim at helping resolve the situation of an individual, including your problems regarding homelessness assistance or income support. It does also not imply that I consider that you are entitled to these benefits because even if the Right to Reside Test and/or the WRS were abolished and/or amended to comply with EU law, the final decision on benefits can only be taken by the national authorities on the basis of national law and the specific facts of your situation.

Finally, your further complaint against the refusal of a Community Care Grant is not linked to the condition of having a right to reside but it seemed to have been refused simply because you did not fulfil the conditions for its granting under national law. The lawfulness of this refusal does therefore not raise any questions of compatibility with EU law because it is Member States that are solely competent to determine the conditions for benefits. You would therefore have to ask a national court to examine whether the refusal to grant you this benefit complies with national law.

Yours sincerely,