Free Movement and Social Security in an Integration Perspective

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1 Introduction

Achieving social security for migrant workers is a necessity in order to create a common market. The free movement of persons along with social security for these persons are, in other words, connected with each other. The Swedish legislation has faced different problems concerning integration, first after signing the EES Agreement, and then as a member of the EU. Since some of these problems were quite obvious, they were solved immediately, whereas other, more unclear problems, are still not recognized by the legislator.

Below, I shall discuss three such problems. The first concerns the question of whether the Swedish Foreign legislation really is in accordance with EU legislation on matters concerning the free movement of persons. The other two integration problems concern the social security field. Are the restrictions in the exportability of Swedish social benefits which have been declared by Sweden in the Official Journal in agreement with the intention of continuous encouragement and promotion of the free movement? Finally, does a migrant person possess a legal right to medical benefits despite the fact that a non-migrant person residing in Sweden does not have that legal right? If that is the case, does it violate the prohibition against discriminating treatment?

2 Limitations in the Free Movement of Persons

2.1 General Facts

The free movement of persons and the the right to establishment are discussed in arts 48,[1] 51, 52,[2] 55, 56 and 57 in the Rome Treaty. The free movement

[1] Social Europe 1/89, The scope of Art 48(4) of the EEC Treaty and the means of action by the Commission of the European Communities on the basis of the jurisprudence of the Court of Justice, p 102 ff. See the cases 44/72 Pieter Marsman v M. Rosskamp (ECR/1972/1243), 167/73 Commission of the European Communities v. French Republic (ECR/1974/359),

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implies that there must be no discrimination because of nationality concerning matters of occupation, payment and other working conditions.[3] This is stated in art 48. Art 52 regulates the right to be employer or establish a business in another member country.[4] Art 51 in the Rome Treaty is of central importance for the EU legislation on the social security field.

Not only the gainfully occupied part of the population is able to benefit from the free movement of persons.[5] The number of categories of persons covered by the regulations on the free movement of persons have now been increased. Certain so called economically inactive persons (and their family members) have the same possibilities to free migration within the EU. However, it is explicitely stated that these persons must not be a burden to their host countries' welfare systems. They shall be able to support themselves eg through pensions, student allowances or fortunes. It is also required that they have a full sickness insurance valid in the host country.

According to the Council's directive 64/221/EEC, the member states might only deviate from the regulations on the free movement of persons in certain situations. This occurs when consideration has to be taken to public order, public security or public health. The directive is valid for all decisions made by the member states, such as entry to a state, the issuing or renewal of residence permits or expulsion from a state. Such regards may not be called upon in order to serve economic purposes (art 2). According to art 3 in the directive, measures taken with respect to public order or public security must be based only on the behaviour of the affected person. Previous sentences for criminal actions shall not in themselves be reasons for calling upon such measures. From art 4 in the directive, it follows that only such diseases that are listed in an appendix to the directive can serve as a reason for denying a person entry to a country or not

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13/76 Gaetano Dona v. Mario Mantero (ECR/1976/1333), 238/83 Caisse d´allocations familiales de la région parisienne v. Mr and Mrs Richard Meade (ECR/1984/2631) and 300/90 Commission of the European Communities v. Kingdom of Belgium (ECR/1992/I-305).

2 See 79/85 D.H.M. Segers v. Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswesen, Groothandel en Vrije Beroepen (ECR/1986/2375), 143/87 Christopher Stanton and S.A. Belge d´Assurances "l´Étoile 1905" v. INASTI (Institut National d´Assurances Sociales pour Travailleurs Indépendants) (ECR/1988/3877) and 154 and 155/87 INASTI (Institut National d´Assurances Sociales pour Travailleurs Indépendants) v. Heinrich Wolf and NV Microtherm Europe, Willifried Dorchain and PVBA Almare (ECR/1988/3897).

3 See Social Europe 3/90, The labour market (The European Labour Market, Monitoring Employment, The Action Programmes, Structural Interventions of a Financial Nature); A. Chapman, *Serious deterioration of the employment situation in Social Europe* 2/93, p 14 ff.

4 Social Europe Suppl. 4/92, The regulation of working conditions in the Member States of the European Community, Vol. 1 and Suppl. 5/93, Vol. 2; G. de Froy, *L´envoi de personnel à l´étranger: la sécurité sociale du travailleur belge à l´étranger* in Revue belge de sécurité sociale, 1991, Brussels, p. 277-311; R. Draperie, *Les retraités dans la CEE in Questions de sécurité sociale*, 1991, 42(3), Paris, p. 102-103.

5 See H.-D. Steinmeyer, *Grundfragen des Europäischen Sozialrechts, Arbeit und Arbeitsrechts* 7/1992, p. 210 ff. Compare J. de Wind, *European Social Fund assistance for the integration of migrant workers*, Social Europe 2/91, p. 108 ff.

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issue a temporary residence permit. Examples of such conditions are drug abuse, severe mental disorders or severe infectious diseases.[6]

The basic regulation on empoyed persons' right to move between member states can be found in the Rome Treaty as well as in the Regulation 1612/68.

An EU citizen who is employed in an EU country other than his own, usually gets a residence permit[7] for at least five years. The same is true for his family members. According to the Directive 68/360/EEC, the permit is thereafter to be prolonged without further ado for at least twelve months. The residence permit must not be withdrawn in case the empolyee gets sick or unintentionally loses his employment. However, the duration of a prolonged residence permit can be reduced if the unemployment has lasted for over a year.

The Swedish regulations on residence permits seem so far to be in accordance with EU legislation. As discussed above, the free movement within the EU for an employee or a private entrepreneur and his/her family members is practically without conditions, whereas this is not the case for economically inactive persons such as students and pensioners. From these persons, it is demanded that they have a health insurance valid in the country in question as well as means to support themselves. The latter is not demanded from employees, private entrepreneurs and their family members. These matters are regulated in the Foreigner's Regulation, §§ 5a and 5b.

The coordination rules on social security in the Regulation 1408/71 concern employees, private entrepreneurs and their family members because it is the free movement of these personal categories that one has wanted to protect in order to achieve a common market. The only limitations that exist are the regards to public order, public security and public health.

In the Regulation 1612/68 can also be found a basic rule on the equality of treatment in matters of social advantages.[8] In art 7, it is stated that an employee, who is a citizen of an EU country, shall be able to benefit from the same social advantages in another member state as can the the citizens of the latter country. The expression "social advantages" has been given a very wide implication in the practise of the Court. It covers all advantages, regardless of whether they are connected with an employment or not, that is, regardless of whether they are given to employees in the country due to these persons' status as employees, or if they are given due to the fact that these persons are residents of the country in

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6 SOU 1993:117 p. 101; see further R. Nielsen - E. Szyszczak, *The Social Dimension of the European Community*, Handelshojskolens forlag, Copenhagen, 2. ed., 1993, p. 84 ff.

7 See below about residence permits from a Swedish perspective.

8 See 63/76 Vito Inzirillo v. Caisse d´Allocations Familiales de l´Arrondissement de Lyon (ECR/1976/2057); 93/75 J. Adlerblum v. Caisse nationale d´assurance vieillesse des travailleurs salariés, Paris (ECR/1975/2147); 70/80 Tamara Vigier v. Bundesversicherungsanstalt für Angestellte (ECR/1981/229); 261/83 Castelli v. Office National des Pensions pour Travailleurs Salariés (ECR/1984/3199); 249/83 Vera Hoeckx v. Openbaar Centrum voor Maatschappelijk Welzijn, Kalmthout (ECR/1985/973) and 122/84 Kenneth Scrivner and Carole Cole v. Centre Public d´Aide Sociale de Chastre (ECR/1985/1027). Compare also 207/78 Ministère public v. Gilbert Even and Office National des Pensions pour Travailleurs Salariés (ONPTS) (ECR/1979/2019) and 256/86 Maria Frascogna v. Caisse des dépôts et consignations (ECR/1987/3431).

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question. In a Swedish perspective, the expression “social advantages” not only comprises social security benefits, but also benefits for geriatric care, handicap care, child care and other kinds of social benefits[9] such as social aid. The same is true for the legislation in several other EU countries.[10]

2.2 The Integration Problem

There is a passage in the Swedish Foreigner’s Regulation about the withdrawal of residence permits in certain cases. It is stated that a residence permit might be withdrawn if the foreigner, ie the EU citizen, is not able to support himself during his stay in the country. In the regulation, it is stated that this reason for withdrawal is valid beyond the rules in the Foreigner’s Act 2 chapt, §§ 9-11 about criminal activities, suspected criminality and illegal intelligence operations.

Why has the want of means for your own support been added as a reason for the withdrawal of residence permits for EU citizens? Is it because one has feared that the free movement should otherwise be a burden for eg the Swedish social welfare system? My opinion is that this regulation disagrees with the EU legal system.

I have the same opinion of the rules about dismissal in chapt 4 § 2 in the Foreigner’s Act. In this regulation, the material grounds for expulsion are discussed. These rules admit, as long as the prerequisites are fulfilled, that a foreigner is expelled within three months from his arrival in Sweden. A foreigner holding a visa or residence permit cannot be expelled. A foreigner can be expelled according to this law if there is reason to suspect that he lacks sufficient fundings either for his own support in Sweden or another Nordic country, or for his journey home.

In chapt 28 in the Danish Foreigner’s Act, there is a similar regulation, to which, however, an exception now has been added. This reads as follows: “A foreigner who does not have a residence permit, or a citizen of a Nordic country who is not a permanent resident of this country, can be expelled on his arrival in Denmark if he does not have sufficient means for his own support here or for his journey home. A foreigner who is covered by EU regulations, however, cannot be expelled on these grounds.” In the comments to the Danish Foreigner’s Act, the following is said about the exception mentioned above: “The exception concerning EU citizens has been added because the old formulation of the law was criticized by the Commission, who claimed that the demand for a documentation of sufficient fundings is in violence with art 2, 2:nd section of the EU Directive 64/221, according to which the regards to public order, public

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9 Here, I speak primarily of benefits described in the Social Services Act (1980:620) and in the Disabled Persons Support and Service Act.

10 For a broader discussion, see P. Baldwin, *Beveridge in the Longue Durée*, plenary paper at the conference 50 years after Beveridge. European Institute of Social Security, 1992; S. Lonsdale, *The Growth of Disability Benefits: An International Comparison*, paper at the conference 50 years after Beveridge. European Institute of Social Security, 1992.

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security or public health which can constitute reasons for dismissing this kind of foreign citizens, not can be called upon due to financial circumstances.

The regulation on expulsion in chapt 4, § 2, 1st sect, is entirely based upon a presumption of the foreigner's financial state. As suggested in the comments to the Danish Foreigner's Act, regards to public order, public security and public health cannot be founded upon financial circumstances. The free movement of persons within the EU can thus not be restricted with support from this regulation.

Let us return to the Foreigner's Regulation § 5c. In the preparatory work (SOU 1993:120, app 5), it is written that the possibility of withdrawing residence permits for EU citizens shall be used restrictively. Only in cases when the person himself can be held responsible for his want of financial means, eg if he has left his employment, the regulation shall be used. However, I consider that the regulation violates the fundamental EU principle of free movement for employers, private entrepreneurs and their family members.

3 Restrictions in the Exportability of Benefits

3.1 Generally About the Exportability Principle

The so called exportability principle is regulated in art 10.1 in Regulation 1408/71. The principle is based on art 51 b in the Rome Treaty, and it stipulates that regulations on residence cannot be called upon as a condition for receiving cash benefits for disablement or old age, survivor's pension, reimbursement for work injuries or work diseases or death benefits as long as the right to these benefits has been earned according to the legislation in one or several member states. Benefits which are given as a non-recurring amount, such as when a surviving spouse, who was entitled to survivor's pension, remarries, are also comprised in the exportability principle. Thus, these cash benefits cannot be reduced, changed, withdrawn or confiscated due to the fact that the recipient resides in a member state other than the one which has the responsibility for the payment of the benefit. Art 10 shall be interpreted thus: The fact that a person resides in a member state other than the state which gives out the benefits shall neither be a hinder of earning the right to the benefits nor to keep this right.[11]

Generally speaking, art 10 stipulates that one must disregard all conditions in national legislation about demands for residency in the country in order for benefits to be given or earned. The regulation also implies that national rules about a minimum period of residency or staying in a country before a benefit will be given, does not apply to persons covered by the Regulation.

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[11] See 379, 380, 381/85 and 93/86 Caisse régionale d´assurance maladie Rhône-Alpes v. Anna Giletti (ECR/1987/955); see also Ph. Watson, *Minimum Income Benefits*, European Law Review 1988, p. 419 ff.

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3.2 The Delimitation Between the Regulations 1408/71 and 1612/68

The exportability of social benefits is a very important factor for promoting the free movement of persons. It is also something that costs money for the host country even after the point of time when an employee and his family have left the country. Therefore, there is a clear tendency among the member states to look upon the social benefits as non-exportable. There are several ways to do this.

Firstly, one has to make a decision on whether a social benefit is covered by the Regulation 1408/71 or not. If this is not the case, the social benefit is instead covered by the Regulation 1612/68. The member states have to produce declarations on the fields of application of the Regulation 1408/71 in the form of public notifications in the Official Journal. However, the member states' declarations on the application of the Regulation 1408/71 are not complete. In 35/77 Elisabeth Beerens v Rijksdienst voor Arbeidsvoorziening (ECR/1977/2249), one can see that, if a public notification concerning a certain benefit has been made in the Official Journal, this is proof of the benefit being a social insurance benefit according to national legislation. This, in turn, is then of crucial importance for the decision of whether the benefit in question falls under the application field of the Regulation 1408/71. However, if a notification has not been made, the circumstances are *not* the opposite. A trial can prove that the benefit falls under the Regulation 1408/71, but the opposite may, of course, also occur. This is made clear in the verdicts 70/80 Tamara Vigier v Bundesversicherungsanstalt für Angestellte (ECR/1981/229) and 356/89 Roger Stanton Newton v Chief Adjucation Officer (ECR/1991/I-3017).

If the benefit is considered to fall under the regulation 1408/71, the question of which kind of benefit it is, arises. The different fields are described in art 4, and in art 10, it is stated that exportability will come in question for some of these. One must also decide whether the benefit in question is a cash benefit or a benefit in kind. Exportability will come in question only for cash benefits.

3.3 The Integration Problem

A rather important question is thus if a Swedish social benefit shall be classified as a benefit in kind or a cash benefit and, in the case of the latter, if it is a cash benefit paid for the reason of sickness, motherhood or disability. Since there, according to art 4 in the Regulation 1408/71, exists no benefits in kind for disability, it may lead to that what has been regarded as a situation of disability in Sweden, will be considered as a sickness benefit in kind since it would be stranger still to regard it as a cash benefit. As an example can be mentioned the Swedish car allowance to handicapped persons. How should that be classified? The first question that has to be answered is whether the benefit falls under the field of social security or of social aid. The car allowance is counted as a social security benefit for two reasons, namely that the beneficiary has a legally defined position, and that the benefit, to a great extent, can be paid regardless of the circumstances in the individual case. If one looks upon the car allowance as a social security benefit, the natural thing to do from a Swedish perspective,

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would be to classify it as a disability benefit, and thus a cash benefit. The car allowance is paid in cash, but the purpose with it is to make it possible for a handicapped person to buy a vehicle to fit his own needs. The recipient of the allowance is bound in law to repay the allowance in case he disposes of the vehicle within a certain time. The allowance is thus bound to costs related to the vehicle, and cannot be used for daily consumtion. The British benefit mobility allowance was considered as a cash benefit in the case 356/89 Roger Stanton Newton v Chief Adjucation Officer (ECR/1991/I-3017), but since it was paid continuously and was not connected to a certain purpose such as the Swedish car allowance, one has in Sweden not seen it as a contradiction to classify the Swedish car allowance as a sickness benefit in kind. One can, however, hesitate about this argument.

The help from the handicap aids centre and the supply of aids for handicapped persons at their place of work are other examples of what is counted as sickness benefits in kind. The same is true for medical and employment rehabilitation and rehabilitation allowance in the form of a special benefit. The mentioned benefits are even considered to be sickness benefits in kind of great importance, and are thus covered by arts 24 and 30 as follows from the decision by the Administrative Commission 115/82. This is also true for the car allowance. The Disabled Persons Support and Service Act, however, falls outside the Regulation 1408/71 analogous with how it, in the national legislation, is not assigned to the medical health care system but to the social services. The benefits described in the mentioned Act fall instead under the rules in the Regulation 1612/68. Nevertheless, when it comes to assistance allowance to disabled persons, it is considered to fall under the scope of the Regulation 1408/71 as a sickness benefit in kind, in spite of the fact that there are good reasons to look upon that kind of allowance as a cash benefit and then as a disability benefit.

In my opinion, the benefits should have been listed in the Swedish declarations according to art 5 in the Regulation 1408/71, in the way that would be the most favourable to the migrant person. The possibility that the EU Court disregards the Swedish declarations should be obvious.

4 A Legal Right to Sickness Benefits in Kind for Migrant Employees

4.1 Permission to Medical Care in Another State

The Regulation 1408/71 contains, as mentioned above, rules about sickness benefits in kind. These benefits are part of a large group of benefits paid for sickness and maternity (sect III chapt 1 arts 18-36). Art 22 concerns both benefits in kind and cash benefits. A description of the different kinds of benefits in kind can be found here. Benefits in kind are paid in three different situations, namely for emergency treatment (art 22.1a), for transfer during medical care (art 22.1b) and for special need of medical care in another member country (art 22.1c). I choose to focus on the last of these three situations to give an answer to the question about integration between Swedish national legislation and EU legislation that was put in the Introduction. In this situation,

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an insured person (employee or self-employed), who fulfills the requirements for benefits in the competent state, and who goes to another member state to there receive the medical care which his health condition demands with permit from the competent institution, has the right to medical benefits.

Thus, there are rules on permissions given by the competent institution. If the kind of medical care in question is a benefit which is given in the member state where a sick person is settled, and the person is not likely to receive that medical treatment within the space of time that is reasonable for his state of health, he must not be refused the permit to go abroad.

In case of the treatment not being offered as a benefit in the state of residency, a permit does not have to be given. On the other hand, if the treatment is contained among the benefits given by the state, but is for some reason not available at the time point in question, a permit can only be refused if the treatment can be offered later, and the period of waiting, regarding the person's state of health and the probable course of the disease, is normal for the country in question. When deciding on what is a normal period of waiting, one has to consider whether treatment can be offered immediately in another country in cases when the individual has a very severe or life-threatening disease. Even if the period of waiting in the state of residency is not longer than normal, one should in such cases give a permit to medical care in the other member state.

As a rule, the state of residency must not refuse permission because the medical treatment in the other country is considered to be too expensive. Financial reasons are no ground for refusing a permit. This, together with the possibilities to get a legal review, give the individual's right to medical benefits the character of a legal right. The individual is entitled both to benefits which are given according to the legislation applied by the institution supplying the treatment, and to benefits given by the competent institution.

If an individual has been given a permit to go to another member state for medical treatment, there is no formal demand for the institution in the state of residency to form an agreement with the other state that the patient will be taken over for medical care. In practise, however, such agreements are usually made.

4.2 The Integration Problem

The Regulation 1408/71, as well as the regulation 574/72 (being a regulation on the application of the former), take it for granted that every member state has a national instance for the trial of the rights to certain benefits, and that obscurities of such rights shall be tried by the EC Court. But there is no such instance to try questions about the right to medical health care in Sweden. The individual has no possibilities to achieve medical treatment to which he, according to his own opinion, is entitled, through legal proceedings. On the other hand, according to the social security system an examination by a social insurance office does not result in any complications concerning the formal handling. The sequence of decisions is formalized, and the result can be retried. Questions concerning the interpretation of the right to sickness benefits in kind according to the Regulation 1408/71 can without problems be tried in court.

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This solution to the complex of problems is most interesting. A legal right to sickness benefits in kind in the sense discussed above does thus exist according to art 22. Anything else would have been impossible. It means that Swedish law would then have been forced to coordinate its legislation in order to fulfill the demands put in the Regulation 1408/71. At present, one has apparently considered Swedish legislation to be in accordance with EU legislation. This question has, however, never been thoroughly investigated but the "sickness insurance solution" has been brought forward as the technically most appropriate solution without further consideration to the practical consequences which follow.

The Swedish Medical Health Care Act is not a legislation including legal rights. A person seeking medical health care is not legally entitled to that care according to the law. The Swedish counties and municipalities have a legal duty to supply good medical health care, but the individual person does not have a corresponding right to recieve it.

If sickness benefits in kind are then considered as legal rights for migrant workers and their families, the same should be the case for non-migrant persons insured in Sweden. Otherwise, we would have a case of reversed discrimination. Reversed discrimination is indeed not a matter for EU legislation, but should be a strong incentive to re-write the national legislation. Today, a non-migrant insured person is thus not considered to have a legal right to medical health care in Sweden. As a consequence of the exhausted finances, care is primarily given to those who suffer from diseases with a high priority for treatment. A future scenario could be that the migrant EU citizen, due to his legal right to medical care, always precedes Swedes in the queues. This, in turn, would probably not result in a positive opinion of European integration among Swedish citizens. The Swedish legislator must be made aware of the situation described above and must then investigate what measures that have to be taken.

5 Conclusion

In Sweden, we have in a very conscientious way tried to adjust our national legislation to EU legislation in order to make the integration of the latter, as being a part of Swedsih regulations, as smooth as possible. The work of harmonizing and coordination was started as early as in the 1980:s in several fields, and has then continued in the first half of the 1990:s.

The examples described of what can be seen as insufficient integration might seem quite unimportant, but for a person subjected to the consequences, that is not the case. Up till now, however, none of the negative consequences described above has presented themselves to a greater extent. Nonetheless, it is important that these problems are pointed out in order to prevent difficulties in the future.

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