

FRAUD ON THE LAW REGARDING THE RIGHT TO FREE MOVEMENT AND RESIDENCE IN THE TERRITORY OF THE MEMBER STATES FOR CITIZENS OF THE UNION AND THEIR FAMILY MEMBERS REFLECTED IN THE JURISDICTION OF THE CJEU

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Abstract

In this article, the author analyzes the fraud and the abuse of the law regarding the free movement of people as reflected in the jurisprudence of the CJEU. The right to free movement of persons is an essential element of European citizenship, assuming that EU citizens can move freely between member states to live, work, study or retire in another state. The essence of the right to free movement is to eliminate discrimination between workers from different countries and to offer equal opportunities to all citizens of the European Union. Although this concept has many benefits, it also had a negative impact, as cases of fraud or abuse of rights have been reported. The author defines the notions of fraud on the law and abuse of law with regard to the free movement of persons considering the regulations of EU law and the constant jurisprudence of the CJEU. Also, the solutions pronounced by the CJEU in the case study analyzed with regard to the free movement of persons in order to establish uniform practices by the member states of the European Union are also taken into account.

Keywords: free movement of persons, European citizenship, European Union, member states, workers, family, fraud on the law, abuse of law, jurisprudence.

1. Premises. The right to free movement of persons is one of the four fundamental freedoms of the European Union (EU) and at the same time an essential element of European citizenship assuming that EU citizens can move freely between member states to live, work, study or retire in another state. The Maastricht Treaty[1] laid the foundations of what is today the European Union, namely a "special subject of international law"[2]. One of the many novelties of the Maastricht Treaty is the establishment of European citizenship for any person who has the citizenship of a member state of the European Union. Any person who holds the citizenship of one of the EU member states is automatically also a citizen of the Union. Union citizenship does not replace national citizenship, but only complements it.

Approximately 11 million citizens of the Union have already benefited from this right and currently live in another member state. Many more citizens of the Union move regularly to other member states, in the interest of business or as tourists, without controls in the Schengen area or with a quick control at the border. Article 21 paragraph (1) of the Treaty on the Functioning of the European Union stipulates that any citizen of the Union has the right to free movement and stay on the territory of the member states, subject to the limitations and conditions established in the treaties and the measures adopted for their implementation.

Although conditional on the existence of a national citizenship[3], European citizenship, currently called "Union citizenship"[4], confers a series of rights on European citizens, namely[5]: the right to free movement and residence on the territory of the member states ; the right to vote and be elected in the European Parliament, as well as in local elections in the member state where they reside, under the same conditions as nationals of this state; the right to enjoy, on the territory of a third country where the member state whose nationals are not represented, protection from the diplomatic and consular authorities of any member state, under the same conditions as the nationals of this state and; the right to address petitions to the European Parliament, to address the European Ombudsman[6], as well as the right to address

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the institutions and consultative bodies of the Union in any of the languages of the Treaties and to receive an answer in the same language.

The right to free movement, as a fundamental right granted to the citizens of the member states, is registered in the primary law of the European Union, since 1951, in the Treaty establishing the European Economic Community. The protection of the rights and interests of the citizens of the member states of the Union, as objectives of the European Community, later of the European Union, determined the drafters of the Treaty to, by establishing a European citizenship, grant natural persons, European citizens, the right to free movement, i.e. a "right primary and individual to travel and stay, freely, on the territory of the member states"[7]. According to the Treaty establishing the European Community (TCE), the recipients of this freedom were, par excellence, those who exercised a "remunerated activity" and this because, in accordance with art. 39 par. 3 lit. b) and d) of the TCE, "the right to stay and to move freely in the territory of a member state, as well as the right to stay in the territory of a member state emanates from the status of worker"[8]. The notion of "worker", in the meaning of the TCE, was initially developed by Regulation (EEC) no. 1612/1968 on the free movement of workers within the Community[9], respectively by Directive 68/360/EEC on the elimination of restrictions on the movement and stay of workers from member states and their families within the Community[10].

2. The right to free movement within the European Union. The Court of Justice of Luxembourg expressed itself in the sense that "the right of nationals of a member state to enter the territory of another member state, as well as the right of residence, for the purpose provided by the treaty - in particular for the search or exercise of a professional activity, paid or independent, or to join his/her spouse or family - constitutes a right conferred directly by the treaty or, as the case may be, by the provisions adopted for its implementation"[11]. Over time, the Court "confirmed the principle of a broad interpretation of the right to free movement, this being a corollary of the concept of European citizenship"[12]. Thus, the Court "used (...) the notion of "worker", in a broad sense, to include not only those involved in economic activity (employees/employers, self-employed workers and service providers), but also students who do a internship or the unemployed looking for a job. At the same time, the Court gave a wider and more general dimension to the notion of "free movement", by referring to the nature of the cases presented, highlighting the individual and social dimension of freedom of movement, which was no longer seen as a simple tool necessary to establish a common economic markets.

In other words, the Court moved from the notion of free movement of workers to the concept of free movement of persons"[13]. The right to free movement, along with the other rights established by art. 20 para. (2) TEU, "is exercised under the conditions and limits defined by the treaties and by the measures adopted for their implementation"[14]. Thus, one of the duties of the European Commission was and is to initiate draft legal acts to implement the principles enshrined in the Treaties. In this approach of the Commission, Directive 2004/38/EC on the right to free movement and residence on the territory of the member states for citizens of the Union and their family members[15] is included, perhaps one of the most controversial legal acts adopted at the level of the European Union .

According to art. 1, the directive establishes the conditions for exercising the right to free movement and residence on the territory of the Member States by the citizens of the Union and their family members and establishes the right of permanent residence on the territory of the Member States for the citizens of the Union and their family members. At the same time, the directive provides for the possibility of restricting the mentioned rights for reasons of public order, public safety or public health. These reasons, however, cannot be invoked for economic purposes. Measures taken for reasons of public order or public safety

must respect the principle of proportionality and be based exclusively on the conduct of the person concerned. "Previous criminal convictions cannot justify taking such measures. The conduct of the person in question must constitute a real, present and sufficiently serious threat to a fundamental interest of society. Reasons that are not directly related to the case or that are related to considerations of general prevention cannot be accepted"[16]. Regarding measures based on public health grounds, art. 29 para. (1) of the directive specifies that "the only diseases that justify measures to restrict free movement are diseases with epidemic potential, as defined by the relevant documents of the World Health Organization, as well as other contagious infectious or parasitic diseases, if they are subject to protective provisions applicable to nationals of the host Member State".

The restriction of the rights to free movement and residence of persons is based exclusively on the stated reasons, however, member states may adopt the necessary measures to refuse, cancel or withdraw any right conferred by the directive, in case of fraud on the law or abuse of law, such as marriages of convenience. In other words, in order to protect themselves against abuses of law or fraud and, in particular, against marriages of convenience or other forms of union contracted solely for the purpose of benefiting from freedom of movement and residence, Member States have the possibility to adopt the necessary measures" [17].

3. The notions of "fraud on the law" and "abuse of law" have not been defined by the Union legislator, which is why the European Commission, in its Communication entitled Guidelines for a better transposition and application of Directive 2004/38/EC on the right on free movement and residence on the territory of the member states for Union citizens and their family members[18], came with some clarifications based on the jurisprudence of the Court of Justice of the European Union. Thus, considering the jurisprudence of the Court of Luxembourg, the Commission considers that, for the purposes of the directive, "fraud can be defined as deception or the invention of a subterfuge, with intention, in order to obtain the right to free movement and residence in accordance with the directive. In the context of the directive, fraud is likely to be limited to the falsification of documents or the false presentation of a material fact regarding the conditions provided for the right of residence. Persons who have been issued with a residence document only as a result of the fraudulent conduct in connection with which they have been convicted may have their rights refused, canceled or withdrawn in accordance with the directive"[19].

The definition takes into account the Emsland-Stärke case[20], in which the Court stated: "the finding of a practice as abusive requires, on the one hand, a set of objective circumstances"[21] and, "on the other hand, imposes a subjective element that consists in the desire to obtain an advantage resulting from the community rules by artificially creating the conditions necessary to obtain it"[22]. This point of view is joined by the one specified in the decision pronounced in the Centros case, in which the Court emphasized that "national courts can take into account (...), from case to case and based on objective elements, the abusive behavior or fraudulently of the persons in question, in order to deny them, as the case may be, the benefit of the invoked provisions of Community law, these courts must also take into account, for the evaluation of such behavior, the objectives pursued by the Community provisions in question"[23]. Fraud can consist, for example, in the falsification of identity or residence documents, respectively the presentation of false material elements that prove that the necessary conditions for obtaining the right of residence are met [24].

Regarding the abuse of rights, according to the Commission, it can be defined as "an artificial behavior, adopted strictly in order to obtain the right to free movement and residence, in accordance with European Union law which, despite compliance with the conditions provided for by the Union rules, does not correspond to the purpose of these

norms"[25]. The definition takes as its starting point the Kol case, in which the Court held that "a worker (...) does not fulfill the condition of having held a regular job in the host Member State (...) when he exercised the activity on the basis of a residence permits that were issued to him through fraudulent behavior"[26]. Later, the Court specified that "a national (...) who, intending to carry out a salaried or self-employed activity in a member state, defeats the relevant controls of the national authorities, falsely declaring that he is going to this state for tourist purposes it is outside the scope of protection"[27] of European Union law.

The rules on the free movement of workers refer only to the performance of actual and real activities. The reasons of a worker from a Member State seeking a job in another Member State do not take into account his right of entry and residence, if he carries out or wishes to carry out an actual and real activity [28]. Nationals of a Member State can invoke the right of entry and residence only if they have already exercised their freedom of movement to carry out an economic activity in another Member State [29]. Free movement of workers is a fundamental freedom of all EU citizens. Any EU national who meets the conditions – for a period of time, provides services to another person or business, is subordinate to another person, receives remuneration for these services – is a worker and is therefore entitled to a range of freedoms and rights of the EU [30]. The typical example of the abuse of law is marriages of convenience.

4. Marriages of convenience – means of facilitating the entry and illegal stay in the European Union of citizens of third countries. The problem of marriages of convenience did not appear with the mention made by the European Union legislator in the content of Directive 2004/38. In 1997, the Council adopted a Resolution on the measures to be adopted to combat marriages of convenience[31], thus drawing attention to the risks that such marriages entail, in terms of the right to free movement within the European Union. In the sense of the Resolution, marriage of convenience is "the marriage of a national of a member state or a national of a third country, who benefits from the right of residence in one of the member states, with a national of a third country, for the sole purpose of to avoid the rules on the entry and stay of third-country nationals and to obtain, for the third-country national, a residence permit or a residence permit in a Member State"[32].

The resolution establishes, in point 2, the factors that must be taken into account when the existence of a marriage of convenience is presumed, among which we mention the following: the spouses have never met before marriage; the spouses are inconsistent with regard to their personal data, the circumstances in which they met or other important personal information concerning them; the spouses do not speak a language understood by both; proof of an amount of money or gifts offered to conclude the marriage (except for money or dowry gifts in cultures where this custom is practiced); in the past of one or both spouses there is evidence of previous marriages of convenience or other forms of abuse of rights or fraud in order to acquire the right of residence, etc. In the event that one of these factors leads to the idea of the existence of a sham, the Member State concerned will not issue the residence permit or residence permit until it has verified that it is not a marriage of convenience and that all the requirements for entry and stay are fulfilled[33].

If the Member State in question determines that it is a marriage of convenience, the penalty is that the residence permit or residence permit will be withdrawn, revoked or not renewed[34]. The sanction provided by the Council Resolution can also be found in Directive 2003/86 on the right to family reunification[35]. According to art. 16 para. (2) of the directive, "member states may reject an application for entry and residence for the purpose of family reunification or may withdraw the residence permit of a family member or may refuse to renew it, if it is found that: have been used false or untrue information or false or falsified documents or that fraud or other illegal means have been used; the partnership, marriage or

adoption was carried out solely to enable the person concerned to enter or reside in a Member State'. In these situations, the directive considers that we are in the presence of a marriage, a partnership or an adoption of convenience, cases in which "member states can carry out specific controls (...). Also, specific controls can be carried out when renewing the residence permit of family members"[36]. Marriages of convenience can concern marriages of third-country nationals with: other categories of third-country nationals living in the EU, EU nationals who have exercised their right to free movement or their own nationals.

Directive 2004/38 provides, both in the preamble[37] and in the normative text[38], that in order to protect against abuses of law or fraud and, in particular, against marriages of convenience or other forms of union contracted exclusively for the purpose of benefiting from freedom of movement and residence, member states have the opportunity to adopt the necessary measures. Within the meaning of the directive, marriage of convenience is defined as a form of union entered into exclusively for the purpose of benefiting from the freedom of movement and residence under the directive, rights which the persons concerned could not otherwise benefit from. With regard to this definition, the European Commission notes that "a marriage cannot be considered of convenience only if through it one benefits from an advantage related to immigration or even any other advantage. The quality of the relationship is irrelevant regarding the application of art. 35 of the directive"[39]. It is also the Commission that expands, by analogy, the definition of marriages of convenience to "other forms of union concluded only for the purpose of benefiting from the right to free movement and residence, such as (registered) partnerships of convenience, fictitious adoption or the situation in which a citizen of a member state of the European Union declares that he is the father of a child from a third country in order for him and his mother to benefit from citizenship and right of residence, knowing that he is not the child's father and not wanting to assume parental responsibility"[40].

However, determining whether a marriage is of convenience is not an easy matter, given that it can be confused with genuine marriages (eg arranged, representative or consular marriages) or non-genuine ones (eg marriages of convenience, deception, forced or false[41]. The Court ruled that a marital relationship cannot be considered dissolved, as long as it has not been dissolved by the competent authority. If the persons live separately, the marriage is not dissolved, even if the spouses intend to divorce at a later date. Consequently, in order to benefit from a right of residence as a family member pursuant to Regulation no. 1612/68, it was not necessary for him to live permanently with the worker [42]. The term "family members" in Article 41 of the EC-Morocco Cooperation Agreement includes persons who have a close family relationship with the worker. This applies to relatives in the ascending line, including those related to the worker by marriage. However, these persons must actually live with the worker [43].

An interpretation of a legal term based on social developments in the member states must take into account the situation in the whole Union, not just in one state. The right to be accompanied by an unmarried partner is a social advantage and is governed by the principle of non-discrimination. It follows that a Member State cannot grant an advantage to its own nationals but deny it to other EU workers on the basis of their nationality [44]. The additional condition of previous legal residence in the EU which restricts the free movement of family members of third-country nationals of EU migrants is incompatible with the text and purpose of Directive 2004/38/EC and the objective of the internal market. The Court ruled that it is irrelevant whether a marriage was concluded before or after the Union citizen migrated to the host Member State, where the marriage was concluded, and whether the third-country national entered the host Member State before or after the marriage [45].

5. Actions by the European Commission to support member states in the fight against fraud and abuse of law. In its Communication of 25 November 2013 on the free movement of EU citizens and their families[46], the Commission announced that it will support Member States' authorities to implement EU legislation enabling them to fight against potential abuses of the right to free circulation by developing a manual on dealing with marriages of convenience. The manual, which accompanies the Commission's 2014 Communication on supporting authorities in combating the abuse of the right to free movement[47], supports national authorities to effectively manage individual cases of abuse in the form of marriages of convenience, without however, it compromises the fundamental objective of guaranteeing and facilitating the free movement of EU citizens and their family members who use the provisions of EU legislation in good faith[48].

Thus, in Case C-409/20, *Subdelegación del Gobierno en Pontevedra* (Fine in case of illegal stay) - Directive 2008/115/EC on the common standards and procedures applicable in the Member States for the return of third-country nationals in a situation of illegal stay, in particular Article 6(1) and Article 8(1) thereof in conjunction with Article 6(4) and Article 7(1) and (2) of this directive, the CJEU decided that it must be interpreted in the sense that it does not oppose a regulation of a member state which sanctions the illegal stay of a national of a third country in the territory of this member state, in the absence of aggravating circumstances, in the first instance, with a fine accompanied by the obligation to leave the territory of that member state within the stipulated period, unless, before the expiry of this period, the said national's stay is regularized, and, in the second phase, if the stay respects of the national is not regularized, by a decision ordering his mandatory removal, provided that the mentioned term is established in accordance with the provisions of Article 7 paragraphs (1) and (2) of the directive.

The manual clearly explains that it provides national authorities with operational guidance, supporting them to detect and investigate alleged cases of abuse in the form of marriages of convenience. The guidance and information included in the handbook should ensure that the practices of national competent authorities are based on the same factual and legal elements within the Union and that they contribute to compliance with EU law[49]. Marriages of convenience are typical examples of abuse, information from Member States on this type of marriage shows that this phenomenon exists, but its extent varies significantly from one Member State to another. EU legislation contains a series of guarantees designed to support member states in combating cases of abuse. However, as regards the way in which these guarantees are used, the responsibility rests with the Member States, the Commission, as the "guardian" of the European Union legislation, supports the efforts of the States in this regard.

Citizens of one Member State can rely on European citizenship for protection against discrimination on grounds of nationality by another Member State. A residence permit can have declarative and evidentiary force only with regard to the recognition of the right of residence. The possession of a permit cannot be a requirement for the right to a benefit, if it is not necessary for one's own nationals to produce some similar document. This would be unequal treatment [50]. The principle of free movement of workers which prohibits discrimination on grounds of nationality applies not only to Member States, but also to private enterprises. It may be legitimate to require a job applicant to have a certain level of language knowledge, and holding a degree may be a criterion for assessing that knowledge. However, the requirement to provide evidence of one's language knowledge exclusively by means of a specific diploma, issued in a specific province of a Member State, constitutes discrimination on grounds of nationality [51].

6. Conclusions. Through its policy, the European Union aims to create a European area of freedom, security and justice in which there is no longer a need to control people at internal borders, regardless of nationality. At the same time, there is an extensive process of implementing common standards regarding the control at the Union's external borders and visa, asylum and immigration policies. The essence of free movement consists in the elimination of discrimination between the citizens of the member state on the territory of which they are located or carry out their activity and the citizens of the other member states who live or work on the territory of this state. These discriminations can refer to conditions of entry, travel, work, employment or remuneration. By ensuring such a non-discriminatory regime, the free movement of people within the European Union is achieved.

In addition to legislation and doctrine, an important role in establishing the current legal framework of the free movement of persons was played by the jurisprudence of the Court of Justice of the European Union, which through the adopted decisions determined each time the specification of the rights regarding equality and non-discrimination and which established the principle of the supremacy of Union law as a fundamental principle [52]. Related to this principle, it was also shown in the doctrine that the system of laws created by international law is complementary to the national laws of individual states and in no case antagonistic to them, as it is based on the same principles and pursues the same goal in defending the rule of law. The judgments issued by the Court are binding only for the referring courts, not for the parties, and the solutions are not for resolving the dispute but for interpreting the rules of Union law applicable to the dispute [53]. This fact led the legal doctrine to declare that the Court's decisions are not decisions and the relationship with the national European courts of referral remains one of horizontal and not of vertical subordination. The jurisdictional activity of the Court of Justice of the European Union interferes with that of the European Court of Human Rights in terms of the defense and respect of the fundamental human rights guaranteed by the European Convention in the sense that the two courts cooperate, analyze both within their jurisdictions and national law.

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[50]. Judgment of the Court of 12 May 1998 in case C-85/96 Maria Martínez Sala v Freistaat Bayern.

[51]. Judgment of the Court of 6 June 2000 in case C-281/98 Roman Angonese v Cassa di Risparmio di Bolzano SpA.

[52]. "From the jurisprudence of the Court of Justice it emerges that the supremacy of community law is a fundamental principle of community law. According to the Court, this principle is inherent in the specific nature of the European Community. On the date of the first decision within this established jurisprudence (the decision of July 15, 1964, in the case 6/64, Costa/ENEL [1]), supremacy was not mentioned in the treaty. The situation has not changed even today. The fact that the principle of supremacy will not be included in the future treaty will in no way change the existence of the principle and the existing jurisprudence of Courts of Justice".

[53]. Marise Cremona, Anne Thies, *The European Court of Justice and External Relations Law*, Hart Publishing, Oxford 2014, p. 224; Corneliu Bîrsan, *Convenția Europeană a Drepturilor Omului, Comentariu pe articole, Vol. I. Drepturi și libertăți*, Editura All Beck, București, 2005.