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The Right to Education for European Union- Migrants

- A Study of the Right to Education in the Host State for Children Who Exercise
Their Freedom of Movement for a Maximum of Three Months

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Summary

The right to primary education has been subject to regulation in both international human rights law and EU law. However, the right to education in the host state for EU migrants who lawfully exercise their freedom of movement, for a maximum of three months, is unclear. The aim of this study is to investigate whether such a right exists in this particular circumstance.

EU legislation explicitly provides a right to education for children of workers but for other categories, such as self-employed people, job seekers or persons who do not fit into any of these categories, there does not exist any explicit right to education. The study investigates two openings that EU law provides to enjoy a right to education; through the parent's status as a worker or through the equal treatment provision. If it is not possible for a person to fulfil the criteria for being a worker the possibility of finding a right to education enshrined in the equal treatment provision in the EU Citizenship Directive has to be investigated. This study concludes that education is not part of social assistance, which is the only possibility to derogate from equal treatment during the first three months of residence in the host state. The equal treatment could therefore *possibly* include a right to education regardless of length of stay in the host state.

Due to the uncertainty of an explicit right to education in EU law for all persons regardless of economic status, international human rights law is examined in order to see how it regulates the right. International human rights law do provide for the right to education and even though international treaties are signed by states and only in some case by the EU, EU legislation should be interpreted in the light of EU's Charter on Fundamental Rights (CFR) which in its turn should be interpreted in the light of the European Convention on Human Rights (ECHR). The European Court of Human Rights, along with other international bodies, has established that the right to education is of such fundamental character that derogations are almost impossible.

In light of the outlined the right to education is contextualised for a particular group of Roma EU-migrants who are coming to Sweden and are begging, collecting cans or selling street papers in order to survive and to be able to send money to their families. The question of whether this particular group can be considered workers is investigated. It turns out that it is problematic to consider begging fulfilling the requirements for work settled in EU law. Hence, children to parents in this group of persons, along with all other EU-migrant children who do not have working parents, are left without any explicit right to education in EU-law.

This study concludes, after an overall assessment of the relevant frameworks that coexist, that a right to education for children who exercise their freedom of movement for a maximum of three months does exist in the host state. This is due to the reference in the CFR to the ECHR taken together with the strong position the right to education has been given in international human rights law and EU's reliance upon international frameworks.

Sammanfattning

Rätten till grundskola har blivit föremål för reglering i internationella instrument rörande mänskliga rättigheter såväl som i EU-lagstiftning. För de EU-migranter som lagligt utnyttjar sin rätt till fri rörlighet i maximalt tre månader är existensen av rätten till utbildning i den mottagande medlemsstaten dock oklart och syftet med den här studien är att undersöka huruvida en sådan rätt finns i den här specifika situationen.

EU-rätten medger uttryckligen en rätt till utbildning till barn vars föräldrar är arbetare, men för andra kategorier såsom egenföretagare, jobbsökande eller personer som inte passar in i någon av de nämnda kategorierna, så finns det ingen uttrycklig rätt till utbildning. Studien undersöker de två möjligheter som ges inom EU-lagstiftningen för en rätt till utbildning; genom förälderns status som arbetare eller genom principen om likabehandling. Om det inte är möjligt för en person att uppfylla kriterierna för att anses vara en arbetare så får rätten till utbildning sökas genom ett studera principen om likabehandling i rörlighetsdirektivet. Den här studien drar slutsatsen att utbildning inte är en del av socialt bistånd, vilket är den enda möjligheten att inskränka principen om likabehandling under de tre första månaderna i den mottagande medlemsstaten. Principen om likabehandling kan därför *möjligen* inkludera en rätt till utbildning oavsett längden på vistelsen i den mottagande staten.

På grund av osäkerheten huruvida en uttrycklig rätt till utbildning finns, oavsett ekonomisk status, i EU-rätten så undersöks internationella instrument rörande mänskliga rättigheter i syfte att se hur rätten till utbildning är reglerad där. De internationella instrumenten rörande mänskliga rättigheter ger uttryck för en rätt till utbildning och även om internationella instrument är ratificerade av stater och inte av EU, så ska EU-rätten tolkas i ljuset av EUs stadga om de grundläggande rättigheterna som i sin tur ska tolkas i ljuset av Europeiska konventionen om skydd för de mänskliga rättigheterna (EKMR). Europadomstolen har, liksom flera kommentarer till de internationella instrumenten, klargjort att rätten till utbildning är av en sådan fundamental karaktär att den i princip är omöjlig att inskränka.

I ljuset av det som framförts så kontextualiseras rätten till utbildning genom att se på ett konkret exempel av en särskild grupp EU-migranter av romskt ursprung som kommer till Sverige och tvingas tigga för att överleva och skicka pengar till sina familjer. Frågan huruvida den här särskilda gruppen kan anses vara arbetare undersöks. Det visar sig problematiskt att anse att tiggeri uppfyller kraven för arbete enligt EU-rätten. Därför är barn till föräldrar i den här särskilda gruppen, tillsammans med alla andra EU-migrerande barn som inte har arbetande föräldrar, lämnade utan någon uttrycklig rätt till utbildning enligt EU-rätten.

Den här studien drar slutsatsen, efter en helhetsbedömning av de relevanta ramverk som samexisterar, att en rätt till utbildning för barn som utnyttjar sin rätt till fri rörlighet i maximalt tre månader existerar i den mottagande medlemsstaten. Detta på grund av referensen i EUs stadga om de grundläggande friheterna till EKMR, sammantaget med den starka position som rätten till utbildning har getts i internationella instrument rörande mänskliga rättigheter och EUs tillit till dessa.

Preface

I want to express my gratitude to a couple of persons who have been a valuable support throughout the writing of this thesis and throughout the years at Lund University.

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Hedvig Areskoug, Malmö-Stockholm, May 2015

Abbreviations

CFR	Charter of Fundamental Rights
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ESC	European Social Charter
EU	European Union
FRA	European Union Agency for Fundamental Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
Skolverket	The Swedish National Agency for Education
TCN	Third Country National
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration on Human Rights
UN	United Nations

1 Introduction

Starting from a right for workers¹, the right to free movement within the European Union (EU) has successively expanded its personal scope to include all citizens within the European Union, regardless of income and financial possibilities. However, the free movement has been set under certain conditions when the stay in another EU member state exceeds three months or when there are justifiable restrictions based on public policy, public security or public health, to not permit entry and stay.² The person needs to show that he or she either is engaged in an economic activity, studies, has enough financial resources to stay in the country or that he or she is a family member taken together with that he or she has health insurance.³ When persons exercise their right to freedom of movement and stay in the host country for a maximum of three months, certain limitations follow in regard to beneficiaries from the social assistance system. The host state does not have to provide financial aid in order to cover the living expenses of an EU-migrant, during the first three months; that would amount to an unreasonable burden on the social assistance system.^{4, 5}

It is in relation to which rights these EU-migrants, who exercise their freedom for a maximum of three months, are entitled to in the host state, the question arises which is the basis for this study. Is the host state responsible to provide education to those children who accompany their parents to another member state? The question has been given a lot of attention in Sweden during the last year due to a rise in EU-migrants with Roma⁶ backgrounds that have come to Sweden and have found themselves in situations where they have to beg for money in order to survive.⁷ These changing patterns in Sweden, and in other EU states, with an increase of Roma migrants, staying for a maximum of three months, but sometimes returning quickly for a new three months-period, have exposed the EU free movement law for a new situation, where temporary migrants are left with uncertainty about their legal rights. The Swedish National Agency for Education (Skolverket) has, in relation to the question whether those

¹ Boeles, P. (ed.), *European migration law*, Intersentia, Antwerp, 2009, p. 7-8, 52-53.

² See article 7 and 27 in Directive 2004/38/EC, EUT L 158, 30.4.2004, entered into force 2004.

³ See article 7 Directive 2004/38/EC Right of Union Citizens and their Family Members to move and reside freely within the territory of the Member States, OJ L 158 of 30.4.2004.

⁴ Boeles, P. (red.), *op.cit.*, p. 7-8, 52-53.

⁵ Rectial 10 and articles 6-7, 24 Directive 2004/38/EC.

⁶ For the purpose of this study the Council of Europe definition of the term "Roma" is used: *The term "Roma" used at the Council of Europe refers to Roma, Sinti, Kale and related groups in Europe, including Travellers and the Eastern groups (Dom and Lom), and covers the wide diversity of the groups concerned, including persons who identify themselves as Gypsies*, Council of Europe, *Council of Europe Descriptive Glossary of terms Relating to Roma Issues*, (2012), p. 4.

⁷ See for instance: TT/Göteborgs Posten, *EU-migranter kommunernas ansvar*, 26 October 2014 <http://www.gp.se/nyheter/sverige/1.2528973--eu-migranter-kommuners-ansvar>-Accessed:2015-05-11.

children who accompany their parents for a maximum of three months are entitled to education, expressed that there is no legal basis in national or EU law that points in either direction whether these children are entitled to education in the host state or not, and this fact constitutes a problem.^{8, 9}

In light of the new migration patterns that have been seen in EU over the last year this thesis will provide an overview of the legal frameworks that regulate the right to free movement and the right to education for EU-migrants residing in the host state for a maximum of three months each time. In order to do so both EU legislation and international conventions will be engaged with. To be able to grasp the problem and the actual implications and questions that arise, the right to education for this particular group of EU-migrants will be examined through the lenses of Roma EU-migrants in Sweden.

The choice of the topic is based on its currency in media and reality. When the EU decides to have a more open approach to border and immigration control, the mobility increases. With this development in the society also follows questions of the actual functionality of the EU system in relation to fundamental human rights obligations. Hopefully, this thesis will bring some clarity to how these legal frameworks are interpreted and how they function in actual situations when the right to education is invoked in an EU context.

1.1 Research Question and Purpose

The research question has been formulated as:

Do children, who are citizens of one EU member state, have a right to education in a host member state when they exercise their freedom of movement within the European Union for a maximum of three months?

In order to answer this question certain sub-questions are to be answered:

- *How are work, self-employment and job-seeking defined under EU law and what requirements have to be fulfilled to qualify to a certain group?*
- *Does the equal treatment provision in EU law establish a right to education regardless of the length of stay in the host state?*
- *Is there an absolute right to education regardless of citizenship and length of stay in the host state?*

The choice of research question is based on the explicit uncertainty in regard to this particular situation that has been raised by the Swedish National

⁸ Kurkiala Medbo, Tova, Sveriges Radio, Svårt med skola för barn till EU-migranter, 21st October 2014. <http://sverigesradio.se/sida/artikel.aspx?programid=114&artikel=5996267>. Accessed: 2015-05-11.

⁹ See supplement 2 for email communication between Skolverket and the author.

Agency for Education in Sweden. The need for the question to be further explored is evident and it is also important since the uncertainty affects a lot of people who are exercising their freedom of movement under these circumstances. To not know what rights one's children are entitled to during a stay in another EU member state is severe and it causes impediments to the freedom of movement which is considered to be a right for all EU citizens. There is a need to explore this legal uncertainty in order to be able to clarify the legal entitlements for this group of EU-migrants. The problem deals with the question if equal treatment and human rights are entitlements secured to all EU child citizens, regardless of the temporary stay and the parents' economic activity.

Although the focus of this thesis is on the right to education for children, certain terms relating to work, as well as the concept of work itself, will be analysed. This is necessary in order to be able to define under which circumstances the right to education is entitled to children whose parents are workers. The right to education is somewhat interconnected with the parents' economic status as will be shown later in the study.

1.2 Methodology and Material

In this thesis a traditional legal methodology will be used in order to identify the relevant material for the analysis that will be given in the conclusive part of this study. The base of a traditional legal method, i.e. a legal dogmatic method is, to analyse a legal problem through the study of different sources of law in accordance with the hierarchy of norms.¹⁰ A legal dogmatic analysis consists of an interpretation of how the studied legal rule should be interpreted in a given situation.¹¹ It is important to determine what the legal problem actually is and what legal questions that arise from that specific situation.¹² Another aspect that forms a part of the legal dogmatic method is the possibility to go beyond a mere representation of the legal position of the problem and extend the study to a critical analysis. It is through the critical analysis, the legal doctrine, of a legal problem in a certain situation that the law develops and certain interpretations become valid.¹³ Lastly, when one applies a legal dogmatic methodology it is important to differentiate between an argumentation that is *de lege lata*, a description of how the legal position is, and an argumentation *de lege ferenda*, how the law ought to be.¹⁴ This thesis will primarily use an argumentation *de lege lata*.

The reason to use a traditional legal method in this study is that the research question needs to be sub-divided to be able to identify the legal frameworks

¹⁰ Kleineman, Jan in Korling, Fredric & Zamboni, Mauro (red.), Juridisk metodlära, 1. ed., Studentlitteratur, Lund, 2013, p. 21.

¹¹ Ibid, p. 26.

¹² Ibid, p. 30.

¹³ Ibid, p. 35.

¹⁴ Ibid, p. 36.

that co-exist. In order to understand the legal implications of the frameworks that relate to the legal issue at hand one has to study the relevant sources. Since the research question addresses a particular situation when the right to education is questioned this method is useful since it clarifies the different legal systems that regulate the research question. Moreover, it is a useful method when there exists a legal uncertainty, as is the case in this study, since it enables a critical analysis of the concern and also provides two grounds upon which the right to education can be established.

Since a major part of this thesis engages in EU law and jurisprudence stemming from the European Court of Justice (ECJ), the methodology that the ECJ uses is of relevance for how the facts and reasoning in this thesis are presented. A lot has been written in academic articles and books about the interpretation by the ECJ and it is relevant to grasp the methodology of the ECJ in order to further analyse the research question presented in this thesis. The rules of interpretation of the ECJ are not clearly manifested in any document and hence the method of legal reasoning in the ECJ does not constitute any specific European theory of legal reasoning.¹⁵ However, there is to some extent coherence in the interpretation of rules that the ECJ follows, even though they are not explicitly laid down in any document. The rules of interpretation are confirmed by the legal doctrine that has described them, and in turn the legal doctrine becomes a form of reference due to its influence and value amongst the practitioners.¹⁶

The ECJ has in the *Cilfit case*¹⁷ tried to distinguish which criteria that national courts should apply when they are assessing whether they need to make a reference to CJEU for a preliminary ruling. Bengoetxea, MacCormick and Moral Soriano¹⁸ have further elaborated and classified the criteria in three different groups: Linguistic (semiotic) criteria, systemic (contextual) criteria and dynamic criteria. In short the first criteria, the linguistic one, means that the literal wording is the one that should determine the interpretation. If the wording is clear, then there is no possibility to interpret something beyond the literal wording.^{19, 20} The ordinary meaning of a word can differ and in the context of the EU, where several official languages are applicable, this can cause problem. The ECJ has solved it by using the interpretation that is most in conformity with all versions except one.²¹

¹⁵ Bengoetxea, Joxerramon, MacCormick, Neil and Moral Soriano, Leonor, *Intergration and Integrity in the Legal Reasoning of the European Court of Justice*, in De Búrca, Gráinne & Weiler, Joseph (eds.), *The European Court of Justice*, Oxford University Press, Oxford, 2001, p. 48.

¹⁶ Itzcovich, Giulio, *The Interpretation of Community Law by the European Court of Justice*, German Law Journal, Vol.10, No.5, 2009, p. 540.

¹⁷ C-281/83 *Cilfit v. Ministry of Health*, 1982 .

¹⁸ Bengoetxea, Joxerramon, MacCormick, Neil and Moral Soriano, Leonor, *op.cit.*, p. 48.

¹⁹ Itzcovich, Giulio, *op.cit.*, p.549-550.

²⁰ Bengoetxea, Joxerramon, MacCormick, Neil and Moral Soriano, Leonor, *op.cit.*, p. 58.

²¹ Itzcovich, Giulio, *op.cit.* p.551.

The systemic criterion means that the rule should be interpreted within the system of rules that it belongs to. The Court has to look at similar principles, rules and concepts in order to determine the content of the rule. Methods commonly used for a systemic interpretation are: a fortiori, analogy, a contrario, a pari, ad absurdum.²² The last criterion, the dynamic, is the one that is mostly used by the ECJ and it is commonly considered that ECJ is a court with a teleological method of interpretation. In the dynamic criterion three sub-categories can be crystallized: functional, teleological or consequentialist interpretation. The functional interpretation has strong connections to the *effet utile* (useful effect).²³ It means that a rule or a principle should be interpreted in a way that enables its effectiveness and in a way in which it becomes most useful. The teleological approach is the way in which the object and purpose of a provision is analysed. It can be either an implicit or an explicit purpose, but the Court “*has to justify the interpretation from the perspective of its instrumental function in relation to such goals and purposes*”²⁴. The last form of interpretation is the consequentialist interpretation which aims at interpreting a rule by anticipating which consequences the rule can get. The different forms of interpretation in the dynamic criteria are often mixed and it is not always a clear-cut division between them.²⁵

The methodology used by the ECJ can be further expanded upon, but for the purpose and limits of a study like this, the given methodology will be sufficient in order to understand the ECJ’s reasoning that will be presented in this thesis as well the analysis of the research question. The legal methodology that the ECJ uses will also be of relevance when analysing the material that will be presented in the thesis and how it should be interpreted. The understanding of the methodology is crucial for how an answer on EU-related issues, such as the one at hand, is sought, identified and interpreted.

The materials that have been used in this study stems from different sources such as EU legislation and correlating doctrine, i.e. textbooks and academic articles. Furthermore, from the doctrine and academic articles available, international and regional human rights instruments are reviewed and analysed. Jurisprudence from EU, international courts, such as the European Court on Human Rights (ECtHR) are scrutinized to identify relevant legal findings. Relevant legislation from the EU on free movement for persons, workers and self-employed has been reviewed. The case law that has been focused on is the European Court of Justice’s (ECJ) decisions in relation to the concept of work and what the definition of economic activity entails. This has been done in order to crystalize relevant criteria for determining a parent’s status within EU law and, as an extension, define the child’s possibility to access education. Moreover, an examination and a comparison have been made of the international and regional conventions that regulate the right to education and the rights of the child. This has been made in

²² Bengoetxea, Joxerramon, MacCormick, Neil and Moral Soriano, Leonor, *op.cit.*, p. 58.

²³ Itzcovich, Giulio, *op.cit.*, p. 555.

²⁴ *Ibid.*, p. 555.

²⁵ *Ibid.*, p. 552-555.

order to be able to analyse the legal obligations of the states that arise in the particular situation that this study aims to investigate.

Legal doctrine, i.e. articles and textbooks, has been engaged in to get explanatory and critical views of the existing law. Furthermore, news media and reports from the FRA (European Union Agency for Fundamental Rights) have been examined to gather information about the situation in Sweden for Roma EU-migrants as well as how the situation for Roma is in Europe today. Based on the collected material and legal review, a conclusion of what the study has found will be presented and the result of the study of the research question will be analysed.

1.3 Delimitations

The thesis has been delimited due to the space and time limit that exists for a master's thesis. Firstly, this study focuses on the right to primary education and not secondary or university education. The importance of education and its impact on the individual will not be deliberated upon in this thesis. Only the mere existence of the right to education in legal frameworks regulating the particular situation at hand will be analysed. Furthermore, the study has been limited to focus only on the first three months of the period when an EU citizen exercises his or her freedom of movement. The reason for the limitation to the initial period of three months is that it is an interesting period to analyse, since there are no formal requirements that have to be fulfilled in order to enter another member state, except holding a valid passport of one of the EU member states. To study which rights and obligations that might be invoked during this specific period of time is interesting in relation to how EU law and international conventions interact. The focus is on the host states' obligations to provide education and the extra-territorial obligations that might exist for the sending state will not be further investigated. Moreover, the study does not include an analysis of the right to education for third country nationals (TCN) who accompany an EU-citizen to another member state.

The limit has also been drawn in relation to the national example given. The example of Roma EU-migrants is not the only example of persons in this particular group of EU-migrants. However, it is an illustrative example that also is based on a current debate in Europe and in Sweden. Moreover, it is important to stress in relation to Roma that the example given concerns Roma who are begging, collecting cans for recycling purposes or selling street papers. However, it is not assumed that all Roma who are exercising their freedom of movement for a maximum of three months take part in the aforementioned economic activities.

1.4 Definitions

This thesis uses the term EU-migrant. The concept of EU-migrant, and what that definition actually includes, is not settled in any EU-document or any other official document. In news media, the term is often used referring to persons who exercise their freedom of movement because of poverty in their home country or due to homelessness. For the purpose of this thesis, it is important to highlight that the term EU-migration is used for describing *all* kind of movements of EU citizens between EU member states, regardless of economic activity and purpose of the movement. Hence, the term EU-migrant is not restricted to any particular group of persons within the EU.^{26, 27}

1.5 Disposition

This thesis is divided into four main substantive parts forming equally many chapters. Chapter two focuses on EU law on free movement of persons. A historical background will introduce the concept of EU citizenship and the development of the right to free movement. It is important to know the incentives behind EU legislation in order to understand the structure of it today. An overview of the legal provisions regarding free movement will provide the reader with the relevant legislation concerning the situation. The chapter on EU free movement will conclude with two different views and an analysis on how the right to education is potentially established in EU legislation; through the explicit reference to the parent as a worker or through the equal treatment provision. Case law is used in order to gain an adequate perception of the meaning of the notions and its relevance for the right to education. The conclusion in this chapter is that workers' children are entitled to education in the host state, from the first day, whence the possibility that finding a right to education under the equal treatment provision may be established.

The third chapter engages in the right to education as a human right enshrined in international conventions and regional instruments. The purpose of this chapter is to see how the right to education is formulated in different conventions and what legal implications that follows from the different conventions. Moreover, the state responsibility and obligations of the right to education is analysed in order to trace the content and meaning of the right and which states that are responsible for ensuring the right to

²⁶ See for instance a news media article highlighting the problematic definition: Ramel, Fredrik; Szoppe, Adam, *EU-migrant ett problematiskt begrepp*, <http://sverigesradio.se/sida/artikel.aspx?programid=3993&artikel=5915740> accessed: 2015-05-11.

²⁷ See also the definition of "migrant" made by the European Commission at the EU Immigration Portal: "*A broader-term of an immigrant and emigrant that refers to a person who leaves from one country or region to settle in another, often in search of a better life*". http://ec.europa.eu/immigration/glossary_en accessed: 2015-05-11.

education in specific circumstances. The conclusion in this chapter is that the right to education is present in both EU law and international law and it is a right that has an absolute character.

The fourth chapter moves from the general analysis that has been made in the two previous chapters, applicable to all EU-migrants exercising their freedom of movement for a maximum of three months, to contextualise the problem within the setting of Roma EU-migrants in Sweden and their access to education. This will provide the reader with an illustrative example that makes the research question more concrete and it will demonstrate how the legal uncertainty comes into play in a national context. The main focus is on which economic activities, such as begging, can be classified as work within the meaning it has been given in EU law. The conclusion is that although their flexible interpretation, the conditions that have to be fulfilled in order to be considered a worker, are not clearly satisfied for beggars, but the door is not closed for an extensive interpretation.

The fifth chapter is analysing the substantive contents of the previous chapters and an answer to the main research question is deliberated upon. The analysis presents a possible way of reasoning, in accordance with the methodology applicable in this study, which generates an answer that reflects the view of the author based on the overall assessment of the legal frameworks available. Moreover, the fifth chapter contains some considerations for the future which have become evident through the writing of the thesis.

Lastly, a concluding chapter will summarize the conclusions that have been made throughout the study.

2 A Right to Education Under European Union Law

This section will provide an overview of the legal framework that regulates the situation of EU-migrants exercising their right to free movement and their access to education. The EU law will be contextualised in the specific situation of persons exercising their right to freedom of movement for a maximum of three months and the question whether their children enjoy a right to education from an EU law perspective. First, an overview of the legal framework, i.e. EU citizenship, directives and regulations, relating to freedom of movement will be presented. Secondly, the concept of work will be studied from an EU perspective and this study will try to show what kind of activities can be regarded as work. As an effect the status of the parent as a worker or not will determine the children's express right to education. Thirdly, the equal treatment provision will be analysed and if it entails a right to access to education. The equal treatment provision will also be dealt with in relation to social assistance and whether education can be regarded as falling within the concept of social assistance. The second part of this chapter is aiming at answering the question whether the right to education is established for this particular group of persons exercising their right to freedom of movement.

2.1 European Union Free Movement Law

2.1.1 Historical Background

When one studies the free movement of persons in the European Union the importance of knowing the historical development of this right in the EU is essential in order to understand the purpose and underlying aim of the right to freedom of movement. To grasp the background and purpose of the establishment of the EU, and how the powers and possibilities have extended throughout the decades, is essential in order to interpret EU law as well. Free movement is one of the fundamental features of the EU taken together with the free movement of goods, capital and services.²⁸ The right to move freely within the EU was however in reality not a freedom that all citizens within the EU were entitled to from the start of the organisation in the 1960s, unless they fulfilled certain criteria. The person had to be both a national of one of the member states and economically active as a worker in order to exercise the freedom of movement.²⁹ The definition of worker has been thoroughly deliberated on in case law and it will be further elaborated

²⁸ Preamble (2) Directive 2004/38/EC

²⁹ Barnard, Catherine, *The substantive law of the EU: the four freedoms*, 4. ed., Oxford University Press, Oxford, 2013, p. 229.

on in chapter 2.2.1. The possibility to move freely was not available to those who did not have any work in the member state they intended to travel to.³⁰

Step by step the free movement of persons expanded in the 1960s to include persons who had sufficient resources and medical insurance, regardless of work activity. Gradually the tendency within the EU has been to recognize the individual as a citizen of the union, not only as a person being part of an economic equation. When the Maastricht Treaty³¹ was adopted in 1993 the citizenship of EU was introduced³² and persons were entitled to rights and duties without any requirement to be economically active in order to exercise their right to move freely within the union. Finally, in 2004 the Directive 2004/38/EC³³ (The EU Citizenship Directive) came which brought together the scattered legislation that previously had been found in different documents. Today the common market, on which the EU once was built, is far from based on strict economic provisions for the free movement of persons, at least at a first glance. In particular the economic requirements are removed from the first three months of the stay in the host state as well as after five years of residence. In between, however, the person has to show that he or she has financial resources enough to stay and live in the country. This will be deliberated on more thoroughly below in chapter 2.1.4.³⁴

2.1.2 Division of Competence

EU has a widespread power in different areas in relation to its member states. However, the division of powers, or competence, between the union and the member states are different depending on the area concerned. It is therefore important to be aware of the division of competence in different areas in order to understand where the legislation is a EU concern, a national concern or a combination of the both. The EU competences are divided in exclusive, shared and supporting competences. Exclusive competences are regulated in article 3 Treaty of the Functioning of the European Union (TFEU) and in the areas that falls within this category, EU has the exclusive power to legislate and adopt legally binding acts. When EU and the member states have shared competence, article 4 TFEU, both parties have the power to legislate. Nonetheless, the member states have only the right to legislate in so far as EU has not already legislated in the area. Supporting competences, article 6 TFEU, implies that EU has non-legislative powers in those areas that are reserved for the member states. EU can only support,

³⁰ Barnard, Catherine, *op.cit.*, p. 229.

³¹ Also known as Treaty on the European Union, entered into force 1993, OJ C 191 of 29.7.1992.

³² Article B (Common provisions), article 8a-8d (part two) Treaty on the European Union (Maastricht), entered into force 1993, OJ C 191 of 29.7.1992.

³³ Directive 2004/38/EC Right of Union Citizens and their Family Members to move and reside freely within the territory of the Member States, OJ L 158 of 30.4.2004.

³⁴ Barnard, Catherine, *op.cit.*, p.229-231.

complement or coordinate the member states in those areas.³⁵ For the purpose of this thesis it is interesting to know in which areas of competence the freedom of movement and education are placed. Freedom of movement is an area in which EU has shared competences with the member states.³⁶ The legislation on free movement will be presented in this chapter. Educational matters belong to the supporting competences and the member states have the main responsibility to legislate.³⁷ The right to education will be further developed in chapter 3.

2.1.3 European Union Citizenship

EU citizenship is primarily regulated in the Lisbon Treaty³⁸. Article 20 (TFEU) describes the meaning of European Union citizenship and it is further developed in article 21-25 TFEU based on the list found in article 20.2 (a-d) TFEU. Article 21-23 deals with the right to free movement and residence within the EU (article 21 TFEU), the right to vote and stand in elections (article 22 TFEU) and diplomatic and consular protection (article 23 TFEU).³⁹

Union citizenship is dependent on the person having a national citizenship in one of the member states from which the Union citizenship follows automatically. Although the EU citizenship at a first glance can be seen as a product of the European Union, it is still the member states that decide their rules for a person to get a national citizenship, and these rules can differ between the member states.⁴⁰ In reality, the Union citizenship is very much dependent on the member states' own national legislations and a substantial part of the decision power remains in the member states.⁴¹

With EU citizenship also follows rights and duties laid down in the treaties. The most relevant right is the right to move and reside freely in another member state, which will be elaborated on more thoroughly in section 2.1.4. What initially has been doubtful about EU citizenship is if the provision in article 20 TFEU actually added anything new to the already existing legislation. Throughout the years the European Court of Justice (ECJ) in a number of decisions has clarified the significance of the EU citizenship. The rights for economically active citizens have been radically extended since the beginning of the European Union to include also those who move and

³⁵ Craig, Paul & De Búrca, Gráinne, *EU law: text, cases, and materials*, 5. ed., Oxford Univ. Press, Oxford, 2011, p. 78-86.

³⁶ Article 4 TFEU.

³⁷ Article 6(e) TFEU.

³⁸ The Lisbon Treaty includes The Treaty on the European Union and the Treaty (TEU) on the Functioning of the European Union (TFEU) as well as several Protocols and Declarations attached to the Treaty. The Lisbon Treaty entered into force in 2009 and it amended previous treaties (the Maastricht Treaty and the Treaty of Rome).

³⁹ Condinanzi, Massimo., Lang, Alessandra & Nascimbene, Bruno, *Citizenship of the Union and free movement of persons*, Martinus Nijhoff Publishers, Boston, 2008, p. 4-7

⁴⁰ Article 20(1) TFEU.

⁴¹ Condinanzi, Massimo., Lang, Alessandra & Nascimbene, Bruno, *op.cit.*, p.4-7.

reside not solely for working and economic purpose. The restrictions that a state may impose on this category of Union citizens have to be proportionate and their status as Union citizens must be recognized.^{42, 43} Of relevance when one is exercising one's Union citizenship is that discrimination on grounds of nationality is forbidden according to article 18 TFEU.

The notion of Union citizenship has not been left without critique. It is a diverse critique that attacks different parts of the concept and problematizes its usefulness. One of the main critiques has been that the actual benefits of a Union citizenship, compared to the possession of solely a national citizenship, is unclear and possibly non-existent, at least when it concerns particular vulnerable groups such as women and ethnic minorities.⁴⁴ One of the main critiques, which is of relevance for this study, is the fact that the Union citizenship, and thereby the lawful residence in the host country, is built on the premise that the person contributes to the economic system in the host country and not becomes an unreasonable burden to its welfare system. This way of connecting the person's usefulness for the host country to the permission to access benefits from the welfare system is far from what citizenship means within the context of a national citizenship.⁴⁵ These economic and market-based underpinnings to the Union Citizenship also indirectly lead to disadvantages for certain groups, such as women, which traditionally, and still reflected in today's society, have been more involved in work at home including taking care of children. Women are less likely to be able to enjoy the benefits of a Union citizenship based on the structures that the society still upholds.⁴⁶

⁴² See C-413/99 *Baumbast and R v Secretary of State for the Home Department* (2002) confirmed in C-200/02 *Zhu and Chen v Secretary of State for the Home Department* (2004).

⁴³ Craig, Paul & De Búrca, Gráinne, *op.cit.*, p. 823-829.

⁴⁴ Bellamy R (2008) Evaluating Union citizenship: Belonging, rights and participation within the EU. *Citizenship Studies* 12(6): 597–611; Kochenov D (2009) Ius tractum of many faces: European citizenship and the difficult relationship between status and rights. *Columbia Journal of European Law* 15(2): 169–237; Maas W (2008) Migrants, states, and EU citizenship's unfulfilled promise. *Citizenship Studies* 12(6): 583–596; cited in Askola, Heli, "Tale of Two Citizenships? Citizenship, Migration and Care in the European Union", *Social & Legal Studies* 21(3) (2012), p. 344.

⁴⁵ *Ibid.*, p. 344.

⁴⁶ Ackers L (1994) *Women, citizenship and European Community law: The gender implications of the free movement provisions*. *Journal of Social Welfare and Family Law* 16(4): 391–406. Ackers L (1996) *Citizenship, gender, and dependence in the European Union: Women and internal migration*. *Social Politics* 3(2–3): 316–330. Ackers L (1998) *Shifting Spaces: Women, Citizenship and Migration within the European Union*. Bristol: Policy Press.; Flynn L (1996) *The internal market and the European Union: Some feminist notes*. In: Bottomley A (ed.) *Feminist Perspectives on the Foundational Subjects of Law*. London: Cavendish, pp. 279–297.; Scheiwe K (1994) *EC law's unequal treatment of the family: The case law of the European Court of Justice on rules prohibiting discrimination on grounds of sex and nationality*. *Social and Legal Studies* 3(2): 243–265; cited in Askola, Heli, "Tale of Two Citizenships? Citizenship, Migration and Care in the European Union", *Social & Legal Studies* 21(3) (2012), p. 344.

The definition of work, which will be much more deliberated on in chapter 2.2.1, is also linked to the gender discussion in such way that generally unpaid work, such as taking care of children, is not considered to be “work” in EU law. Then the significance of the caretaker is recognized and the person (primarily a woman) enjoys the benefits of being a citizen of the union.⁴⁷ These norms that underpin EU law and the Union Citizenship show that it is still a market based concept and that the gender inequalities remain indirectly. This critique is of course based on feministic views and it highlights that there are values and norms that are prevailing in EU law system and these and other values possibly effect other vulnerable groups such as Roma and children. These aspects of EU Citizenship will be more thoroughly discussed in chapter 4.

Another critique that is based more on the right of the state is that the EU infringes on the state sovereignty and one of its fundamental principles to be able to control the entry and residence of aliens within its territory. By allowing freedom of movement and not laying down any certain conditions for the first three months certainly infringes on the state sovereignty in this matter. However, the economic requirement that applies after three months enables the individual state to control the migration flow to a certain extent.⁴⁸

2.1.4 Free Movement of Persons and the 2004/38/EC Directive

The relevant provisions for the free movement of persons are found in the Lisbon Treaty. Article 21 TFEU lays down the right to free movement within the union that is further enlarged on in the EU Citizenship Directive^{49 50}

The EU Citizenship Directive was adopted in order to consolidate and amend the already existing legislation on the right to free movement. The purpose was to collect the different directives that dealt with workers, self-employed, students and inactive persons in one single instrument.⁵¹

Roughly, one can say that the EU Citizenship Directive lays down the conditions under which EU citizens can exercise their right to freedom of movement within the EU. The rights of a person to freedom of movement

⁴⁷ For comparison see ECJ case law: C-85/96 Maria Martinez Sala v Freeistat Bayern (1998) and C-413/99 Baumbast and R v Secretary of State for the Home Department (2002) confirmed in C-200/02 Zhu and Chen v Secretary of State for the Home Department (2004).

⁴⁸ Askola, Heli, *Tale of Two Citizenships? Citizenship, Migration and Care in the European Union*, Social & Legal Studies 21(3) (2012), p. 343.

⁴⁹ Directive 2004/38/EC, EUT L 158, 30.4.2004, entered into force 2004.

⁵⁰ “A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.”, Article 288 TFEU.

⁵¹ Recital 3 in the preamble to 2004/38/EC.

within the EU also extend to his or her family members, i.e. children and spouses, even though the rules for the free movement distinguish between family members with a Union citizenship and third country nationals.⁵²

For the purpose of this thesis the focus will be on the initial right to residence for persons in the host member state. The relevant parts of the articles in the EU Citizenship Directive will be cited below:

Article 6

Right of residence for up to three months

1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.
2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.

Article 7

Right of residence for more than three months

1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:
 - (a) are workers or self-employed persons in the host Member State; or
 - (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or
 - (c)
 - are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and
 - have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family

⁵² Article 1 2004/38/EC. Regarding third country nationals different provisions can be found in the EU Citizenship Directive, see for example articles 5(2), 7(2) and 9.

members not to become a burden on the social assistance system of the host Member State during their period of residence; or

- (d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

When applying the EU Citizenship Directive one first has to see whether the personal, material and territorial scope of application are fulfilled in the situation concerned. In order for the personal scope to be fulfilled the individual must be a national of a member state of the EU. Furthermore, the person must fit within any of the categories: worker, self-employed, service-provider, job-seeker or tourist. The determination of a person's status is dependent on whether the person is economically active or not. In order for the material and territorial scope to be fulfilled the person has to move between two states, which normally is between the home state and to the host state.^{53 54}

Secondly, one has to distinguish between if the situation concerns a stay of less or more than three months. As stated in article 6 of the EU Citizenship Directive there are no requirements, except having a valid identity card or passport and fulfil the personal, material and territorial scope, that the EU citizen has to fulfil in order to enjoy free movement and residence in another member state the initial three months. However, after three months article 7.1 (a)-(d) comes into play and the economic requirement is activated unless he or she is a family member to someone on whom he or she can depend economically.

In relation to this study the status of children in the EU Citizenship Directive is important to clarify. Firstly, one can notice that if the child has the nationality of one of the EU member states, then he or she is regarded as a Union citizen within the meaning of article 2(1) of the EU Citizenship Directive. However, it is most likely that the child accompanies one or both of his or her parents to the host country and then the child is also covered by being a "family member" within the meaning of article 2(2)(c) EU Citizenship Directive, a status which a descendant can have up to he or she turns 21 years old. The reason to highlight the children's position is important, but it also shows that there exists a relationship of dependency between the Union citizen and the family members, in this case the children, who accompany the parent. The possession of rights and access to social benefits are dependent on the person who exercises its Union citizenship and the person's fulfilment of the requirements laid down in the EU Citizenship Directive.

Equal treatment is one of the cornerstones within the EU⁵⁵ and in the EU Citizenship Directive article 24 is reaffirming this principle:

⁵³ Article 2 Directive 2004/38/EC.

⁵⁴ Barnard, Catherine, *op.cit.*, p. 231-234.

⁵⁵ Articles 18-19 TFEU.

Article 24

Equal treatment

1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.
2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.

What can be deduced from the equal treatment article is that whilst the first paragraph sets out the general standard for equal treatment to those who exercise their freedom of movement, the second paragraph entitles states to derogate from the general equal treatment provision. This derogation allows states to “escape” from their entitlement to provide social assistance to those who stay for a maximum of three months and not are economically active as well as for those who are job seekers. This can be seen as one way of preventing what some of the critical voices against a more open EU, have called “benefit-tourism”.⁵⁶ The equal treatment and the social assistance in relation to the right to education will be deliberated more on in chapter 2.2.2.

2.1.5 Regulation no 492/2011 on Freedom of Movement for Workers within the Union

Regulation⁵⁷ no 492/2011⁵⁸ on freedom of movement for workers within the union replaces the previous Regulation 1612/68⁵⁹ regarding the same issues.

⁵⁶ Verschueren, Herwig, *Free movement or benefit tourism: the unreasonable burden of Brey*, European Journal of Migration and Law (16), 2014, p. 149.

⁵⁷ “A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States”, article 288 TFEU.

⁵⁸ Regulation 492/2011 on freedom of movement for workers within the union, OJ L 141, 27.5.2011.

⁵⁹ Regulation 1612/68 on freedom of workers within the Community Series I Volume 1968(II) p. 475 – 484.

However, due to several amendments over time there was a reason for codification that gives an overall picture of the present legislation in the area. The reason to deal with this regulation is that it concerns workers and their families, i.e. children. The Regulation 492/2011 applies simultaneously as the EU Citizenship Directive, however, there are provisions which apply only to workers and they are laid down specifically in regulation 492/2011 concerning among other things equal treatment, clearances of vacancies and applications for employment and workers' families.

What is remarkable with the Regulation 492/2011, in comparison to the EU Citizenship Directive, is that there is a provision in article 10 of Regulation 492/2011 that establishes a right to education for children who accompany a working parent to another member state.

Workers' families

Article 10

The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.

Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions.

This provision is based on the fact that non-discrimination is the prevailing norm between nationals and Union citizens of another member state. Conclusively, one can say that if the parent is considered a worker within the meaning of EU law, then the children are entitled to education in the host state without any explicit requirement of minimum time of residence in the host state. It seems as workers and their families are, due to the specific provisions in the Regulation 492/2011, entitled to more rights than those who do not perform an economic activity regarded as work.

The right to education in relation to workers has been dealt with in the *Baumbast case*⁶⁰ that also extended the scope of the right to education for migrants. This case is reflected upon not because it applies to the persons that exercise their freedom of movement for a maximum of three months, but because it reflects the general view of ECJ in relation to the right to education in the host state. The case raised four questions before the ECJ, but the one which is of relevance for the right to education was whether the children who were citizens of the EU and had installed themselves in primary education in the host state, based on the father's status as a worker, had the right to continue their education despite the fact that the father no longer worked in the host country. The question was raised in relation to regulation 1612/68 (today in Regulation 492/2011) concerning the freedom

⁶⁰ C-413/99 *Baumbast R v The Secretary of the State for the Home Department* (2002).

of movement of workers and especially in relation to article 12⁶¹ in that legislation. The ECJ found that regardless of whether the working parent ceases to work, or that only one of the parents is a citizen of the EU, or that the parents divorce in the meantime, the right to education for the children should not be affected.⁶²

Even though the regulation for migrating children can be seen as relatively exhaustive compared to other rights protected in EU law, loopholes do occur due to the classification of persons in different categories in which they can benefit from the social welfare system. The *Baumbast case* shows one of the loopholes where the ECJ deemed that article 12 in the 1612/68 Regulation (today article 10 in the Regulation 492/2011) should be interpreted broadly. If the children were refused to continue their education in the host state there would be a disruption in the integration process and it would also create obstacles to the free movement of workers if the children were refused to continue an education that had already been started.⁶³ However, the right to education in the *Baumbast case* was based on a previously lawful residence as a worker in the host country that differentiates it from cases where EU-migrants stay for a maximum of three months and do not classify as workers. Nevertheless, the case illustrates the views of the ECJ that a wide interpretation should be given and that the integration process is an important element.

The definition of worker will be deliberated more upon in chapter 2.2.1 concerning the ECJ case law on the definition of work. Moreover, the definition of worker will be returned to in the chapter 4 on the situation of Roma EU-migrants in Sweden. It is interesting in relation to the question whether begging can be seen as an economic activity generating the same rights that workers are entitled to and as an extension of that, the question arises if Roma EU-migrants' children are entitled to education if they are staying for a maximum of three months at a time in the host state.

2.1.6 European Union Law on Self-employment

The EU has made a special category for those who are not considered to be workers but who instead are self-employed persons. This category needs, within the context of EU legislation, special regulation. The question that is relevant for this study is what legal entitlements follow from the status as a self-employed person and especially whether there exists any reference to

⁶¹ Article 12 in Dir. EC/1612/68: "The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory. Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions."

⁶² C-413/99 *Baumbast R v The Secretary of the State for the Home Department* (2002) para. 39-63.

⁶³ *Ibid.* para. 46, 51-52.

the right to education for the children who accompany their parents to another member state for a limited period of time.

The right to establishment and the right to provide services are treated in separate sections in the EU legislation even though there are similarities. The central provisions are found in articles 49-55 TFEU (freedom of establishment) and articles 56-62 TFEU (freedom to provide services) which have been supplemented by secondary legislation in the form of directives.

Whilst the freedom of establishment presumes either a primary establishment (the individual leaves state A in order to set up an establishment in state B) or a secondary establishment (the person has an establishment in state A but sets up second base in state B) on a permanent basis, the freedom to provide services presumes that there is an establishment in one member state and either the provider or the recipient of the service temporarily engages in the service in another member state.⁶⁴ The temporal element is a necessity in order for the economic activity to be regarded as a service and not an establishment. The determination and content of *temporal* is however not necessarily connected to the infrastructure (or the lack of) that the service requires. The fact that the service needs for example an office is not in itself an evidence of it being an establishment.⁶⁵

Self-employed persons have similarities with posted workers, even though the two categories are differently treated in EU law.⁶⁶ Situations do occur when a self-employed person from one member state (the posting state) leaves and starts working in another member state (the state of employment). Questions arise in relation to which rules that apply in the situation and concerning the self-employed person – the posting state’s laws or the state of employment’s laws? When it concerns self-employed persons who temporarily work in another member state EU law provides special regulation due to the obstacles and confusion it would create for the persons exercising this right if they had to figure out which state’s laws that are applicable. A general rule is found in article 12(2) of Regulation 883/2004⁶⁷ which states that the posting state’s laws and regulations are applicable as long as the activity carried out is similar to the one that the person carried out in the posting state and that the stay in the state of employment does not exceed 24 months. This criterion presumes that the person already in the posting state has an establishment, otherwise the person is not qualified as a self-employed person within the meaning of the regulation. When determining whether a person can be categorized as a self-employed person two criteria are of relevance. Firstly, the person has to have pursued the

⁶⁴ Barnard, Catherine, *op.cit.*, p. 306-308, 365-366.

⁶⁵ Craig, Paul & De Búrca, Gráinne, *op.cit.*, p. 764-767, 788-790.

⁶⁶ The Posting of Workers Directive 96/71/EC and article 49 TFEU on the right of establishment for self-employed.

⁶⁷ Regulation 883/2004 on the coordination of social security systems, EUT L 314, 7.6.2004.

activity for some time (two months has been accepted) in the posting state before leaving to another member state. Secondly, the person has to fulfil the necessary requirements for pursuing an activity in the posting state and that the establishment, and the means which enables the activity to be carried out, remain in the posting state for his or her return. When assessing if a person fulfils the criteria above one can for example see whether the person pays taxes in the posting state, has an office there or maintain a VAT-number there. These are only examples of ways to check if the person can be labelled as self-employed and they are not obligatory or exhaustive ways for the determination.⁶⁸

Conclusively, if a person is self-employed the legislation of the posting state applies for a person the initial period of two years, i.e. for the purpose of this study the first three months, which means that the social security system of the posting state is the crucial one. What implications does it have on the right to education for a child who is accompanying his or her self-employed parent? The only thing that is determined is that *if* the person, i.e. the parent, is possible to classify as a temporarily self-employed, it does not change the applicable laws regarding social security issues, it remains with the posting state. However, the definition of social security is important in order to know if it applies to access to education. In regulation 883/2004 article 3 dictates which matters that are covered and education is not specifically identified. The only possible parallel to education is family benefits (article 3(1)(j) regulation 883/2004). Family benefits are moreover defined in article 1(z) Regulation 883/2004 as “*all benefits in kind or in cash intended to meet family expenses, excluding advances of maintenance payments and special childbirth and adoption allowances mentioned in Annex I.*” Education is possibly not included as a family benefit in the social security system. The question then remains – which state is responsible for a self-employed person’s child and that child’s right to education if it is not regarded as falling within the social security system?

Apparently, a linguistic method of interpretation does not provide a satisfactory answer to the question on the status for self-employed persons’ children’s right to education. As mentioned earlier the ECJ often adopts a teleological approach in its judgements, an approach that was adopted in the *Carpenter case*⁶⁹. The case concerned a TCN who married a national from the United Kingdom. The TCN, a Philippine woman, overstayed her lawful time of residence before she married the man from the United Kingdom. The man worked as a self-employed and had to travel to other member states of the EU in order to run his business. United Kingdom issued a deportation order of the woman but she appealed against the decision, stating that she had the right to stay under Community law and a deportation order would infringe on the husband’s possibility to work as a self-employed, travelling to other member states, since she was the one who

⁶⁸ European Commission, *Practical guide: The legislation that applies to workers in the European Union (EU), the European Economic Area (EEA) and in Switzerland*, 2012, p. 12-13.

⁶⁹ C-60/00 *Mary Carpenter v Secretary of State for the Home Department* (2002).

took care of the children meanwhile he was working.⁷⁰

The ECJ acknowledges the importance of enable the freedom of movement for workers, self-employed and their family members. The Court finds that a separation between the spouses would cause an infringement on the fundamental rights of the husband laid down under Community law. This freedom could not be fully effective if Mr Carpenter was hindered to move freely as a self-employed as a consequence of his wife's deportation from the UK where she otherwise took care of his children.⁷¹

What the *Carpenter case* illustrates is that workers and self-employed are seen as important contributors to the internal market, fulfilling the economic purposes constituting the fundamental values of the EU. It also shows that an extensive interpretation should be given in cases where the right of self-employed persons are at stake. This judgment is a good proof of the teleological approach and it shows a possible way of ensuring rights to self-employed persons that sometimes are more far-fetched than the right relevant for this study – the right to education. Perhaps the possibility to enjoy a right to education for children to self-employed persons can be protected with a teleological interpretation, based on previous case law in favour of self-employed persons, such as the *Carpenter case*. Such interpretation might ensure a right to education to children who have one or two parents working abroad, for example as an IT- consultant, but then there still is a large group left without protection: job-seekers, tourists or persons who due to any other reason are exercising their freedom of movement. What interpretation, if any, can give them a right to education? The next sub-sections will explore further possibilities.

2.1.7 European Union Law and the Status of Job Seekers

The EU free movement provisions include a group that are neither workers or self-employed persons, nor tourists, namely job seekers. This category within the EU law system holds an interim position between being a person exercising its right to freedom of movement and a worker doing the same. The particular position in which job seekers are also creates special regulation. The debate has been whether, and how far, job seekers should be included in article 45 TFEU, laying down the free movement principles of workers.⁷²

The answer is sought in the different EU instruments as well as the case law. Article 45 TFEU has been interpreted widely by the ECJ and there is no requirement that the person has to have a job offer before entering the host

⁷⁰ C-60/00 *Mary Carpenter v Secretary of State for the Home Department* (2002), para. 13-17.

⁷¹ *Ibid*, para. 38-39.

⁷² Craig, Paul & De Búrca, Gráinne, *op.cit*, p. 726-728.

state. That would be contrary and counterproductive to the aim of the free movement itself. Certain provisions tend to give a less restrictive treatment to job seekers, such as in recital 21 to the EU Citizenship Directive, where it is stated that the ECJ can give a more favourable treatment to job seekers than to those who are not engaged in any economic activity, or do not attempt to be involved in any work. This indicates, and has been confirmed in case law, that job seekers might stay for longer period of time than three months without any specific requirements since it is reasonable to get more than three months to search for a job. However the exact time for how long a job seeker can stay under these more favourable conditions is not yet established. In the *Antoinissen case*⁷³ the ECJ held that allowing a six-month period of job seeking seemed reasonable by a state, but if the person gives evidence that he or she is continuing seeking job after six months the state is not allowed to expel the person. The interpretation of ECJ regarding the time limit is somewhat flexible.^{74, 75}

Nevertheless, job seekers do not obtain the status of worker, and the rights stemming from the possession of that status, since they do not contribute to the economic system in the same way as a worker. Regulation 492/2011 (and its predecessor Regulation 1612/68) which specifies the rights for workers and their freedom of movement has been dealt upon by the ECJ in relation to what privileges that a job seeker can be entitled to. In *Collins*⁷⁶ the distinction was made between job seekers and workers in relation to the social advantages and equality of treatment with nationals and the ECJ held that job seekers could not take advantage of the same rights as workers. The only provision that is applicable to job seekers on the same level as workers is regarding access to employment and equal treatment to the access.⁷⁷ Even though job seekers are entitled to more benefits than those who only can stay for a maximum of three months⁷⁸ their family and children are not entitled to the same social advantages as workers' children.⁷⁹

2.2 Two Ways to Establish the Right to Education under European Union Law

The purpose of this sub-chapter is two-folded. Firstly it aims at investigating the definition of work and worker within the EU case law and what limits that have been established through the jurisprudence. The aim is to show which economic activities fall within the concept and what persons who are exercising their freedom of movement for a maximum of three months can

⁷³ C-292/89 R v Immigration Appeal Tribunal, ex p Antoinissen (1991).

⁷⁴ Craig, Paul & De Búrca, Gráinne, *op.cit.*, p. 726-728, 745-746.

⁷⁵ See reasoning in C-292/89 R v Immigration Appeal Tribunal, ex p Antoinissen (1991), in relation to the length of a justifiable job seeking period, para. 21.

⁷⁶ C-138/02 Collins v Secretary of State for Work and Pensions (2004) confirmed in C-258/04 Office National de l'emploi v Ioannidis (2005).

⁷⁷ Craig, Paul & De Búrca, Gráinne, *op.cit.*, 8, 745-746.

⁷⁸ Recital 21 to Directive 2004/38/EC.

⁷⁹ Job-seekers are not included in article 10 Regulation 492/2011.

expect to be labelled as. To be qualified as a worker is the only way that EU law expressly provides for education to the accompanying children as has been shown by the previous presentation of the existing EU legal framework.⁸⁰ Secondly, this subchapter seeks an answer to the question on if there exists a right to education for those children staying in the host state for a maximum of three months, regardless of economic activity, through the provision of equal treatment. In relation to the equal treatment discussion the concept of social assistance will be further investigated since it plays a crucial role for whether the persons who are a maximum of three months in the host state, and do not fulfil the work criteria, have access to education or not.

2.2.1 European Court of Justice and its Case Law on the Definition of Work

This section will focus on how case law from the ECJ has defined work and what restrictions it might entail and if the EU definition of work possibly can encompass other forms of economic activities that typically fall outside the definition of work. The right for workers to freely move within the Union is laid down in article 45-46 TFEU (article 49 TFEU if the person is self-employed) where it is also stated that secondary legislation (such as the EU Citizenship Directive and Regulation 492/2011) should be made in order to provide more detailed provisions concerning the freedom of movement of workers. The right to freely move between the member states for workers has existed for a long time due to the economic and market based impacts these kinds of activities have on the union. The right for workers has existed long before the right existed for every citizen of the union to move freely. Since this area is one of the most fundamental for the EU, the case law has been extensive and the concept of work and worker has slowly been more crystalized than in its initial phase. The cases that will be mentioned below are all involved in establishing borders, or non-borders, for the concept of worker.

Firstly, the ECJ has in one of its earlier cases *Hoekstra*⁸¹ expressed that national law is not to decide upon the meaning and content of the concept of worker, it is EU law which lays down the definition.⁸² It is stated that the concept of worker has to be interpreted broadly and that the concept has a specific meaning within the context of EU law.⁸³

⁸⁰ In article 10 Regulation 492/2011. See sub-section 2.1.4 for a more comprehensive overview.

⁸¹ C75/63 *Hoekstra v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* (1964) ECR 177.

⁸² *Ibid*, p. 184.

⁸³ C-138/02 *Collins v Secretary of State for Work and Pensions* (2004) para. 26.

In the *Trojani*⁸⁴ opinion from 2004 the Advocate General⁸⁵ identifies four conditions that should be satisfied in order for a person to qualify as a worker. The first three conditions are to be fulfilled cumulatively. The last criterion is relevant for the overall assessment. The conditions are:

- the activity must last for a certain period,⁸⁶
- there must be a relationship of subordination,⁸⁷
- the person carrying out the activities must be remunerated and,⁸⁸
- there must be real and genuine economic activity⁸⁹

These conditions, which have been evolved through ECJ's case law, will be deliberated upon in detail below. The first criterion was laid down in the *Levin*⁹⁰ case and *Meeusen*⁹¹ case where the court established that the activity carried out must be effective and genuine and not be marginal or ancillary in order to fulfil the criteria that it should last for a certain period.⁹² There is however no requirement of a certain time that the employment must exist to fulfil the first criteria. In order to determine whether a work is qualified as effective and genuine the national court has to conduct a comprehensive assessment of all circumstances that relate to the activity and the employment relationship and base it on objective criteria.⁹³

The second criterion can be seen as self-explanatory, however there are situations in which the relationship between the employee and the employer is not framed in what is normally considered to be an employment-relationship. A good example can be found in the *Steymann*⁹⁴ case that concerned a man with German citizenship who worked as a plumber, but moved to the Netherlands where he also initially worked as a plumber, but soon after his arrival got involved in the religious Bhagwan Community. In

⁸⁴ Opinion of the Advocate General Geelhoed in the case C-456/02 Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS) (2004).

⁸⁵ The role of the Advocate General: "It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement." Article 252 TFEU. "Where it considers that the case raises no new point of law, the Court may decide, after hearing the Advocate-General, that the case shall be determined without a submission from the Advocate General." Article 20 in Protocol (no 3) On the Statute of the Court of Justice of the European Union. The opinion of the Advocate General is not binding for the ECJ and thereby the opinion does not establish any binding perception of EU laws.

⁸⁶ Opinion of the Advocate General Geelhoed in the case C-456/02 Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS) (2004), para. 35. The three conditions are laid down in C-66/85 Lawrie-Blum (1986), paragraph 17, C-3444/87 Bettray (1989), paragraph 12, and C-337/97 Meeusen (1999), paragraph 13.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid, para. 45.

⁹⁰ C-53/81 D.M. Levin v Staatssecretaris van Justitie (1982).

⁹¹ C-337/97 C.P.M Meeusen v Hoofddirectie van de Informatie Beheer Groep.

⁹² C-53/81 D.M. Levin v Staatssecretaris van Justitie (1982), para. 17.

⁹³ Confirmed in C-456/02 Michel Trojani v Centre Public d'aide sociale de Bruxelles (CPAS) (2004) para 17.

⁹⁴ C196/87 Udo Steymann v Staatssecretaris van Justitie (1988), para. 14.

the Baghwan Community Steymann worked with the community's commercial activities. The Bhagwan community enabled its existence by running different forms of commercial activities, which included running a discotheque, a bar and a laundrette. Regardless of the activity the member carried out, the Bhagwan community provided its members with all material needs they might have.⁹⁵ The ECJ concluded that a community, based on religion or any philosophy, which carries out commercial activities to its members, that indirectly can be perceived as genuine and effective work, will constitute work within the meaning it has in EU law.⁹⁶ In this case the subordination, and the relationship between the employer and the employee, was somehow not ordinary and not subordinate in character, nonetheless the ECJ has regarded this as adequate work since it had an indirect quid pro quo aspect.⁹⁷ Remarkably is, as pointed out by the Advocate General in the *Trojani case*, that the ECJ does not comment on whether Steymann was under subordination, such as obliged to do "specific jobs to be specified by the community".⁹⁸

The third criterion concerns the remuneration and it has been deliberated upon in several cases. The *Levin* case will serve as ground for the explanation in this case. The *Levin* case concerned a woman of British nationality who moved to the Netherlands with her husband from a third country. In the Netherlands the woman engaged in small part-time work and financed her living with investments. The question was whether the remuneration from the part-time job was enough in order to consider her to be a worker within the meaning it has in EU law. Noteworthy is that the income she got was way below what was considered as a minimum wage in the sector. The ECJ concluded that even though the work was only on part-time this did not in itself preclude the woman the right to freedom of movement as a worker. Furthermore, the fact that the income was below the necessary amount for living in the state did not directly mean that it was impossible to live in the state. Other incomes, such as the woman's investments, enabled her living and the right to the status of worker should not be decided upon productivity or the amount of remuneration.⁹⁹

The fourth and last criterion that the Advocate General highlights in order to be considered a worker is that it should be a real and genuine economic activity. This criterion is linked to the content of the work performed and parallels can be drawn to other case law from ECJ, which stated in the *Betray*¹⁰⁰ case, that work that has a merely rehabilitative or reintegrative character, adapted to the physical and mental state of the person concerned, is not considered work.¹⁰¹ The Advocate General in the *Trojani* case

⁹⁵ C196/87 Udo Steymann v Staatssecretaris van Justitie (1988), para. 3-4.

⁹⁶ *Ibid*, para. 14.

⁹⁷ *Ibid*, para. 12.

⁹⁸ Opinion of the Advocate General Geelhoed in the case C-456/02 Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS) (2004) para. 44.

⁹⁹ C-53/81 D.M. Levin v Staatssecretaris van Justitie (1982), para.16.

¹⁰⁰ C- 344/87 Betray v Staatssecretaris van Justitie (1989).

¹⁰¹ C- 344/87 Betray v Staatssecretaris van Justitie (1989), para. 17 confirmed in C-456/02 Michel Trojani v Centre Public d'aide sociale de Bruxelles (CPAS) (2004) para 18.

furthermore emphasised the fact that in that case the person did not apply for any job and the “employer” did not base the employment on any personal skills or requirement of the “worker”. This was however not considered in the final judgment in the *Trojani* case.¹⁰²

Several aspects should be noted in relation to the criteria laid out above. Firstly, they are a summary of the case law concerning the concept of worker done by the General Advocate in the *Trojani* case and in some aspects the ECJ has differed in its final judgments. However, it is a good summary of the present views of the concept of worker, but every case should be decided on the specific circumstances that are at hand in the specific situation. Nevertheless, the criteria elaborated upon above are generally considered in cases where the ECJ has to determine whether a person can be classified as a worker as has been shown in the cases elaborated upon above.

2.2.2 Equal Treatment and Social Assistance

This section investigates the equal treatment provision in EU law and whether that provision establishes a right to education regardless of the status of the child’s parent in EU law. The purpose of this sub-chapter is to answer the sub-question to the main research question: *Does the equal treatment provision in EU law establish a right to education regardless of the length of stay in the host state?* In order to analyse the equal treatment provision this section will also consider the definition of social assistance and social advantages and whether the terms include the access to education.

As presented in chapter 2.1.3 the equal treatment provision is one of the cornerstones in EU. The provision is laid down in article 2-3 TEU and articles 8 and 10 TFEU as a general base and then it is enshrined in article 24 of the EU Citizenship Directive as mentioned in a sub-section 2.1.4. In the context of free movement for a period of maximum three months a derogation clause is included in article 24(2) of the EU Citizenship Directive as explained earlier in this study. This derogation leaves it up to the host state to decide whether it should grant social assistance to a person for the first three months. Job seekers can be excluded from the benefit of social assistance as long as they retain that status even though they are lawfully residing in the host state. That depends, as noted before, on whether the host state decides to grant social assistance or not.¹⁰³ In recital 10 to the EU Citizenship Directive it is stated that persons “*should not become an unreasonable burden on the social assistance system during an initial period of three months*”¹⁰⁴. This is to protect states from benefit-tourism, where people come in order to take advantage of the social welfare system in another state.

¹⁰² Opinion of the Advocate General Geelhoed in the case C-456/02 Michel Trojani v Centre public d’aide sociale de Bruxelles (CPAS) (2004), para. 53.

¹⁰³ Recital 21 Directive 2004/38/EC.

¹⁰⁴ Recital 10, Directive 2004/38/EC.

For the purpose of this study it is important to determine what social assistance means and whether or not the right to education is included in that term. In the *Brey case*¹⁰⁵ the ECJ defined the term social assistance: “that concept must be interpreted as covering all assistance introduced by the public authorities, whether at national, regional or local level, that can be claimed by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family and who, by reason of that fact, may become a burden on the public finances of the host Member State during his period of residence which could have consequences for the overall level of assistance which may be granted by that State”¹⁰⁶.

As a comparison to the notion of social assistance the term social advantages can be analysed. This term is used in the Regulation 492/2011, which is applicable to workers. Is there a difference between the two concepts? The social advantage concept is very broad and it has been interpreted to include as well financial as non-financial benefits. The term has gained a wide interpretation and includes social advantages that normally is not included in the concept such as a right to require that legal proceedings are carried out in a specific language and the possibility for the partner to a migrant worker, not yet married, to live together.¹⁰⁷ Both social assistance and social advantages are terms that generally are not defined at national level, which hence makes the EU definition, and the ECJ interpretation, the one that is used.¹⁰⁸

Since there is a terminological difference between the concepts, but the lines are somewhat blurred, the focus will be on the term social assistance since it is the one that applies to people exercising their right to freedom of movement for a maximum of three months, regardless of status. Does education seem to be compatible with the definition laid down by the ECJ in the *Brey case*? The purpose of having a wide definition and not an exhaustive list of the term social assistance is of course that national differences and rephrasing of assistances would lead to states being able to escape from their responsibility to provide social assistance if such an exhaustive list is used. However, guidance can be sought in national definitions and specifications and for the purpose of this study the Swedish legislation will be used in order to reach an understanding of the term social assistance. In the Swedish transposition of the EU Citizenship Directive the term social assistance refers to actions that can be taken under the Social Services Act¹⁰⁹. These actions mainly include financial assistance in the form of maintenance aid or assistance to life in general, which is compatible with the conclusions drawn in the *Brey case*. The social assistance is

¹⁰⁵ C-140/12 Pensionsversicherungsanstalt v. Peter Brey, (2013).

¹⁰⁶ Ibid., para. 61.

¹⁰⁷ Aleksandra Czekaj-Dancewicz, *Analytical note on social and tax advantages and benefits under EU law*, European Report, 2013, p. 4. Accessible at <http://ec.europa.eu/social/main.jsp?catId=475&langId=en&moreDocuments=yes> accessed: 2015-05-11.

¹⁰⁸ Ibid, p. 6.

¹⁰⁹ Socialtjänstlagen SFS 2001:453.

provided in order to satisfy a certain standard of living and to empower the person to live an independent life.¹¹⁰ Nevertheless, there is no explicit reference to the right to education in the Social Services Act, which reinforces the view that social assistance does not include the right to education.

If then one can conclude that the right to education is beyond the scope of social assistance, then one also can determine that the exception in the derogation clause in article 24(2) EU Citizenship Directive does not apply to the right to education. Hence, the access to education in accordance with the principle of equal treatment is not dependent on the length of the stay in the host state for a person, regardless of status, that exercises its freedom of movement.

2.3 Concluding Remarks

This chapter has provided the reader with the relevant law concerning the freedom of movement within the EU. The purpose has been to determine whether EU law provides an answer to the question whether children are entitled to education when they exercise their right to freedom of movement for a maximum of three months. As has been confirmed, EU legislation distinguishes between persons depending on their position in the society and whether they are contributing to the economy and internal market, or if they are mere “tourists” exercising their freedom of movement for a maximum of three months. The only express reference to the right to education is found in regulation 492/2011 that gives worker’s children the right to education, regardless of length of stay in the host state. The possibility to move within the union as a self-employed person or a job-seeker has also been covered in order to evaluate whether the possession of such status would entitle the children to education. No such express possibilities have been found.

Furthermore, this chapter has sought to investigate the concept of worker and what kind of activities the ECJ has considered as acceptable in order to qualify as work. Different conditions have been crystallized through an analysis of the ECJ’s case law. The conclusion is that the criteria laid down by the ECJ case law have to be fulfilled cumulatively, however there is scope for flexible interpretation. Children of self-employed persons might, with the methodology used by ECJ, enjoy a right to education through a teleological or consequentialist interpretation. Lastly, the equal treatment provision in EU law has been considered and whether it is possible for a host member state to derogate from the provision in relation to education. It is only on the equal treatment provision that persons who do not qualify in any of the other categories can rely on, if at all. Since EU law does not provide a fully satisfactory answer to the research question the next chapter will analyse the question from a human rights perspective. The right to education is a right within the international context. The implications from

¹¹⁰ Socialtjänstlagen SFS 2001:453, Chapter 4, §1.

international human rights conventions as well as the EU framework for human rights will be covered in order to see what obligations that derive from these conventions.

3 A Right to Education Under Human Rights Law

The right to education has been enshrined in a number of different international and regional instruments that are binding on the state parties. This chapter will present the legal framework that exists regarding the right to education and also explain the implications of the right and what can be expected of states to provide when it comes to their obligation to fulfil the right to education. One analytical tool will be described, the “respect, protect, fulfil”-typology, in order to cover the legal implications that follow from the right to education. This chapter will investigate whether the research question can be answered with reference to international conventions and one of the analytical tools that is available.

3.1 The Concept of the Right to Education and its Existence in International Conventions

To define the right to education is not an easy task. What one realizes reading the different provisions in the treaties is that there is no universal concept of what the right to education actually is, a weakness that makes it easier for states to take this obligation less seriously.¹¹¹ That the right to education should be classified as a *fundamental* right is an argument that is put forward in the international human rights arena and some of the arguments for it will be presented shortly in the following. Firstly, education can be seen as the fundamental way in which states preserve their culture and values, and pass it on to the next generation. Moreover, education is a necessary tool in order to engage and enjoy other rights of politic and civil nature. Education creates a certain degree of competence that is valuable in order to build the democratic structure in the society, with all its implications. Furthermore, the right to education is closely linked to the human dignity where education gives the human being the basic tools to think logically and gain self-respect. And in the extension of this the human being can have a personal development and realise its potential and function in a society. Lastly, the right to education has been recognised as a welfare right, meaning that if one is unable to provide for the right oneself, the community will give certain help to fulfil it. Other welfare rights are access to health care and food.¹¹²

¹¹¹ Spring, Joel, *The universal right to education: justification, definition, and guidelines*, Lawrence Erlbaum, Mahwah, N.J., 2000, p.1, 4.

¹¹² Hodgson, Douglas, *The human right to education*, Dartmouth, Aldershot, 1998, p. 17-20.

The first human rights document that still is applicable today, that included the right to education, is the Universal Declaration of Human Rights (UDHR) from 1948. In article 26 UDHR it is stated that: “*Everyone has the right to education*”. Since the adoption of the UDHR several international treaties have reaffirmed the right to education. For example in article 13-14 in the International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted in 1966 it lays down “*the right of everyone to education*”¹¹³. Several commentaries¹¹⁴ to the rights enshrined in the ICESCR have been issued, but in relation to education General Comment 13¹¹⁵ is relevant. The four A-scheme (availability, accessibility, acceptability and adaptability)¹¹⁶ assures the right to education on all levels. Interesting is that the right to education for migrants, refugees and asylum-seekers have been confirmed by the Committee: “*The principle of non-discrimination extends to all persons of school age residing in the territory of a State party, including non-nationals, and irrespective of their legal status.*”¹¹⁷ This statement is reaffirmed in other international instruments such as in article 3(e) of the UNESCO Convention against Discrimination in Education as well as in article 30 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. Nationality is therefore a discrimination ground that is non-acceptable.¹¹⁸

The Convention on the Rights of the Child (CRC)¹¹⁹ is another important instrument regulating the rights of the child and the right to education. CRC entails the right to education in article 28 CRC¹²⁰ and it is clearly stated that

¹¹³ Article 13(1) ICESCR.

¹¹⁴ The legal status of General Comments have been debated. General Comments have been defined as: “*means by which a UN Human Rights Experts Committee distils its considered view on an issue which arises out of the provisions of the treaty whose implementation it supervises and presents those views in the context of a formal statement of its understanding to which it attaches major importance. In essence the aim is to spell out and make more accessible the “jurisprudence” emerging from its work.*” Alston, Philip, *The Historical Origins of the Concept of General Comments*” in Human Rights law Review in L. Boisson de Chazournes and V. Gowland Debbas (ed.), *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab*, The Hague Martinus Nijhoff, 2011, p. 775 fn 49. For more thorough deliberation upon the legal status of General Comments see for instance: Keller, Helen; Ulfstein, Geir; Grover, Leena, *UN Human Rights Treaty Bodies: Law and Legitimacy*, Cambridge University Press 2012.

¹¹⁵ Committee on Economic, Social and Cultural Rights, *General Comment 13, The right to education* (Twenty-first session, 1999), U.N. Doc. E/C.12/1999/10 (1999).

¹¹⁶ This analytical tool was developed by the former Special Rapporteur on the right to education, Katarina Tomasevski. See for instance: Tomasevski, Katarina, *Preliminary Report of the Special rapporteur on the Right to Education*, submitted in accordance with Commission on Human Rights Resolution 1998/33, E/CN.4/1999/49, 1999 for a further elaboration on the concepts.

¹¹⁷ Committee on Economic, Social and Cultural Rights, *General Comment 13, The right to education* (Twenty-first session, 1999), U.N. Doc. E/C.12/1999/10 (1999), para 34.

¹¹⁸ Saul, Ben; Kinley, David; Mowbray, Jacqueline, *The International Covenant on Economic, Social and Cultural Rights. Commentary, Cases and Materials*, Oxford University Press, 2014, p. 1124.

¹¹⁹ The Convention on the Rights of the Child opened for signature in 1989 and entered into force 1990.

¹²⁰ Article 28(1) CRC: “*1. States Parties recognize the right of the child to education, and*

the state has to provide free and compulsory education to all children. This obligation is applicable to children who are below 18 years old.¹²¹ In the CRC the aims of education are laid down in article 29. This description of the aims is one of the most detailed that exists in international human rights instruments today. These aims intend to strengthen both the individual and his or her knowledge, but also gain the society by fostering fundamental values and morals on the individual.¹²²

Furthermore, the CRC has laid down the best interest of the child and determined that the principle should be a guidance:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”¹²³

The best interest of the child primarily focuses on the well-being of a child, but how that well-being is defined is dependent on many factors such as the age, the maturity of the child, the child’s environment and the presence or absence of his or her parents.¹²⁴ The emphasis on the *interest* of the child implies that it is a wide protection, since rights are based on some kind of interest. Interests include a wider spectrum of entitlements than rights. The *consideration* is also a definition with a broad ambit and it implies that when authorities have to make a decision involving children they have to not only note the fact that it concerns children, but actually take into account and give it weight in the final decision.¹²⁵

The best interest of the child principle has been subject to critique because some regard it as vague and open for too much interpretation. Especially it has been noted that it is a principle that can be interpreted differently depending on the cultural context, which also might diminish the actual protection of the child. An example that can be given is in cases concerning female genital mutilation where the principle, depending on the cultural

with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: a) Make primary education compulsory and available free to all; (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need; (c) Make higher education accessible to all on the basis of capacity by every appropriate means; (d) Make educational and vocational information and guidance available and accessible to all children; (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.”

¹²¹ See article 1 CRC for the definition of a child.

¹²² Hodgson, Douglas, *op.cit.*, p. 75-83.

¹²³ See article 3 CRC for the definition of the principle the best interest of the child. The principle is repeated in different forms in article 9(1), 9(3), 18(1), 20(1), 21, 37(c), 40(2)(b)(iii) CRC.

¹²⁴ UNHCR, *Guideline on Determining the Best Interest of the Child* (2008), p.14-15.

¹²⁵ McAdam, Jane, *Complementary protection in international refugee law*, Oxford University Press, Oxford, 2007, p.177-179.

context in which the child is, might not be interpreted in the child's favour. Nonetheless, the advocates for the usefulness of the principle argues that indeterminacy is a key feature of human rights principles in general and that CRC nevertheless lays down good standards and a minimum framework of ethic values.¹²⁶

An essential question in relation to the conventions is to whom the state is obliged to respect, protect and fulfil the rights enshrined in the conventions. "*Everyone (has the right to education)*", everyone is a word that indicates that there are no limits of the states' obligations. However, in some conventions a jurisdictional¹²⁷ clause is incorporated, as for example in article 2 CRC. This means that the state party is obliged to respect and ensure the rights laid down in the convention "*to each child within its jurisdiction, without discrimination of any kind...*"¹²⁸. A similar jurisdictional clause is not included in the ICSECR or the UDHR, which also invokes a greater responsibility outside a state's own territory, where no territorial or jurisdictional borders are defined.¹²⁹

The state obligation to ensure the right to education is clearly defined in several international instruments. The division of responsibility for the fulfilment of the rights is however unclear but in relation to this study and in the context of the EU it is an interesting aspect that needs to be further engaged in when it comes to the relationship between EU law and international treaties for EU-migrants who exercise their freedom of movement for a maximum of three months.

3.2 State Obligations – the Tripartite Typology

When one analyses a state's actions in relation to a right, especially a social, economic or cultural right, one can use analytical tools in order to see if the state adhere to the obligations that it has signed in international conventions. Two different analytical tools have emerged which have gained acceptance, however they are still debated. The "respect, protect and fulfil" tool was initially developed in relation to the right to food, but has afterwards been used to other rights. The 4-As scheme (availability, accessibility, adequacy and adaptability) was previously mostly used in relation to the right to

¹²⁶ McAdam, Jane, *op.cit.*, p. 179.

¹²⁷ "The term "jurisdiction" refers to the territory and people over which a state has factual control, power, or authority. It should not be confused with the limits imposed under international law on the ability of a state to exercise prescriptive (or legislative) and enforcement jurisdiction." See: De Schutter, Oliver et al, *Commentary to the Maastricht Principles on Extra-Territorial Obligations of States in the Area of Economic, Social and Cultural Rights*, Human Rights Quarterly 43, 2012, p. 1102.

¹²⁸ Article 2(1) CRC.

¹²⁹ Vandenhole, Wouter, *Beyond Territoriality. The Maastricht Principles on Extra-Territorial Obligations in the Area of Economic, Social and Cultural Rights*, 29 Netherlands Quarterly of Human Rights, 2011, p. 430.

education but has also been used for analysing other rights.¹³⁰ The next section will go through the respect, protect and fulfil tool since it has been used the most and it is also widely accepted as applicable to a wider range of human rights. The 4-As scheme is more about challenging the quality of the right as opposed to the actual right to have education in the first place.

The tripartite typology evolved through Asbjorn Eide's work as Rapporteur for the UN and in his report "*The Right to Food as a Human Right*"¹³¹ he initially described four different obligations: an obligation to respect, an obligation to protect, an obligation to ensure and an obligation to promote. Later these four obligations were narrowed down to the tripartite typology. Henry Shue, who amended the typology a bit by introducing the element of the state's obligation to promote, has further deliberated upon the typology. Shue also concluded that for every right there are three types of duties. The three duties must all be satisfied and recognized in order for the right to be fulfilled. However it is not necessary that the same institution fulfil all duties as long as all levels of duties are fulfilled at the same time.¹³²

The application and usage of the analytical framework has been proven useful for both judicial and quasi-judicial bodies when examining social, economic and cultural rights and state's compliance with the rights. How the tripartite typology works in practice and what the different notions mean is of relevance for understanding international rights laid down in conventions. In an elaboration of his analytical framework, Eide in 1999 further explained the different obligations. The level of *respect* aims at the state's duty to respect the resources, freedoms, autonomy and liberty of action by the individual. It is an obligation where the state should refrain from infringing on the enjoyment of the right. Nonetheless, there might be third parties that infringe on the fundamental right and the state then has a duty to protect the individual from the third parties infringement. This aspect of the obligation to *protect* has been seen as the most important one for the enjoyment of economic, social and cultural rights. The protection can be given in forms of legislative measures and effective remedies that are accessible to the individuals. The duty to protect and the duty to fulfil are both correlated to the duty to *promote*, which includes for example promoting tolerance and raising awareness. Lastly, the obligation to *fulfil* includes the actual realization of the right to all individuals. Special attention should be given to those who have difficulties in accessing the social, economic and cultural rights such as persons with disabilities, children or elderly persons.¹³³ ¹³⁴

¹³⁰ Schutter, Olivier de, *International human rights law: cases, materials, commentary*, Cambridge University Press, Cambridge, 2010, p. 241- 242.

¹³¹ Eide, Asbjorn, *The Right to Adequate Food as a Human Right*, E/CN.4/Sub.2/1983/25, 1983.

¹³² Schutter, Olivier de, *op.cit.*, p. 242-243.

¹³³ Eide, Asbjorn, *The Right to Adequate Food and to be Free from Hunger, Updated Study on the Right to Food*, submitted by Asbjorn Eide in accordance with Sub-Commission decision 1998/06 E/CN.4/Sub.2/1999, 1999, para 52, cited in Schutter, Olivier de, *International human rights law: cases, materials, commentary*, Cambridge University Press, Cambridge, 2010, p.245-246.

Critiques have been put forward to the tripartite typology and its functioning. The critique has merely focused on the justiciability of these rights.¹³⁵ Nevertheless, the typology has functioned and been applied by a lot of judicial and quasi-judicial bodies and for the purpose of this thesis the existing critique will be left out since it does not contribute to the analysis of the research question in this study.

The purpose of demonstrating the tripartite typology, in addition to the positive and negative obligations regime that exists, is to embrace a more multifaceted view on the right to education and the obligations that are imposed on states. The analytical tool also shows more clearly what the right to education entails and what states are responsible for providing. Some of the conventions have jurisdictional and territorial clauses that indicate that the right to education should be ensured to anyone within the borders of a state. For those instruments that do not have such jurisdictional clause, how far goes the responsibility for the host states, does it include a right to education for those who exercise their freedom of movement for a maximum of three months in the EU? As has been expressed in the Commentaries to the ICESCR there exists a right for non-nationals to education, but the migration context in which the commentaries are done is different from the EU free movement migration for three months. However, there seems to be a right for migrants and asylum-seekers to enjoy the right to education in the host state due to the fact that they are under that state's jurisdiction. One can ask oneself if, in the context of temporal movement within the EU, the state responsibility is less rigid? Is it the host state, whose immigration control is almost non-existent for this particular group, or the home state due to an extra-territorial obligation, that should ensure the right to education for the EU-citizens? That question, about extra-territorial state responsibility, is relevant, but the purpose of this thesis is only to investigate the host state's responsibility.

3.3 The European Union, Human Rights and Children

This section will elaborate on the relationship between the EU and human rights. As has been thoroughly deliberated on in the historical overview of the EU in chapter 2.1.1 the union was initially founded on purely economical and market-based grounds.¹³⁶ The agenda was not to be a

¹³⁴ African Commission on Human and People's Rights, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Comm. No. 155/96 (2001), para. 44-48. Cited in Schutter, Olivier de, *International human rights law: cases, materials, commentary*, Cambridge University Press, Cambridge, 2010, p. 246-247.

¹³⁵ For more reading on the critique of the tripartite typology see for example: Ida Elisabeth Koch, *Dichotomies, Trichotomies or Waves of Duties?*, *Human Rights Law Review*, 5, No.1 (2005), p. 81-103 and Ida Elisabeth Koch, *The Justiciability of Indivisible Rights*, *Nordic Journal of International Law*, 72, No. 1, 2003, p.3-39.

¹³⁶ Barnard, Catherine, *op.cit.*, p.229-231.

human rights organization, however through the expansion and its development the EU has been obliged to affirm its position in human rights concerns regarding its member states and its citizens. The frameworks for human rights in Europe can be found in different forms of treaties, stemming from different institutions, which makes it more complicated for the individual to have an overview and to know which one of the instruments that is most appropriate to trigger in the situation concerned.¹³⁷

The EU has throughout its history recognized human rights as fundamental and as “general principles of law”¹³⁸. Primarily, general principles of law refer to the ECHR, constitutional traditions prevalent in the member states and, to a lesser extent, treaties from the United Nations.¹³⁹ However, it was not until the year 2000 the EU adopted its own Charter of Fundamental Rights (CFR) and it did not become legally binding until 2009 when the Treaty of Lisbon entered into force. Hence CFR is regarded as primary EU law, on the same level as EU Treaties.¹⁴⁰ Article 6 Treaty on the European Union (TEU) clarifies the status of CFR in the EU and for its member states. Before 2009 the human rights within the EU were protected mainly based on the litigation process of the European Court of Justice. It was previously an *ad hoc* kind of evolvement of human rights protection in the EU and no coherent system was available. This approach has led to a less coherent overview of the rights protected. The CFR’s actual impact on the ECJ’s case law has been disputed since some argue that the Court rather cited the European Convention on Human Rights (ECHR) than the CFR during the first years.¹⁴¹

The CFR as a human rights instrument entails 50 rights and principles that have derived their design from other human rights treaties such as from the United Nations (UN) or from the ECHR. Included in these rights are civil and political rights and social, economic and cultural rights but also so-called third generation’s rights which are aimed to be of a more general and worldwide nature. Important to notice is nevertheless that the CFR is only applicable as far as it concerns EU related situations that involve EU law.^{142 143}

Moreover, the CFR is regarded to be less exhaustive and protective in its character than many other human rights instruments. As was described

¹³⁷ Scott, Sionaidh Douglas, *The European Union and Human Rights after the Treaty of Lisbon*, Human Rights Law Review 11:4 (2011), p. 646-647.

¹³⁸ Article 6(3) of the TEU (2008) OJ C 115/15 states: *‘The Union shall respect fundamental rights, as guaranteed by the European Convention on Human Rights and as they result from the constitutional traditions common to member states as general principles of Community law.’*

¹³⁹ United Nations Human Rights Office of the High Commissioner, *Europe Regional Office, The European Union and International Human Rights Law*, p.9.

¹⁴⁰ EU’s webpage http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm accessed: 2015-05-17.

¹⁴¹ Scott, Sionaidh Douglas, *op.cit.*, p. 647-649.

¹⁴² Article 51 CFR.

¹⁴³ Scott, Sionaidh Douglas, *op.cit.*, p. 651-652.

earlier in the chapter on the respect, protect and fulfil, the typology is often invoked in relation to the discussion of the content of rights and state obligations. CFR is by some considered to cover only the respect part of the typology, which relates to the negative obligation of a party not to interfere in a right, at least as long as it concerns principles and not rights.¹⁴⁴ The distinction between rights and principles in the CFR is not made explicitly clear. Some interpretations indicate that principles refer to economic, social and cultural provisions whilst civil and political provisions are rights. However, this is not clearly convincing since only three articles in CFR actually are named “principles” but more articles refer to economic, social and cultural rights in reality.¹⁴⁵ It has been argued that the limitation to include only the “respect” part of the tripartite typology relates only to the principles and that the rights enshrined in the CFR should include the whole typology.¹⁴⁶ The legal implications that are imposed by CFR on EU member states are therefore not fully established and one explanation might be the relatively short existence of the Charter in the international human rights arena.

The child’s position and actual recognition in EU law has not been explicitly stated until the Treaty of Lisbon, which entered into force in 2009. Before 2009 there was only general provisions concerning the importance of respecting human rights in the actions taken within the EU framework. Today in article 3(3) second paragraph and article 3(5) TEU the protection of children’s rights is mentioned as a fundamental cornerstone of EU.¹⁴⁷ In relation to the CFR, children are explicitly mentioned two times, firstly in article 14 CFR on their right to education further deliberated on in detail below in the next sub-chapter, and in article 24 CFR which is where the best interest of the child is stated in the following terms:

The rights of the child

- 1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.*
- 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.*
- 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.*

¹⁴⁴ United Nations Human Rights Office of the High Commissioner, Europe Regional Office, *The European Union and International Human Rights Law*, p.14.

¹⁴⁵ Scott, Sionaidh Douglas, *op.cit.*, p. 652.

¹⁴⁶ Lenaerts, Koen, *Exploring the Limits of the EU Charter on Fundamental Rights*, European Constitutional Law Review, Vol. 8, Issue 3, 2012, p. 399- 401.

¹⁴⁷ Stalford, Helen and Shuurman, Mieke, *Are We There Yet?: the Impact of the Lisbon Treaty on the EU Children’s Rights Agenda*, International Journal of Children’s Rights 19 (2011), p.382.

In the TFEU the lack of explicit reference to children and their need of protection of their rights is noteworthy, especially in relation to the general provisions that are stipulated in articles 7-17 TFEU, which include the combat of discrimination and social exclusion, the importance of equality between the sexes, protection for consumers etc. The TFEU fails to particularly deal with one of the most vulnerable groups, children, within the union except for in two particular cases concerning sexual exploitation and human trafficking (articles 79(2)(d) and 83(1)). In order to derive children's right from the TFEU one has to use the more general and universally applicable provisions on non-discrimination (article 19 TFEU) and EU citizenship (article 21 TFEU).¹⁴⁸

3.3.1 The European Union and the Right to Education

The historical background of the EU with its emphasis on the common market and the economic incentives behind the foundation of the movement has been described in a previous chapter. It cannot be a surprise that the right to education within the EU has evolved through the economic values that underpins the organization, even though this right for children has roots in international treaties (see chapter 3.1) as well as in national legislation (see chapter 4) and EU legislation.¹⁴⁹ As mentioned in chapter 2.1.2 the EU has supporting competence in areas relating to education, article 4(e) TFEU. The supporting competence relates to the structure and the content of the education, whereas the right to education is laid down in the EU's Charter on Fundamental Rights.

This section will go through the relevant provisions regarding education in EU law. Education is primarily regulated in article 14 CFR that reads as follows:

Right to Education

- 1. Everyone has the right to education and to have access to vocational and continuing training.*
- 2. This right includes the possibility to receive free compulsory education.*
- 3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.*

¹⁴⁸ Stalford, Helen and Shuurman, Mieke, *op.cit.*, p.383-383.

¹⁴⁹ Stalford, Helen, *Children and the European Union: rights, welfare and accountability*, Hart, Oxford, 2012, p. 143-145.

Compared to other international instruments regulating the right to education this provision in the EU law tends to give the impression that it is less obligatory for the member states to provide education and that the obligation is less exhaustive than in other instruments regulating the right to education. In the second paragraph certain concern can arise in relation to the “possibility” to receive free education. This phrasing is far from the strict formulations that are found in other provisions that include a right for an individual and an opposed duty for the state to provide education.¹⁵⁰ However, a more rights-based interpretation can be done if the *possibility* in the second paragraph instead is interpreted as having its focus on the *free* education. Then the CFR can be relied upon in order to prove that primary education should be cost free education. So, in reality it might, depending on way of interpretation, actually be a stronger protection than in most international conventions.

Before the Maastricht Treaty the main competence of the EU was in relation to the economic sphere and workers. The right to education was hence, in the initial stage of the EU, primarily regulated only when it had a connection to the competence of the EU and the right as such was not applicable to a wider sphere of children living in the EU. Even though the expansion of the competence that EU has had in the education field, the regulations still tend to give a lot of decision power to the member states when it comes to the shape and content of the education as such.^{151, 152}

An interesting aspect on EU law and the right to education arises in the context of free movement of persons and EU citizenship. The direct law-making power that the EU has in the area of free movement and education has created an absolute right for migrating children to enjoy equal access to education as nationals in the host state. The categories that are included are children to parents who qualify as workers¹⁵³, third country nationals who are long term residents¹⁵⁴ and asylum seekers^{155, 156}. What this absolute right

¹⁵⁰ Ibid, p. 145-146.

¹⁵¹ See the formulation in article 165(1) TFEU: “*The Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity. (...)*”

¹⁵² Stalford, Helen, *op.cit.*, p.146-147.

¹⁵³ See: article 7.1 (a) Directive 2004/38 and Reg 492/2011 article 10.

¹⁵⁴ Council Directive 2003/109/EC concerning third country nationals who are long-term residents 2003/109 OJ L16/44, 23/01/04, article 11 and 14.

¹⁵⁵ Article 14(1) in Directive 2001/55 states that: “*The Member States shall grant to persons under 18 years age enjoying temporary protection access to the education system under the same conditions as nationals of the host member state. The Member state may stipulate that such access must be confined to the state education system.*”

¹⁵⁶ Article 14(1) in 2013/33/EU, “*Member States shall grant to minor children of applicants and to applicants who are minors access to the education system under similar conditions as their own nationals for so long as an expulsion measure against them or their parents is not actually enforced. Such education may be provided in accommodation centres.*” OJ L 180, 29.6.2013.

actually implies and if it has an absolute character when it concerns EU-migrants exercising their freedom of movement for a maximum of three months is what this study aims to investigate.¹⁵⁷

Case law in this area has been limited and there is only one case that refers to article 14 CFR, a case of scarce importance for this thesis. In relation to the article 24 CFR, the rights of child, there have been 31 references to the article, however none in relation to the right to education. The article has been mainly used in asylum cases and custody cases. It shows that the right to education has not been a matter of debate, at least for the ECJ.¹⁵⁸

3.4 The Council of Europe's Regional System for Protection of Human Rights and its Relationship to the European Union

In the context of EU it is important to clarify the position of the ECHR within the EU. The ECHR is a separate and individual treaty that the ECJ has referred to many times in its case law. The ECHR was adopted by the Council of Europe and it regulates civil and political rights. It came into force in 1953 and it is binding to its members.¹⁵⁹ The Council of Europe has 47 member states whence 28 also are members of the EU. The ECHR was created in the aftermath of the Second World War and it has been described as “*a type of collective pact against totalitarianism*”¹⁶⁰. The purpose was to create an international instrument that was binding upon the parties in an attempt to avoid a repetition of the horrible actions that had taken place in the past. The ECtHR has been able to function as an important tool and guidance for human rights interpretation in the 47 contracting states and has also laid down judgements of high importance and good quality.¹⁶¹ When the Treaty of Lisbon entered into force in 2009 article 6(3) TEU emphasises the importance of the ECHR in EU law. It reads as follows:

Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

¹⁵⁷ Stalford, Helen, *op.cit*, p. 153-155.

¹⁵⁸ For case law based on a specific CFR article see FRA webpage:

<http://infoportal.fra.europa.eu/InfoPortal/caselawFrontEndAccess.do> accessed 2015-05-11.

¹⁵⁹ European Court of Human Rights webpage on the background of ECHR:

http://www.echr.coe.int/Pages/home.aspx?p=basictexts&c=#n1359128122487_pointer
accessed: 2015-05-11.

¹⁶⁰ Christoffersen, Jonas. & Madsen, Mikael Rask. (ed.), *The European Court of Human Rights between law and politics*, Oxford University Press, Oxford, 2011, p.40.

¹⁶¹ *Ibid.*, p. 100, 111.

The article 6(3) TEU acknowledge the ECHR as one of the sources for the ECJ's decisions. ECJ has the possibility to go beyond the protection laid down in ECHR and therefore extends its protection to encompass more than the ECHR does. Hence, the ECHR provisions serve as a minimum.¹⁶² Another important step towards EU accession to the ECHR is stressed in article 6(2) TEU where it is stated expressly that the EU *shall* accede to the ECHR. However, this process has not been finalized yet.¹⁶³

Due to the importance of the ECHR and its decisions for EU law a short description of the relevant provisions stemming from ECHR will be given as well as some case law that might be of guidance. The right to education is enshrined in the first additional protocol to the ECHR and it is stated that:

Article 2 Right to Education

*“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”*¹⁶⁴

Firstly, one can consider the relationship between the two sentences in the article and what it implies. The European Court of Human Rights (ECtHR) has stated that the first sentence is the dominant one and the primary right. The formulation implies that the right of the child is considered as stronger than those of the parents.¹⁶⁵ What the right to education actually includes has been subject to interpretation already in one of the earliest cases from ECtHR, *The Belgian Linguistic Case*¹⁶⁶. The term education has been interpreted to encompass all levels of education, primarily because the states within the Council of Europe system often have made both primary and

¹⁶² Craig, Paul & De Búrca, Gráinne, *op.cit.*, p.366-367.

¹⁶³ In December 2014 the ECJ delivered its judgement on the accession and it had identified problems with regard to ECHR's compatibility with EU law. The accession can not interfere with the competences of the EU and the power of its institutions and laws. However the ECJ identified several critical issues which included: the external control by the ECHR would not be in accordance with the interpretation of EU law, the ECHR should be coordinated with the CFR and the autonomy of the EU would be undermined as well as the autonomy of the preliminary ruling procedure. When an accession is possible is therefore not yet possible to say, see: The European Court of Justice, *The Court of Justice delivers its opinion on the draft agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms and identifies problems with regard to its compatibility with EU law*, Press Release 180/14, Opinion 2/13, Luxemburg 18 December 2014.

¹⁶⁴ Art 2, Additional Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

¹⁶⁵ See *Campbell and Cosans v. United Kingdom*, Application no. 7511/76; 7743/76 (1982), para 50.

¹⁶⁶ Case "Relating to Certain Aspects of the Laws on the use of Languages in Education in Belgium" v. Belgium, Application no 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, 1968.

secondary education compulsory and it would be contrary to an effective protection of the right not to include all levels of education in the right.¹⁶⁷

As one may have noted in this chapter, the wording of the right to education takes different forms in different provisions and the obligation and right it creates may then be differently interpreted. The negative formulation that is used in the protocol to the ECHR indicates that there exists a negative (instead of a positive) state obligation. This negative formulation has been explained by the ECtHR to mean that a state is not obliged to set up educational system of “*any particular type or level*”¹⁶⁸. The ECtHR states in the *Belgian Linguistic Case* that the right to education meant “*guaranteeing to persons subject to the jurisdiction of one of the contracting parties, the right, in principle, to avail themselves of the means of instruction existing at a given time*”¹⁶⁹. Conclusively, three rights which are included in the concept of education can be distinguished, namely: “*a right to non-discriminatory access to educational institutions existing at a given time; a right to receive education in national language and a right to official recognition of studies successfully completed*”¹⁷⁰. Despite its negative formulation of the right to education it is obvious that it also entails and gives rise to positive state obligations. To find otherwise would be contrary to the spirit of the ECHR. A minimum level of education is therefore required by the state to offer as part of its positive obligations.¹⁷¹ For the purpose of this study the parental rights that are enshrined in the right to education will not be further investigated.

Compared to the ECJ the European Court of Human Rights (ECtHR) has dealt with the right to education numerous times. The majority of the cases relating to the right to education in ECtHR have touched upon the negative obligation of states not to interfere in the given education. A couple of cases have engaged in the introduction of different religious aspects, or exclusion of certain religions, from education.¹⁷² Other cases have dealt with the linguistic aspects of the education.¹⁷³ One case that touches upon similarities with the freedom of movement and the right to education is the *Timishev v. Russia case*.¹⁷⁴ The case concerned an ethnic Chechen national who lived in Russia with his family, but no longer was registered in the city the family lived in and additionally he no longer had a migrant’s card since he had

¹⁶⁷ Beiter, Klaus Dieter, *op.cit.*, p. 159-161.

¹⁶⁸ Case “Relating to Certain Aspects of the Laws on the use of Languages in Education in Belgium” v. Belgium, Application no 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, 1968, para.3 in section B “Interpretation adopted by the Court”.

¹⁶⁹ *Ibid.*

¹⁷⁰ Beiter, Klaus Dieter, *op.cit.*, p. 163.

¹⁷¹ Beiter, Klaus Dieter, *op.cit.*, p. 164-166.

¹⁷² See for instance: *Folgerø and Others v. Norway*, application no. 15472/02 (2007), *Hansen and Eylem Zengin v. Turkey*, application no. 1448/04 (2007), *Mansur Yalçın and Others v. Turkey*, application no. 21163/11 (2014).

¹⁷³ See for instance: Case “Relating to Certain Aspects of the Laws on the use of Languages in Education in Belgium” v. Belgium, Application no 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, 1968 and *Catan and Others c. the Republic of Moldavia and Russia* (2012).

¹⁷⁴ *Timishev v. Russia*, application no: 55762/00 and 55974/00 (2006).

been forced to give it away in exchange for property. The children were denied access to education, despite their previous attendance in the Russian school for two years, due to the father's loss of the migrant's card. The ECtHR concluded that the right to education is a right available to anyone within a contracting state's jurisdiction. Furthermore it stated that: *Article 2 of Protocol No. 1 prohibits the denial of the right to education. This provision has no stated exceptions and its structure is similar to that of Articles 2 and 3, Article 4 § 1 and Article 7 of the Convention ("No one shall ..."), which together enshrine the most fundamental values of the democratic societies making up the Council of Europe. In a democratic society, the right to education, which is indispensable to the furtherance of human rights, plays such a fundamental role that a restrictive interpretation of the first sentence of Article 2 of Protocol No. 1 would not be consistent with the aim or purpose of that provision.*¹⁷⁵ Since the right to education in Russia is not conditional upon the parents' registration of their residence, the ECtHR found the denial of the children's school attendance to be a violation of the right to education enshrined in the ECHR.¹⁷⁶

The circumstances of this case differ of course from the situation for those who exercise their freedom of movement within the EU for a maximum of three months (Russia is not a member of the EU for example). But the ECtHR makes an important statement in this case – that the right to education is unconditional for *anyone* within a contracting state's jurisdiction. This statement is perhaps even more important for the group that this study discusses since some groups of the EU-migrants are more vulnerable and marginalised and left to rely on the practices and conduct of the host state's authorities. By referring to other international conventions in the *Timishev case* as well as in other judgments, the ECtHR reaffirms and acknowledges the content of the international obligation to fulfil the tripartite typology in relation to the right to education.

The European Social Charter (ESC) is the other main document created by the Council of Europe. The creation of the charter, in 1961, was made in order to complement the civil and political rights in the ECHR with social, economic and cultural rights in ESC. The right to education is laid down in several articles, but does not in itself form a specific article. The reference to the right to education can be found in article 7(3), 9, 10, 15(1), 17(1)(a)-(2) and 19(11)-(12). By laying down the right to education also in the ESC, the other side of the right, the economic, social and cultural was also acknowledged. It is noteworthy that in article 19(11)-(12) ESC the right for migrant workers' children to education in language, both of the receiving state and the mother tongue, is provided for. This indicates a form of educational rights for migrant workers. The term migrant worker is however not defined in the ESC and the uncertainty of who is deemed as a worker continues.¹⁷⁷

¹⁷⁵ Ibid., para. 64.

¹⁷⁶ Ibid., para. 9-11, 22-27, 63-67.

¹⁷⁷ Beiter, Klaus Dieter, *op.cit.*, p. 172-175.

3.5 Concluding remarks

The right to education has been subject to regulation in if not all, at least in the majority of international human rights instruments. It is regarded as one of the most fundamental rights and one of the most necessary to enjoy in order to enjoy other rights. As has been shown the structure of the right in the different instruments varies, but the core right is nevertheless the same—the right to education should be available to everyone and a denial of the right is almost impossible. Different analytical tools have been developed in order to encompass the complexity of the right to education and the essence of it. What still differ between the different international treaties available are the persons who are protected and able to enjoy the right to education. Sometimes a jurisdictional or territorial clause is included, but how it applies to the right to education within the regional system of EU-migrants who exercise their freedom of movement for a maximum of three months is not clear in the international human rights instruments. The question of responsibility for ensuring the right to education, and which state, in a union of states which have given up some of their sovereignty and some of their immigration control, that is responsible for ensuring the right, is not something that the international treaties are made to regulate. In this legal lacuna a large group of people are finding themselves today. What is clear is that the EU Citizenship Directive must be interpreted in the light of CFR. In turn, CFR is interpreted in the light of ECHR, an instrument which has expressed convincing argumentation that the right to education has to be acknowledged for all persons finding themselves within the territory of a member state. The *Timishev* case undoubtedly reinforces the view that the CFR has to be interpreted in accordance with that judgement and the Citizenship Directive has to be interpreted in accordance with CFR, despite that it is not expressly established. The right to education is a right of a fundamental character, with no explicit exceptions and with no possibilities to strict and narrow interpretations since it would inhibit the purpose and aim of the right itself. In the international human rights law the division between economically active parents exercising their freedom of movement for a maximum of three months and other persons exercising their freedom of movement despite lack of financial resources, is not a problem. The character of the right to education does not enable a possibility to interpret the right differently depending on financial resources and reasons of the residence in the host state.

4 The Swedish Example

This chapter will contextualize what previous chapters have set out and described as the law and case law regarding the free movement of persons. The reasons for people to exercise their freedom of movement for a maximum of three months can differ widely. Except the group of workers' and their children's immediate access to education, a wide range of EU-citizens with different agendas and objectives can use their right to move freely within the Union. It can be a businessman or woman who is temporarily living in another country but who does not qualify as a worker but instead is a self-employed person or a service-provider. It can also be a person who seeks a change in his or her life and moves to another country in order to seek a job. On the other end of the scale are persons who move to another country in hope for better living or in order to gain some money by begging, collecting cans for recycling or selling street-papers. As preceding chapters have demonstrated each of these groups face the same challenge in relation to accessing education for their children in the host member state. In this chapter the situation of Roma persons coming to Sweden will be further explored since it has been an increasing issue in Sweden and the politicians and authorities remain uncertain about what their obligations are and what rights they have to respect when they handle this peculiar situation.¹⁷⁸

Firstly, the situation of Roma as a minority will be developed upon in the context of EU. Thereafter a short description about the factual situation in Sweden will be given. Then an overview of the Swedish legislation on education will be provided. The last parts of this chapter will engage in the concept of begging and whether it can constitute work within the meaning it has in EU law according to the principles laid down in previous chapters. If so, the right to education for the children of Roma beggars is ascertained on that ground. Moreover, it will be explored if there is any other way of solving the problem through the interpretation of the existing legal frameworks in this particular situation.

4.1 Roma and Their Situation in the European Union

This section will give an insight in the work that is carried out in EU for the minority group Roma. An overview will give some insight to the complex situation that is found in Europe today and it will also point out the wide discrimination that the Roma has been, and still is, a target for. To get a general perception on the situation for Roma is important in order to understand underlying conceptions that still today effects decision-making.

¹⁷⁸ See statement from the Ministry of Education and Research in the email communication between the Ministry of Education and Research and the author. See supplement 1.

As already has been stressed out this study will use the Council of Europe (COE) definition of Roma¹⁷⁹. However, it is clear that the definition of Roma may very well differ between persons since it is a term that not yet has been established due to the discrepancies and uncertainties that still exist in regard to the knowledge about the history of the Roma. To use the word Roma in academic writing is of course problematic since in reality the term Roma includes a diverse range of people with different languages, religions, political views and history and different possibilities to access social benefits in the society. To narrow down a diverse population to one word in order to write an academic paper as well as try to clarify legal issues which concern this diverse group, is and will be a simplification. However, sometimes it is necessary to do so in order to get a chance to elucidate the problems and discrimination that are more prevalent among this diverse group.¹⁸⁰

Since the Roma have very different backgrounds when it comes to the language they speak, the religion they believe in and their economic and social welfare situation, it also differs within Europe if they are travellers or sedentary. The majority of the Roma are still today living in eastern-central and the south of Europe even though some have settled in the northern part of Europe.¹⁸¹ The population of Roma in Europe is estimated to be around 10-12 million whence 6 million lives in the EU.¹⁸² It is however hard to estimate the total population of Roma in Europe because not all are registered in a national population register and therefore the estimation may differ.¹⁸³ By attributing Roma the epithet as “*vagabonds, beggars and criminals*”¹⁸⁴ acts of slavery, genocide and assimilation have been justified. Unfortunately, the negative historical representation of Roma is still today very much evident in the European context. The significance and the characteristics of Roma are today heavily decided upon the majority’s will and influence.¹⁸⁵

Firstly, when one handles the identity of Roma one has to separate between ethnic identity and civic identity in order not to confuse the legal implications that follow from the different identities. The former is linked to the Roma identity and the latter is connected to the civic identity that is determined upon the belonging to a nation state such as for example

¹⁷⁹ See footnote 6.

¹⁸⁰ McGary, Aidan, *Roma as a political identity: Exploring representations of Roma in Europe*, Ethnicities 2014 Vol. 14(6), p. 2.

¹⁸¹ Council of Europe, Human Rights of Roma and Travellers in Europe, Council of Europe Publishing, Strasbourg, 2012, p. 31.

¹⁸² European Union Agency for Fundamental Human Rights (FRA): <http://fra.europa.eu/en/theme/roma> accessed: 2015-05-11.

¹⁸³ Gynther, Päivi, *From utopia to quintessence: education law from the viewpoint of Roma and skills deficiency*, Diss. Åbo Akademi, Åbo: Åbo Akademi University, 2006, p. 17.

¹⁸⁴ Stauber, Roni & Vago, Raphael (ed.), *The Roma: a minority in Europe : historical, political and social perspectives*, Central European University Press, Budapest, 2007, p. 8.

¹⁸⁵ McGary, Aidan, *op.cit.* p. 5.

Hungary, Bulgaria or Romania.¹⁸⁶ The Roma have been described as the biggest minority¹⁸⁷ in Europe and in the EU, however there are some who, due to the non-legal binding character and status in international documents of the word “minority” problematize the actual concept and whether Roma fall within the term minority.¹⁸⁸ For the purpose of this study Roma will be dealt with as a minority because the EU has recognized and described Roma as a minority.¹⁸⁹

In the EU the problem of discrimination against Roma and other groups that are exposed for racism and discrimination has been subject for different forms of actions throughout the years. The Directive 2000/43/EC¹⁹⁰ concerning equal treatment irrespective of racial or ethnic origin, addresses both direct and indirect discrimination, harassment and instruction to discriminate.¹⁹¹ The Directive was more modern than existing legislation since it protects all persons and it applies in both public and private sectors. Moreover, the scope of the Directive extends to new spheres that previously have not expressly been protected such as education, health care and housing.^{192 193}

Besides Directive 2000/43/EC the EU has taken further steps in order to combat the inequalities and discrimination that occurs against the Roma in Europe by launching their EU Framework for National Roma Integration strategies up to 2020. This campaign is a step that will engage national member states to diminish the gap between Roma and non-Roma in their access to education, employment, housing and health care. The Member states are required to report to the European Parliament and the Council every year on the national progression in this matter.¹⁹⁴

In relation to this project for Roma Integration within the EU the European Agency for Fundamental Rights (FRA) launches reports on the development

¹⁸⁶ Marushiakova Elena & Popov Vesselin, “Gypsy” groups in Eastern Europe: *Ethnonyms vs. professionyms*, *Romani Studies* 5, Vol. 23, no.1 (2013), p.62.

¹⁸⁷ For the definition of minority see for example Francesco Capotori’s definition in *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, New York, United Nations 1991: *a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members- being nationals of the State - possess ethnic, religious, or linguistic characteristics differing from those of the rest of the population, and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion, or language.*

¹⁸⁸ See for instance: Gynther, Päivi, *From utopia to quintessence: education law from the viewpoint of Roma and skills deficiency*, Diss. Åbo Akademi, Åbo: Åbo Akademi University, 2006, p. 20-28.

¹⁸⁹ See for instance: EU’s webpage “EU and Roma”

http://ec.europa.eu/justice/discrimination/roma/index_en.htm accessed: 2015-05-11.

¹⁹⁰ Directive 2000/43/EC of 29 June implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal L180 19/07/2000 P.0022-0026.

¹⁹¹ See article 2 Directive 2000/43/EC for definitions.

¹⁹² See article 3 Directive 2000/43/EC for the scope of the directive.

¹⁹³ COM (2006)643 Final. On the application of Directive 2000/43/EC.

¹⁹⁴ Report on the Implementation of the EU Framework for National Integration Strategies COM(2014)209 final, p. 1.

in the targeted areas. The most recent report concerning the right to education for Roma was issued in October 2014.¹⁹⁵ The attendance of Roma children in school is considerably lower than for those who are non-Roma and the early drop-outs are higher among the Roma children. In the 11 countries that were reviewed in 2014 (Sweden was not included) the non-attendance of Roma children was 14 % compared to 3 % for children with a non-Roma background. The main reason for these alarming figures for Roma children is a late start in school and irregular attendance that results in early drop-outs.¹⁹⁶

When one studies these figures it is important, for the purpose of this thesis, to remember that the figures are based on the ethnic identity of Roma and included in the survey are both citizens and non-citizens of the country concerned. It is therefore not exclusively a presentation of figures for Roma, exercising their right to free movement to a country in which they are not nationals and as a consequence of that, in the host state, not being able to get access to the education system. The figures presented in the FRA reports are heavily based on the ethnic identity and it makes it impossible to use the study in order to see the access to education for Roma children possessing an EU-citizenship, but residing outside their home country for a maximum of three months. No study has explicitly studied the data for Roma children in this situation referred to in the previous sentence, but based on media and news and observations it could be stated that the school attendance of this group is very low.^{197 198}

4.2 The Present Situation of Roma European Union Migrants in Sweden

The situation of Roma EU-migrants coming to Sweden by exercising their right to freedom of movement has been heavily reported in the news in Sweden during the last year.¹⁹⁹ The increase in EU-migrants with Roma background coming to Sweden was significant in 2014 and the reason for

¹⁹⁵ FRA, Education: *The situation of Roma in 11 EU Member States*, Luxemburg, 2014. Accessible at http://fra.europa.eu/sites/default/files/fra-2014_roma-survey_education_tk0113748enc.pdf accessed: 2015-05-11.

¹⁹⁶ FRA, Education: *The situation of Roma in 11 EU Member States*, Luxemburg, 2014, p. 11-12.

¹⁹⁷ FRA, Education: *op.cit.*, p. 56-57.

¹⁹⁸ For reference to news papers' reports on the issue see chapter 5.1.

¹⁹⁹ A number of newspapers have reported on the issue. See for instance: Sundén Jelmini, Maria, Svenska Dagbladet, *Få barn till EU-migranter får skolgång*, http://www.svd.se/nyheter/inrikes/fa-barn-till-eu-migranter-far-skolgang_4224581.svd published 2 January 2015, accessed 2015-05-11.

TT/Göteborgs Posten, *EU-migranter kommunernas ansvar*, <http://www.gp.se/nyheter/sverige/1.2528973--eu-migranter-kommunernas-ansvar->, published 26 October 2014, accessed 2015-05-11.

Wendle, Joel, Sveriges Radio, *Hemlösa EU-migranter i 67 kommuner* <http://sverigesradio.se/sida/artikel.aspx?programid=83&artikel=5740442>, published 23 December 2013, accessed 2015-05-11.

this migration is, according to many of the interviewed Roma persons in the news, their hope to get a job and a better living in Sweden.²⁰⁰ Romania and Bulgaria, situated in the Eastern Europe are where the majority of the Roma population in the EU lives today although the Roma is a diverse group spread all over the world.²⁰¹ The increase in Roma migrants and the reason behind it is not fully established. What one can note is that Romania and Bulgaria became members of the EU in 2007²⁰² but until the year 2014 the countries' citizens had restrictions on their freedom of movement. These restrictions meant that a work permit was needed in order to freely move to some of the member countries. The restrictions were gradually released and on the 1st of January 2014 they were fully removed. What impact the releasing of the restrictions can have had on the increased mobility and the actual number of Roma EU-migrants exercising their freedom of movement is not statistically confirmed.²⁰³

The exact number of Roma EU-migrants in Sweden is hard to estimate since there is no registration criterion when one is entering an EU member state as a Union Citizen.²⁰⁴ According to a survey carried out by the Swedish Television (Sveriges Television) in April 2015, approximately 4000 homeless EU-migrants live in 241 out of the 290 municipalities that exist in Sweden. However, this survey is not comprehensive and amongst the municipalities that answered the survey there were some who were uncertain about the actual amount of Roma EU-migrants in their municipality. Moreover, the amount of EU-migrants in Sweden has doubled in one year.²⁰⁵

The living conditions of the unknown, but significant, number of Roma EU-migrants in Sweden are generally poor as well as their access to social benefits and access to education. In late 2014 the access to education for the accompanying children to those Roma EU-migrants differed among the municipalities and The Swedish National Agency for Education has clearly expressed its view that the legal position for those children is uncertain both in relation to national law and its relation to EU-law.²⁰⁶ The Ministry for Education and Research has confirmed this statement.²⁰⁷ The municipalities

²⁰⁰ Ibid.

²⁰¹ Council of Europe, Council of Europe Descriptive Glossary of terms relating to Roma issues, 2012, p. 5-6.

²⁰² For more information about the accession of Bulgaria and Romania to the EU see the European Union's Official Journal OJ L 157 of 25 April 2005, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:157:SOM:EN:HTML>

²⁰³ European Commission, *End of restrictions on free movement of workers from Bulgaria and Romania* - statement by László Andor, European Commissioner for Employment, Social Affairs and Inclusion, Memo/14/1, Brussels, 2014.

²⁰⁴ The freedom of movement is deliberated upon in the previous chapter 2.

²⁰⁵ Olsson, Jonas; Axelsdotter Olsson, Karin, *Dubbelt så många tiggande Eu-migranter senaste året*, <http://www.svt.se/nyheter/inrikes/dubbelt-sa-manga-tiggande-eu-migranter-senaste-aret> accessed 2015-05-11.

²⁰⁶ See email communication between Sofia Kalin, lawyer at Skolverket, and the author. Supplement 2.

²⁰⁷ See statement from the Ministry of Education and Research in the email communication between the Ministry of Education and Research and the author. See supplement 1.

in Sweden therefore differ in their treatment of those children and it is only in some municipalities that these children have access to education.^{208 209}

The present situation in Sweden shows that the Government as well as the municipalities are finding themselves in a situation that is difficult to solve due to the differences in legal frameworks in their mutual application. The legal lacuna that exists for this specific group of EU-migrants results in people not getting access to the human rights that they are entitled to according to international legislation. Moreover this situation shows that loopholes in the legislation lead to that human rights are being overridden when they are needed at its most.

4.2.1 Swedish Legislation on Education

This section will further examine the right to education, but in a national context. For the purpose of this study it is important to know, when one contextualizes the problem in a national setting, how the legal frameworks coexist with EU and international legislation. The national Education Act in Sweden, Skollagen, sets out the detailed provisions regulating the content and form of education in Sweden. In Sweden a new Education Act (Skollagen)²¹⁰ entered into force in 2010. The Swedish system of access to education is based on the registration of the child in the national population register. For those children who are nationally registered there is compulsory school attendance from the year the child turn seven years old and it lasts until the child has turned 16 (9 years of compulsory education).²¹¹

The right to education, however, is not dependent upon the population register. Everyone that is nationally registered automatically has a right to education. This right is extended to other groups of children who need education but are not nationally registered. The aim with the new law and its amendment was to make it clearer for certain groups of children that they enjoy a right to education and these groups include asylum seekers, undocumented children and those who have the right to education as a result of EU law.²¹²

The objective of including other groups than nationals in the right to education is evident through the legislation and especially its later amendment in 2013. The reasoning behind the extension of the right to education to undocumented migrants is that the government considered it

²⁰⁸ Kurkiala Medbo, Tova- Sveriges Radio, *Svårt med skola för barn till EU-migranter* <http://sverigesradio.se/sida/artikel.aspx?programid=114&artikel=5996267> published 21 october 2014, accessed 2015-05-11.

²⁰⁹ Sundén Jelmini, Maria-Svenska Dagbladet, *Få barn till EU-migranter får skolgång*, http://www.svd.se/nyheter/inrikes/fa-barn-till-eu-migranter-far-skolgang_4224581.svd published 2 january 2015, accessed 2015-05-11.

²¹⁰ Skollag SFS: 2010:800.

²¹¹ Skollag 2010:800 chapter 7 para.10 and 12.

²¹² Prop. 2009/10:165 p. 333, 589-590.

important to offer education to children who find themselves in this difficult situation and it also raises their prospects of better wellbeing psychologically, physically and socially.²¹³

In the government bill concerning the amendment to extend the group of persons to include “all” children, i.e. undocumented migrants, the government held a discussion about the potential need of having a delimitation of the target group as to the time the children were supposed to be in Sweden. The government concluded however that such a limitation would be hard to make in practice since very often these children and their families move between municipalities to hide and there is no possibility to estimate the time they will stay in Sweden. Moreover, the Government argues that for those staying less than three to four months there is “*probably no need for education and they will to a very low extent make such claims*”^{214, 215}.

The only group that, according to the Government in the government bill 2012/13:58, is not entitled to the right to education is children who have time-limited residence permits for a maximum of one year. Considerations will be taken in relation to the question if the right should be extended to include also this group of children.²¹⁶ The problematic formulation is that the Education Act entitles “*children who has the right to education as a result of EU-law*”²¹⁷ to invoke the right to education. Nevertheless, as has been shown no such right to education is mentioned in the EU Citizenship Directive, the case law or any other EU-instrument for the first three months. Therefore, the national and regional frameworks seem to leave the situation for EU-migrants who not are worker’s children unregulated.²¹⁸

The status of the CRC in Sweden is of importance for how the convention is and should be applied in legal settings. Sweden has ratified CRC and it is therefore legally binding in the state. However, the CRC is not incorporated in Swedish legislation which has raised some concern because it might lead to that authorities are able to ignore the legal binding effect of the CRC more easily. Swedish laws should be changed and adapted after the CRC but that can be a less effective way of securing the rights enshrined in CRC. Voices have been raised that the CRC should be legislated and incorporated in Swedish law in order to make it more efficient.²¹⁹

²¹³ Prop. 2012/13:58 p. 12.

²¹⁴ Prop. 2012/13:58 p. 14.

²¹⁵ Ibid, p.14.

²¹⁶ Ibid, p. 16-17.

²¹⁷ Ibid, p. 16. In Swedish: ”...barn som har rätt till utbildning till följd av EU-rätten...”.

²¹⁸ Ibid, p. 16.

²¹⁹ Unicef, <https://unicef.se/projekt/gor-barnkonventionen-till-lag> accessed: 2015-05-11.

4.3 Does a Right to Education Exist in the Roma Context?

This section will use the knowledge presented previously about the definition of work within the EU. In the specific context of Roma EU-migrants in Sweden who beg, collect cans or sell street papers, it will be analysed if their activity possibly could amount to work and thereby give their children a right to education. Firstly a discussion on the definition of begging will be presented in order to see its relevance and connection to the concept of work. Thereafter the definition of begging, collecting cans and sales of street papers will be applied to the criteria that have been described in chapter 2 as regards the case law from ECJ on work and what can be included in the concept. Since the status of the parent as a self-employed person or job-seeking person does not entitle the child to an express right to education, begging will not be contextualised in relation to self-employment and job-seeking.

4.3.1 The Definition of Begging

Despite that begging has existed and been documented for an indefinite, but long period of time, no universal definition of the activity has been established in any of the disciplines that have been working with it. Begging as a concept is scarcely documented as a research field in itself, instead it has been studied through the lenses of legal, social, historical or cultural theories. This lack of consensus and differentiated definitions and explanations of the concept of begging constitutes a problem when one has to work with it and understand its implications in different situations. In the situation on which this thesis is built it is important to know the definition of begging in order to see what legal implications that follow from it and especially for the purpose of this study, if it can be considered work within the meaning of EU law and jurisprudence.²²⁰

Begging can in some states constitute a criminal act whereas in other states it is accepted as a form of gaining an income. Its definition ranges from wide to narrow and some definitions tend to label it as a form of work. In an attempt to crystalize a minimum definition of begging certain elements can be identified. Begging is often described as: “*a public request for money, food, or other goods, with little or nothing of value given in return*”^{221, 222}. The relationship that emerges between the giver and the receiver is often

²²⁰ Brito, Oliver, *Definitional Paradox and Legal Heterogeneity: Towards a Comprehensive and Operational Definition of Begging*, Asian Social Work and Policy Review 7 (2013), Wiley Publishing Asia Pty Ltd (2013), p. 228-229.

²²¹ Ibid, p. 232.

²²² For comparison see the definition of begging by Philip Lynch: “*Begging, or gathering alms, can be defined as the solicitation of a voluntary unilateral gift - most often money – in a public place*”. Lynch, Philip, *Understanding and Responding to Begging*, Vol 29 Melbourne University Law Review 518 (2005).

unequal and the common perception is that the giver is doing an act of charity and goodness whilst the receiver is perceived as an immoral person, a perception which often creates stigma to the beggars. Begging is considered to be a “*street-level economic activity*”²²³ amongst some researchers but among the majority of the beggars themselves it is perceived as a work.²²⁴

From both a materialistic and a symbolic perspective it can be argued that begging is similar to an economic activity comparable to work. There might be cases where the beggar is offering something material by framing it as sale of something in order not to be disturbed in his or her activity. By framing begging as sales it implies that there exists some kind of authorization. In other cases the symbolic interaction between the giver and receiver can be seen as a win-win situation, for example in religious situations or when the givers’ fortunate situations are legitimized by the alms-giving. However, there are critiques against the labelling of begging, or panhandling, as a form of work. Brito claims that the lack of a productive element of a material character is the springing point where work and begging differs. Regardless of whether begging should be considered a formal, or more likely, an informal form of work, the productivity is lacking according to Brito. Instead Brito draws parallels between begging, politics and religion. He argues that they all share the common feature that they raise awareness about social issues. Brito justifies the similarities with other areas such as religion and politics by claiming that begging can be regarded as “*an indirect contribution to the democratic process*”²²⁵. However, there are several forms of work today which do not include any material character such as priesthood and psychologists etc.

Conclusively, there does not exist any universal, formal definition of begging. The lack of a universal definition gives space for different treatment and the legal implications of the act are highly diverging.²²⁶ Due to the need of a specified definition of a word in order to use it for legal purposes it is a shortcoming that no general definition of begging is at hand. The next subsection will deliberate on how work has been defined in the case law from ECJ and how the term has evolved and if there is an opening for an inclusion of begging in the concept of work and in the extension a right to education for those children who accompany their parents to another member state.

²²³ Brito, Oliver, *op.cit.* p. 232.

²²⁴ *Ibid.*, p.232.

²²⁵ *Ibid.* p. 233- 234.

²²⁶ For instance the Swedish Nationalencyklopedin has defined ”begging” as: ”*försöka beveka någon att lindra ens armod genom att skänka en gåva*”. Nationalencyklopedins ordbok, språkdata, Göteborg, 1996.

4.3.2 Is Begging, Collecting Cans and Sales of Street Papers Work within European Union Law?

By applying the circumstances that beggars or persons who are collecting cans or selling street papers are operating in, to the concept of worker and the conditions that have to be fulfilled, this study will try to determine whether it is possible to consider begging, collecting cans or selling street papers as work within the context of EU law. Notably is that the situation of begging, collecting cans or selling street papers has not been deliberated upon by ECJ in relation to the concept of work. This comparison is therefore based on possible explanations and arguments that can be put forward in order to see if the activities fall within or outside the scope of application for the concept of workers within EU law.

The criteria in relation to work described in chapter 2.2.1:

- the activity must last for a certain period,²²⁷
- there must be a relationship of subordination,²²⁸
- the person carrying out the activities must be remunerated and,²²⁹
- there must be real and genuine economic activity²³⁰

The criterion that the work should last for a certain period of time and should not be marginal or ancillary is, if we apply it to begging, collecting cans or selling street papers, most likely fulfilled. The ECJ has concluded that even part-time work which is not fully economically substantive in order to live is counted as work, as described above.²³¹ The lack of a formal employment contract, which is the case for beggars, creates obstacles when one labels and categorizes an economic activity in terms of work.

The first work-criterion is closely linked to the third one concerning remuneration. The crucial factor is if beggars, collectors or sellers of street papers actually can survive and live on the money they get. This is of course uncertain since the amount may vary from day to day and it is not corresponding to the hours they are active. The ECJ has though been quite clear that even though the amount in itself is not sufficient the person can have other incomes or someone in the family that they might rely on economically. The productivity and the income in itself can not determine whether it constitutes work as long as there actually is a remuneration.²³²

²²⁷ Opinion of the Advocate General Geelhoed in the case C-456/02 Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS) (2004), para. 35. The three conditions are laid down in C-66/85 Lawrie-Blum (1986), paragraph 17, C-3444/87 Bettray (1989), paragraph 12, and C-337/97 Meeusen (1999), paragraph 13.

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Ibid, para. 45.

²³¹ C-53/81 D.M. Levin v Staatssecretaris van Justitie (1982). See reasoning in chapter 4.1.

²³² Ibid.

The subordination between an employer and an employee is a criterion that has been tackled differently by the ECJ, which implies that it is not a strict and formal condition that has to be met. The form of subordination varies and no border has explicitly been drawn but the *Steymann*²³³ case indicates, as discussed in subsection 2.2.1., that flexibility is possible. One can argue that there existed a relationship between the person and the religious organisation that enabled the commercial activity that engaged the person as a worker. For a beggar there is no relationship, except if the activity is organized, which sometimes is the case. It is important to differ between organized in a non- criminal sense and organized in a criminal sense i.e. trafficking. The activity can be organized in the sense that the persons are coming together, as families, relatives or friends, to another member state, for example Sweden. In the host state they might structure their activity in a way that they decide who shall be at a specific place, helping each other with claiming places etc. This behaviour is not criminalized, but it can form a relationship of subordination. Trafficking on the other side is criminalized, since there is a leader who in order to help the persons to transport themselves to “good” begging places and countries take an exorbitant price. That is certainly a form of subordination, but it is criminalized²³⁴ and a lawful employment is not possible.²³⁵, ²³⁶

Is begging, collecting cans or sales of street papers then a real and genuine economic activity within the meaning it has in EU law? Once again the lines in this case are blurred. From the *Betray*²³⁷ case, discussed in subsection 2.2.1., it is noted that rehabilitative and reintegration work is not considered to be work since it was adopted after the individuals mental and physical state. It is also clear that the purpose of the economic activity in the *Betray* case was rather social in character than that of an economic one. The purely economic based purpose of begging, collecting cans or selling street papers points in the direction that it can be labelled as work in that sense. However, it is far from certain that the criteria outlined above are fulfilled simultaneously and there is no clear-cut answer.

The new form of gaining money for vulnerable persons by selling street papers, has also been subject to review by domestic courts. What label of economic activity that selling street-papers should get is a noteworthy aspect of the work-begging relationship. In a case of a Romanian street-paper seller in Bristol, United Kingdom, the seller wanted housing benefit which was dependent on the residence and her status as a worker. The question was whether the seller could be classified as a worker. The judge

²³³ C196/87 Udo Steyermann v Staatssecretaris van Justitie (1988).

²³⁴ See for instance: Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report (Warsaw, 16.V.2005) Council of Europe Treaty Series No. 197.

²³⁵ Dagens Nyheter, *DNs reporter om tiggeriet i Stockholm*, <http://www.dn.se/sthlm/dns-reporter-om-tiggeriet-i-stockholm/> published 2014-10-04, accessed:2015-05-11.

²³⁶ European Commission- Migration and Home Affairs: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/trafficking-in-human-beings/index_en.htm accessed 2015-05-18.

²³⁷ C- 344/87 Betray v Staatssecretaris van Justitie (1989).

concluded that the seller was to be labelled as a self-employed person using the ECJ criteria deliberated upon previously stating that: “*For someone to be regarded as a worker the work must be genuine and effective and not marginal or ancillary. Factors to be taken into account in assessing this are the period of employment, the number of hours worked, the level of remuneration and whether the work was regular or erratic. The ECJ in Jany made it plain that a similar test of genuineness and effectiveness was applicable to self-employment.*”.²³⁸ What then is the big difference of selling a street-paper and begging? The only difference seems to be the framing of it in market-based relations that legitimize the street-paper vending as work.²³⁹

4.3.3 Conclusion on the Right to Education in the Roma Context

The conclusion is that even though an EU-migrant has the aim of seeking a job and stays in Sweden with the family and children, EU law in combination with the national legislation of Sweden, does not expressly guarantee the access to education for this group of children. The parents are neither considered workers and entitled to the same social benefits, nor are they undocumented migrants or asylum seekers that due to that status are enabled to get access to education for their children.

This subchapter has aimed at investigating the specific context in which Roma EU-migrants find themselves when coming to Sweden by exercising their freedom of movement. They are begging, collecting cans or selling street papers with ambitions of getting money to live and support their family. They carry out an economic activity that is well known since centuries, but not shaped in a formal structure that makes it respected as a work. This subchapter has tried to insert a livelihood and a way to support oneself in the legal framework of EU. It has provided a practical example of how that the right to education for the children is first and foremost dependent on the status of the parent and secondly the status of the parent is dependent upon which formal requirements that exist for an activity to be considered work. These requirements are still attributable to the history of the EU as an organization with economic and market based purposes and not to an organization with human rights in focus.

4.4 Concluding Remarks

If children can not invoke the status of the parent as a worker in order to get the right to education, then what is the children left to rely on? As has been

²³⁸ Bristol City Council v FV [2011] UKUT 494 (AAC) (21 December 2011), para 8.

²³⁹ For a more thorough analysis of street-paper vending see: Cockburn, J.,L. Patrick, *Street Papers, Work and Begging: “Experimenting” at the Margins of Economic Legitimacy*, Journal of Cultural Economy 7:2, 2013 p. 145-160.

shown in previous chapters, the equal treatment provision in EU law might enable the right to education due to its fundamental character. What becomes clear when different legal frameworks such as international, regional and national legislation of the right to education are coexisting is that, if they do not correspond then the individual might be left in a legal lacuna. The critical point seems to be that if EU law does not explicitly provide for the right to education, but the international conventions do, at least in relation to the states which have signed them, which legal framework is the one to adhere to in a national context such as the one described above?

The purpose of showing a national example is to concretise how EU law and the international legislation operate in a national context because it is in national contexts that these two supranational frameworks come into play. As has been shown the national legislation in Sweden did not provide any answer to the question whether EU migrants that are exercising their freedom of movement for a maximum of three months enjoy a right to education in Sweden. Even though the Swedish law makes reference to EU law when it aims at encompass EU-migrating children's right to education, it fails to fill the legal loophole that EU law in itself is upholding by not making any explicit reference for this particular group of children. When one has to solve a legal dilemma like the one at hand it would be much more simple if an existing hierarchy of norms could solve the legal dilemma. However, that does not exist when it comes to EU law and international law. Much has been written on the interplay between these two frameworks and the ECJ has also dealt with it in several cases, but not yet reached a coherent approach.²⁴⁰ The next chapter will further engage in an analysis of the coexistence of the legal frameworks based on the findings in the study.

²⁴⁰ See for instance: C-308/06 Intertanko and Others and Joined Cases C-402/05 P and C-415/05 Yassin Abdullah Kadi and Al Barakaat International Foundation V Council of the European Union And Commission of the European Communities

5 Analysis

The previous chapters have engaged in the legal frameworks as well as the existing case law that concerns the research question. The aim of this chapter is to do an analysis of the outcome of the previous chapters and determine how well the different legal frameworks answered to the research question. Moreover, an analysis of how the legal uncertainty concerning the right to education for EU-migrating children in the host state during an initial and temporary period can be solved will be presented, according to the author's view.

The research question is if children who exercise their freedom of movement for a maximum of three months enjoy a right to education in the host state. The study concerns a specific group (EU-citizens exercising their freedom of movement for a maximum of three months) and a specific right (the right to education). In order to find a solution to the right to education, the study started, in chapter 2, with a review of the legal framework within the EU concerning the situation and the particular group of persons specified for this study. The answer was that the only way to find an explicit right to education in these circumstances was if the child's parent could be classified as a worker. Whether the equal treatment provision enables an interpretation that gives an immediate right to education is *possible*, but not explicitly established for this particular group during this period.

Due to the lack of a satisfactory answer on the research question based only on EU law, elaborated on in chapter 2, the answer was sought in international human rights conventions as well as the EU's own fundamental rights charter, CFR, in chapter 3. The purpose was to see if the right to education was made conditional or absolute depending on the situation the children were in, i.e. if the right was restricted due to the time-limit in the host state or, for example, the financial resources of the parents. Several international conventions were reviewed and although discrepancies do occur between them, the overall impact is that there does exist a right to education through the wording of "everyone" or "no person shall be denied". However, some uncertainty is still evident due to the fact that international obligations are concluded between, for example the UN and the state, and the interplay with EU is not settled in relation to the obligations agreed between the member state and an international treaty. The fact that the EU legislation enables a new form of "citizenship", creating free movement for persons, also opens up for having persons within the state's territory that not are citizens of the state, but yet stays there lawfully and are under the state's jurisdiction. The question is then if the international obligations include this group of EU citizens who stay in the host state temporarily as a consequence of EU law? Although the international treaties in themselves seem to be more convinced about the universal right to education, it is still not evident which one of EU law and international law that prevails, or how they interact.

The fourth chapter was taking the question further to a national level, in order to see if the national context possibly could generate an answer. An example of Roma EU-migrating children in Sweden was given in order to see how these legal frameworks operate in a national context where the additional element of national legislation was added. The example was given due to the express concern by the Swedish National Agency for Education in regard to the right to education for Roma migrants in Sweden, even though the problem concerns all EU-migrants in this particular situation. By using the criteria for work, the example of Roma EU-migrants that are begging, collecting cans or selling street papers was examined. The applicability of the work criteria still left this particular group with no strong protection due to the lack of fully convincing arguments that begging constitutes an economic activity comparable to work, within the context of the ECJ case law. The legal uncertainty for other groups of persons exercising their freedom of movement for this limited time, such as self-employed and job-seekers, was, even though not put in a national context, still unclear based on the outcomes of chapter 2 and 3.

The research question was: *Do children have a right to education in the host state when they exercise their freedom of movement within the European Union for a maximum of three months?* The next sections will summarize what has been deduced as an answer to it.

By analysing EU law it became clear that EU has shared competence to regulate the freedom of movement for persons and it has supporting competence in matters relating to education. The only express regulation of education in situations where freedom of movement is engaged, i.e. where these two matters of concern (free movement and education) are triggered simultaneously, is in regulation 492/2011 regarding the right to education for workers' children. Since the member states are free to regulate on educational matters, the right to education for all other children, who do not classify as children to working parents, becomes a matter for the member state.

Member states that are bound by international treaties, such as CRC, ICESCR and ECHR, have to follow the obligations laid down therein. The conclusion is that all persons that are within a member state's territory or jurisdiction are entitled to education due to the lack of express requirement of length of stay in a state in order to get access to a right. Conclusively, if a state, which is bound by international human rights conventions, does not regulate specifically that children who are exercising their freedom of movement for a maximum of three months do *not* enjoy a right to education, which would be a breach of international human rights law, there does exist a right to education. For those who are children to workers there exists automatically a right to education due to the character of the competence the EU has in the area of free movement. Since a right to education for worker's children is in conformity with international standards, any conflict or legal

lacuna does not exist for this sub-group within the larger group of children moving freely within the EU for a maximum of three months.

Since the EU Citizenship Directive should be interpreted in accordance with CFR and CFR in its turn should be interpreted in accordance with ECHR it turns out that the free movement of persons within the EU and the rights they are entitled to are those enshrined in ECHR, regardless of the length of stay in the host state. The ECtHR has clearly stated that the right to education is fundamental, no exceptions exist and it is a right that can not be interpreted strictly. That is a strong argument for regarding the right to have an absolute character, where no derogations are acceptable.

The methodology of the ECJ that was described in the chapter 1.2 is also of high relevance when a final analysis of the right education in this specific context should be presented. The teleological approach certainly can extend the scope of a directive to be more in harmony with the aim of the EU itself. If the right at stake inhibits in a persons life to the extent that free movement is threatened, then the ECJ tends to do a flexible and generous interpretation- at least when the person does contribute to the economic market. The aim of the EU is not to be a pure human rights organization, but by creating the CFR and acknowledge the importance of ECHR, and adhere to its reasoning of level of protection, it would be hard to find that the right to education is possible to derogate from, regardless of length of stay in the host state and the economic status of the parents.

5.1 Future Considerations

Although there seem to be more convincing arguments for finding a right to education for children in the particular situation that this thesis has investigated, it is not automatically a clear-cut solution without question marks and issues for further discussion. Some of the questions and thoughts that the writing of this thesis has given rise to will be deliberated upon shortly in the following.

Firstly, the fact that the EU is created as a union with strong similarities with a state causes questions of how strong the state sovereignty of the national states is. With reduced border control, the state borders are less strict and sovereignty does not have the same meaning as it has for other states. This creates new rules and legislative measures e.g. questions as migration. When a right enshrined in an international convention, such as the right to education, is claimed by a EU-citizen it causes concern if the person is not a national of the host state. The international treaties, where certain rights are laid down, are signed by national states, not by the EU. Who are included and can rely on the rights enshrined in an international convention? Is it nationals, EU-citizens, or only some EU-citizens? The jurisdictionary or territorial clauses included in some of the international conventions are probably not adopted after a "state" as the EU, where territory and jurisdiction are different from the traditional national

perspective. With a more open border control between the EU member states the question of the burden of the responsibility to ensure rights for its citizens arises. Do states have an extra-territorial obligation to ensure rights for those citizens who only temporarily exercise their freedom of movement to another member state? Does EU free movement law create a new form of responsibility for states regardless of if the persons are staying in the host state temporarily or for longer periods fulfilling the criteria for having right of residence? These are questions that arise in relation to EU free movement and the full enjoyment of human rights, questions that have become evident through this study, but remain to be answered within the framework of another research question.

Secondly, what has been remarkable throughout this work is that although the right to primary education is a topic that through its nature only involves children, the main part of EU legalisation that has been reviewed has concerned the status of the children's parents. Children's express right to education is dependent on their parents' economic status, in order to gain access to the right, which implies that children, who are nationals of one EU member state, not fully can enjoy their possession of a EU citizenship. The notion of the EU citizenship has not been without critique and some of the problems were addressed in short in chapter 2.1.2. A more thorough analysis of the concept of EU citizenship would be interesting. For example if the construction of the EU, based on economic values, entails structures that discriminates certain groups such as children and women. That is a question that needs to be further explored for a better understanding of what can be done in order to be an organization that is based on equal treatment.

Lastly, as was shown by the previous chapter, exemplifying the research question in the context on Roma and their access to the right to education, it is obvious that it is not only children and women that implicitly, through the structure of the EU, become excluded. The EU is initially created after a western view on work and economic livelihood. The Roma and their livelihood do not fit into the frame set up by the market-based EU creators. The concept of work and living is different between cultures and the EU seem to, by adopting certain requirements for fulfilling, for example the right of residence, preserve values and livelihoods that only are in favour of certain cultures whilst others, such as Roma might be excluded. These concerns were raised through the process and work of this study. Even though some of its aspects were touched upon by the access to education during a temporary stay in the host state, there is a lot left to discover which most likely does not favour a person with a Roma livelihood and culture.

6 Conclusion

That a right to primary education is one of the most fundamental rights that have to be fulfilled for a person to be able to become a citizen with full insight and participation in the democratic life is highly uncontested. More concern arises in relation to which state that is responsible for respecting, protecting and fulfilling this right when it concerns children who not have the nationality of the state. As has been shown the right to education for migrants might be problematic, but it seems more likely that a right to education does exist for this particular group than that it does not.

The legal dilemma arises when an organization of states, such as the EU, open up borders which enables a kind of migration that does not fit in the ordinary definition of the word. The quasi citizenship that a citizenship of the EU implies facilitates movements and residence in a union of states, but the rights for the individual and the division of the responsibilities for the states is not clear-cut. The aim of this thesis has been to investigate the legal frameworks that regulate the situation for children who exercise their freedom of movement for a maximum of three months and whether those children do enjoy a right to education in the host state. It has clearly been a bumpy road and many inconsistencies have occurred. The most striking thing is the economic underpinnings of the EU that still influence the access and enjoyment of fundamental human rights.

The frameworks for international human rights have been more clear in their message, there does exist a right to education for all children within a state's jurisdiction. The greatest concern with a statement like that is that those international instruments are created for states, which are able to decide on their border control, not for a union of states where the border-control is reduced. However, it is hard to neglect the fact that human rights should be guaranteed for all within a state's jurisdiction. The judgements from ECtHR indicate that the right to education has a fundamental character that makes it almost impossible to derogate from. Due to reference from the EU Citizenship Directive, to the EU's own Charter on Fundamental Rights which in its turn refer to ECHR it is more easy and convincing to declare that the right to primary education exists to all children who exercise their freedom of movement only temporarily, but yet lawfully. That these kinds of movements between the states in the EU do not only create opportunities, but also new legal dilemmas is this study a proof of. When the border control between EU member states diminishes, the legal uncertainties in the host states increase for the EU-citizens. That the economic incentives of free movement came before the human rights consideration is traceable and obvious in the EU legal framework. The quasi EU citizenship that more than 505 million²⁴¹ people possess still has a lot to show if equal treatment and human rights are values that should be associated with the EU.

²⁴¹ Eurostats statistics explained website: http://ec.europa.eu/eurostat/statistics-explained/index.php/Population_and_population_change_statistics accessed 2015-05-11.

Supplement 1



REGERINGSKANSLIET

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U2015/238/S

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*Skolenheten
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Hej Hedvig,

tack för ditt brev till Utbildningsdepartementet. Rätten till utbildning regleras i skollagen (2010:800). Enligt skollagen har barn som är bosatta i Sverige rätt till utbildning. Med bosatt i landet avses i skollagen den som ska vara folkbokförd här enligt folkbokföringslagen (1991:481). Dessa barn har skolplikt fr.o.m. sju års ålder. Den som har skolplikt har rätt till kostnadsfri utbildning.

Det finns också barn som utan att vara folkbokförda i Sverige ska anses som bosatta i Sverige vid tillämpningen av skollagen. Dessa barn har inte skolplikt, men de har samma rätt till utbildning som skolpliktiga barn. Detta gäller t.ex. asylsökande barn och barn som vistas i Sverige utan stöd av myndighetsbeslut eller författning, så kallade papperslösa barn. För dessa barn är det frivilligt att utnyttja rätten till utbildning. Sådana barn har även rätt till utbildning inom gymnasieskolan eller gymnasiesärskolan, men för det krävs i vissa fall att de påbörjar sina studier där före 18 års ålder.

De barn som är medborgare i andra EU-länder och vistas i Sverige med stöd av rätten att vistas i ett annat EU-land i högst tre månader saknar rätt till utbildning enligt skollagen.

Kommuner kan ansöka om statsbidrag för utbildningskostnader för asylsökande barn och barn som vistas i landet utan tillstånd.

Med vänlig hälsning

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Supplement 2

Från: Hedvig Areskoug <hedvig.areskoug@gmail.com>
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Datum: 2015-01-15 11:41
Ärende: Fråga inför examensarbete kring EU-migranternas rätt till skolgång

Hej Sofia,

Jag är juriststudent på Lunds universitet (International Human Rights Law) och ska till våren skriva mitt examensarbete som ska behandla EU-migranternas rätt till utbildning i Sverige. Fokus i uppsatsen kommer att vara på de EU-migranter som åker fram och tillbaka mellan sitt hemland och Sverige och därmed stannar relativt korta perioder i Sverige. Jag läste på Sveriges Radio att du var intervjuad (det var även så jag fick nys om uppsatsämnet) i oktober förra året i frågan (<http://sverigesradio.se/sida/artikel.aspx?programid=1646&artikel=5996013>).

I uppsatsen tänker jag redogöra för hur såväl nationell som EU-rätt samspelar med internationella konventioner. Framst kommer uppsatsen beröra den fria rörligheten för personer i relation till rätten till utbildning. I SR:s artikel så uppges rätten till utbildning för EU-migranter som kommer till Sverige under dessa förutsättningar (att tigga) vara oreglerat. Vad jag undrar är hur Skolverket resonerat i denna fråga för att nå slutsatsen att området är oreglerat? Är det i relation till de barn som stannar i Sverige kortare tid än tre månader som de "faller utanför systemet" eller är det för att, om de stannar mer än tre månader, inte har föräldrar som kan räknas som arbetstagare i dess EU-rättsliga mening som barnen således blir utan utbildning (för att de inte heller anses vara papperslösa efter tre månader)?

Såvitt jag har förstått så finns det i EU-rätten relativt omfattande skydd just för barn som migrerar och deras rätt till skolgång, oavsett föräldrarnas legala status i landet. Därför vore det mycket intressant och givande om du har möjlighet att utveckla hur du och Skolverket ser på den här situationen.

Jag är väldigt tacksam om du finner tid att svara på mitt mejl, men förstår såklart om du har mycket annat att göra!

Mvh,

Hedvig Areskoug

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Till: Hedvig Areskoug <hedvig.areskoug@gmail.com>

Ang. Fråga inför examensarbete kring EU-migranternas rätt till skolgång

Hej Hedvig,

För vissa kategorier av EU-medborgare står det klart att det finns en rätt till utbildning i andra medlemsstater, t.ex. för arbetstagare och deras barn. Deras rätt är reglerad i bl.a. förordning 492/2011 om arbetskraftens fria rörlighet inom unionen och i rättsfall från EU-domstolen. För EU-medborgare som vistas i andra medlemsstater enbart med stöd av den s.k. tremånadersregeln i artikel 6 i rörlighetsdirektivet (2004/38/EG) har vi dock inte kunnat finna rättsligt stöd för att en rätt till utbildning finns.

Om en EU-medborgare stannar kvar i Sverige i längre tid än tre månader utan att få någon annan form av uppehållsrätt eller uppehållstillstånd så vistas han eller hon här utan stöd av myndighetsbeslut eller författning och är med andra ord papperslös. För barn i denna situation finns rätt till utbildning i 29 kap. 2 § 2 stycket 5 skollagen (2010:800).

Jag hoppas att jag tolkat dina frågor rätt. Lycka till med ditt examensarbete!

Med vänlig hälsning

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