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The Right to Adequate Housing for Vulnerable EU Citizens in Sweden

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Summary

Sweden has seen an increased number of homeless EU citizens over the last years. There is no consensus among Swedish municipalities on how to handle the issue of housing for vulnerable EU citizens. The purpose of this thesis is to examine the right to housing and why vulnerable EU citizens cannot access the right. The issue is studied on three levels – human rights law, EU law and domestic Swedish law.

Both the ICESCR and the RESC establishes a right to housing. It has been emphasised that a minimum level of housing should be ensured for everyone, citizens as well as non-citizens. However, states frequently exclude irregular migrants. The implementation of human rights requires a state which is willing to ensure them, and it is therefore difficult for vulnerable EU citizens without a right of residence to access the right to housing. The right of residence is determined by EU law. Freedom of movement is a fundamental principle within the EU. However, Directive 2004/38/EC establishes that only workers, self-employed persons or persons with sufficient resources not to become a burden on the social assistance system have a right of residence for more than three months. Thus, the freedom of movement is not available to persons who cannot access the labour market. Many vulnerable EU citizens are of Roma origin, and there exists a widespread discrimination of Roma on the European labour market. Hence, they cannot enjoy the free movement due to discrimination. This leads to an irregular status, which leads to an inability to access human rights. Moreover, there is no right to housing within Sweden. Housing assistance is instead offered through the social assistance system. Swedish authorities have interpreted the Social Services Act to exclude vulnerable EU citizens without a right of residence from the right to social assistance.

The conclusion reached is that the reason why vulnerable EU citizens cannot access adequate housing lies within all three legal regimes. The main issue is the fact that many vulnerable EU citizens are unable to access the right of residence, since this has an impact on all three levels. The personal scope of the treaties and domestic laws is unclear and Sweden can therefore exclude irregular migrants, although it has been emphasised that everyone is entitled to at least a minimum level of housing.

Sammanfattning

Antalet hemlösa EU-medborgare har ökat i Sverige de senaste åren. Svenska kommuner är inte eniga i frågan om hur bostäder för utsatta EU-medborgare ska hanteras. Denna uppsats undersöker därför rätten till bostad och varför utsatta EU-medborgare inte kan ta del av den. Frågan studeras på tre nivåer - mänskliga rättigheter, EU-lagstiftning och nationell svensk lag.

Både Konventionen om ekonomiska, sociala och kulturella rättigheter och den Europeiska sociala stadgan etablerar en rätt till bostad. Stater ska garantera en miniminivå till alla, medborgare så väl som icke-medborgare. Stater utesluter dock regelbundet utländska medborgare utan laglig rätt att uppehålla sig i landet. Genomförandet av mänskliga rättigheter är beroende av en stat som är villig att garantera rättigheterna. Utsatta EU-medborgare utan uppehållsrätt i Sverige har därför svårt att ta del av rätten till bostad. Den rättsliga ställningen för utsatta EU-medborgare fastställs av EU-lagstiftningen. Den fria rörligheten är en grundläggande princip inom EU. Direktiv 2004/38/EC fastställer att endast arbetstagare, egenföretagare eller personer med tillräckliga tillgångar för att inte bli en belastning på det sociala biståndssystemet har rätt att uppehålla sig i mer än tre månader. Den fria rörligheten är således inte tillgänglig för personer som inte kan komma in på arbetsmarknaden. Många utsatta EU-medborgare är av romskt ursprung, och det förekommer omfattande diskriminering gentemot romer på den europeiska arbetsmarknaden. De kan följaktligen inte åtnjuta den fria rörligheten, på grund av diskriminering. Det finns dessutom ingen lagstadgad rätt till bostad i Sverige. Socialtjänstlagen fastslår att socialbidrag kan ges för kostnader till boende. Socialstyrelsen har dock tolkat lagen så att utsatta EU-medborgare utan uppehållsrätt inte har någon rätt till socialbidrag.

Slutsatsen är att orsaken till att många utsatta EU-medborgare inte kan ta del av rätten till bostad grundar sig i alla tre rättsordningar. Utsatta EU-medborgares bristande möjlighet att få uppehållsrätt i Sverige är det huvudsakliga problemet, eftersom detta påverkar alla tre rättsordningar. Tillämpningen av konventionerna och lagarna är otydlig och stater kan därför utesluta irreguljära migranter, även om det har framhållits att alla ska ha rätt till åtminstone en miniminivå av boende.

Preface

The submission of this thesis marks the end of an era. More than five years have passed since I first set foot in Juridicum. Before I move on, into the unknown future, I would like to take the opportunity to express my gratitude to a couple of persons.

Firstly, my warmest thanks to my beloved friends and family! I couldn't have done this without you. A special thanks to Riad, for convincing me to apply to law school. Who knows where I would have ended up otherwise.

Thanks to everyone in the RWI kitchen, for making this semester enjoyable. I would also like to thank my supervisor Markus Gunneflo, for helpful advice throughout the process of writing this thesis.

Lastly, thank you Erik. For your never-ending love and support. I can't wait to discover the world with you!

Malmö, May 2016

Johanna Grundberg

Abbreviations

CESCR	Committee on Economic, Social and Cultural Rights
CFR	Charter of Fundamental Rights of the European Union
CJEU	European Court of Justice
CoE	Council of Europe
ECHR	European Convention on Human Rights
ECSR	European Committee on Social Rights
ESC	European Social Charter
EU	European Union
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICHRP	International Council of Human Rights Policy
ILO	International Labour Organization
RESC	Revised European Social Charter
TFEU	Treaty of the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations

1 Introduction

1.1 Background

Sweden has seen an increased number of homeless people from other European Union (EU) states over the last years. In 2015, around 5.000 vulnerable EU citizens were living in Sweden, mostly in informal settlements or on the streets.^{1,2} There is no consensus among Swedish municipalities on how the issue of housing for vulnerable EU citizens should be handled. Some municipalities have opened up shelters and camp sites, while others have only offered a ticket home. The issue has been widely discussed in Sweden, and it has been considered as a political question whether vulnerable EU citizens should have a right to housing. This thesis studies the issue from a legal perspective. Article 11 of the International Covenant on Economic, Social and Cultural Rights³ (ICESCR) establishes a right to adequate housing for everyone. It is evident that the right to adequate housing is not ensured for someone who is living on the street or in an informal settlement. Hence, many vulnerable EU citizens in Sweden are not guaranteed the right to housing. The main problem which this thesis aims at examining is why this is the case. The issue is studied on three levels; human rights law, EU law and domestic Swedish law.

The starting point for this thesis is the principle that human rights are universal and apply to everyone. The Universal Declaration of Human Rights⁴ (UDHR) establishes that, “*Everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind*”.⁵ One common idea is that human rights are inherent in the essence of being human.⁶ However, the accuracy of this statement is examined. It is not controversial among states to exclude irregular migrants from the protection of human rights. This thesis examines the application of the right to housing, in order to determine whether everyone is entitled to the right.

¹ SOU 2016:6, *Framtid sökes – Slutredovisning från den nationella samordnaren för utsatta EU-medborgare*, 2016, p. 7. (Hereinafter SOU 2016:6).

² See section 1.5 for a definition of vulnerable EU citizens.

³ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

⁴ *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

⁵ Art. 1 and 2 of the UDHR.

⁶ See for example Donnelly, Jack, *Universal Human Rights in theory and practice*, 2 ed., Cornell University Press, Ithaca, 2003, p. 7.

If human rights are limited in application to non-citizens, it is of importance to examine vulnerable EU citizens' right of residence. Free movement is one of the fundamental freedoms of the EU. The Treaty of the Functioning of the EU⁷ (TFEU) establishes a citizenship of the Union and prescribe that all citizens have the right to move and reside freely.⁸ However, Directive 2004/38/EC⁹, *The Free Movement Directive*, limits the freedom to reside in another state to three months. After three months, free movement is only applicable to workers, self-employed or persons with sufficient resources not to become a burden on the social assistance system.¹⁰ Thus, it is clear that not all EU citizens have an unlimited right to reside in other Member States. This can play a potential role in vulnerable EU citizens' denied possibility to access housing. Moreover, Sweden has a dualistic system. Human rights must therefore be implemented into Swedish law, in order to apply as positive law.¹¹ Thus, domestic Swedish law is of importance for vulnerable EU citizens' access to housing. It is therefore relevant and necessary to examine all three legal regimes, to establish why vulnerable EU citizens cannot access housing.

1.2 Research Question and Purpose

The research question is formulated as:

What role does human rights law, EU law and domestic Swedish law play in vulnerable EU-citizens' inability to access adequate housing in Sweden?

In order to help answer the question, three sub-questions have been formulated;

1. What obligations does Sweden have under the right to housing in international and European human rights law and do they apply to non-citizens?
2. How is the right of residence for vulnerable EU citizens determined according to EU Directive 2004/38/EC on the freedom of movement?

⁷ European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C E 115/01.

⁸ Art. 20.2(a) of the TFEU.

⁹ Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. (Hereinafter Directive 2004/38/EC).

¹⁰ Art. 6 and 7.1(a)-(b) of Directive 2004/38/EC.

¹¹ Denza, Eileen, *The relationship between international and national law*, in Evans, D. Malcolm, *International Law*, 3.ed., Oxford University Press, Oxford, 2010, p. 417.

3. How is the right to adequate housing implemented in domestic Swedish law?

The purpose with this thesis is to examine why vulnerable EU citizens in Sweden have no access to housing. Three different legal regimes are scrutinised in order to answer this – human rights law, EU law and domestic Swedish law. These three regimes are relevant since they all prescribe obligations for Sweden, and thereby have a potential impact on vulnerable EU citizens. The question is raised whether the problem lies within one of the legal systems, or if the answer is to be found in all three of them. Firstly, the provisions on housing in human rights law are studied, with focus on the ICESCR and the revised European Social Charter¹² (RESC). The personal scope of the treaties is moreover examined. The purpose is to determine whether the right to housing applies to everyone or if states can exclude certain groups from the protection. The second legal regime, EU law, is discussed in order to establish whether vulnerable EU citizens' have a right of residence. Directive 2004/38/EC, on the freedom of movement, is examined to conclude how the right of residence shall be determined. The definitions of worker, self-employed and unreasonable burden on the social assistance system are studied in this context. This is relevant since it constitutes the boundaries of the right of residence. The impact of the regulation regarding free movement on vulnerable EU citizens' access to adequate housing is furthermore analysed. Lastly, the implementation of the right to housing within domestic Swedish law is scrutinized. The purpose is to establish whether vulnerable EU citizens have access to the right to housing in Sweden. The Social Services Act, through which people have a right to assistance for housing, is examined and vulnerable EU citizens' access to social assistance is discussed. An analysis of the interaction between the three legal systems is conducted throughout the thesis.

The topic is relevant since there is no consensus among Swedish municipalities on how to handle the issue of housing for vulnerable EU citizens. It is evident that many vulnerable EU citizens have no access to housing, and it is an issue which affects many individuals. It has been treated as a political problem, and different municipalities interpret their obligations differently. This uncertainty implies that a clarification of the legal situation is needed and this thesis is therefore focusing on the legal aspects of the issue.

¹² Council of Europe, *European Social Charter (Revised)*, 3 May 1996, ETS 163.

1.3 Methodology and Material

I have, in this thesis, adopted the traditional legal methodology *legal dogmatic method*, in order to map out the legal position of the right to housing for vulnerable EU citizens. Legal dogmatic method is used to determine and analyse applicable law, by examining both primary and secondary sources. The base in this method is the legal sources, which are analysed in order to highlight issues. Primary sources include treaty texts, domestic law and case law. Secondary sources consist of academic articles, reports and literature by scholars which analyse the primary sources.¹³ Legal dogmatic method distinguishes between *de lege lata*, what the law is, and *de lege ferenda*, what the law ought to be. However, the division is not always clear. In this thesis, the provisions in human rights law, EU law and domestic Swedish law has been examined *de lege lata*. However, the applicable law has also been critically analysed, in order to answer why housing is not ensured for vulnerable EU citizens. A critical perspective on what the law is has been adopted, and potential issues with how the legislation is interpreted today is discussed.

This thesis is written from the perspective that human rights ought to be universal. I am of the opinion that human rights should apply to everyone, everywhere. Human rights can be discussed from two perspectives; as an ideal of how the world ought to be, and as legally binding obligations established in applicable law. The latter perspective can be described as legal positivism. It separates what law *is* and what law *ought to be*. It is the view that law is a social construction, and identified by established legislation and case law.¹⁴ Another perspective is the view that law is a tool to enhance the common good. Sean Coyle has named this perspective idealism. Law can be looked upon as a system of black-letter rules, but at the same time a system of values and principles. When examining social order, both the specific rules and the values behind them are of importance.¹⁵ This thesis discusses human rights from both perspectives. This is especially done in sub-section 2.2.3, where human rights and state sovereignty is discussed.

¹³ For a further discussion on legal dogmatic method see Kleineman, Jan in Korling, Fredric & Zamboni, Mauro (red.), *Juridisk metodlära*, 1. ed., Studentlitteratur, Lund, 2013, p. 21-45.

¹⁴ Harris, James William, *Legal Philosophies*, Butterworths, London, 1980, p. 12ff.

¹⁵ Coyle, Sean, *From positivism to idealism – a study of the moral dimensions of legality*, Ashgate, Aldershot, 2007, p. 125f.

The material which has been used stretches from academic articles and literature by scholars, to United Nations (UN) reports and case law. Both international human rights treaties and domestic Swedish law have been scrutinised. Case law from the UN, the European Committee on Social Rights (ECSR) and Swedish courts have been examined to establish the legal position regarding the right to housing. Case law from the UN and the ECSR are not binding upon states, but is still relevant when studying the interpretation of the treaties. Concluding observations and general comments from the UN have also been examined. These are not binding documents, but constitute guidance for Member States on how to apply the principles. Regarding Swedish domestic law, Swedish Government Official Reports, government bills and *travaux préparatoire* have been studied to analyse the legislators' purpose. Moreover, case law from the European Court of Justice (CJEU) has been used to establish the concepts of workers, self-employment and unreasonable burden within EU. To give an account of the situation of vulnerable EU citizens in Sweden, news media has been examined. Furthermore, academic literature, articles and reports from civil organisations have been used to analyse the legal frameworks and reinforce arguments.

1.4 Delimitations

This thesis is limited to the application of the right to housing in the ICESCR, the RESC and domestic Swedish law for vulnerable EU citizens. Several rights under the European Convention on Human Rights¹⁶ (ECHR) have been interpreted to include aspects of housing rights.¹⁷ However, the main provision on the right to housing in European human rights law is in the RESC, and the focus is therefore on this Charter. There are many issues that would be interesting to examine more closely regarding vulnerable EU citizens, for example the legal situation concerning the right to education. However, the right to housing has been selected since it is a basic right which influence the access to many other rights. It is moreover a topical issue in the Swedish debate today. It would also be of interest to study the issue from a gender perspective, to examine whether or not there is a

¹⁶ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS No. 005, 4 November 1950.

¹⁷ See for example *Marzari v Italy*, Application No. 36448/97, Judgment of 4 May 1999; *Öneryıldız v Turkey*, Application No. 48939/99, Judgment of 30 November 2004; and *Moldovan v Romania (No. 2)*, Application Nos. 41138/98 and 64320/01, Judgment of 12 July 2005.

difference between the access to housing for men and women. However, this thesis is taking an overall perspective, and is therefore not distinguishing between men and women.

The right to adequate housing includes a prohibition of forced evictions. Swedish authorities have carried out many evictions of vulnerable EU citizens' informal settlements over the last couple of years. This is thus an important issue. However, this thesis does not concentrate on the prohibition of forced eviction. Instead, a more general understanding of the right to housing is examined. If states would ensure the right to housing in the first place, the formation of informal settlements would not be necessary and forced evictions would not have to be carried out. Furthermore, vulnerable EU citizens live all over Europe, and the issues of homelessness and informal settlements are not exclusive for Sweden. However, this thesis is limited to the situation in Sweden, due to time and space restrictions. The option of Sweden was chosen because of my connection to the country, and the on-going debate within Sweden on how to handle the issue.

1.5 Terminology

In everyday language, the term *EU migrants* is used to describe homeless EU citizens who are residing within the territory of another EU state. However, this term is problematic. EU citizens have a right to move and reside freely within the Member States. By using the term *EU migrants* to describe only the poor part of people moving within EU, an explicit distinction is made. Free movement is perceived as something positive, while EU migrants are perceived as a problem.¹⁸ To avoid the negative connotation of the term *EU migrants*, the term *vulnerable EU citizens* is used in this thesis. This term emphasises that the persons concerned are EU citizens in a particular vulnerable situation.

There is no official definition of *vulnerable EU citizens*. For the purpose of this thesis, it will be used to describe a homeless person from another EU state, who is exercising his/her freedom of movement. It will include both persons who have been in Sweden less than three months, and persons who have been in Sweden

¹⁸ Sveriges radio, *EU-migrant ett problematiskt begrepp*, 16 July 2014, <http://sverigesradio.se/sida/artikel.aspx?programid=3993&artikel=5915740>. Accessed: 2016-03-16.

longer. Many vulnerable EU citizens support themselves by begging or selling street papers. This will therefore be taken as examples. However, vulnerable EU citizens' activities are not limited to this. Furthermore, many vulnerable EU citizens are of Roma origin. Discrimination against Roma will therefore be briefly discussed. It is, however, important to remember that not all vulnerable EU citizens are Roma.

The term *irregular migrant* is used in this thesis to describe a person who has no legal right to reside within the state. This is a general term applicable to all forms of migration. For the purpose of this thesis, it will include vulnerable EU citizens without a right of residence. Moreover, the phrase *legal status* is used throughout the thesis. My opinion is that no person in itself can be illegal. It will therefore only refer to vulnerable EU citizens' right of residence.

1.6 Structure

This thesis consists of five chapters including the introduction. The second chapter (2) examines human rights law. It introduces the legal framework of the right to housing, in order to determine what obligations Sweden have. The universal application of human rights is discussed, and whether states can exclude persons without a legal right to reside from the protection of the treaties. This is put in relation to vulnerable EU citizens' access to housing. The third chapter (3) studies the legal regime of EU law. It scrutinises Directive 2004/38/EC, which regulate the free movement of EU citizens. The requirements for legal residence within another EU state is examined. In this regard, the concepts of unreasonable burden on the host state, workers and self-employed persons are discussed. The consequence of the system of free movement on vulnerable EU citizens' access to housing is furthermore analysed. The fourth chapter (4) is concerned with the last legal regime – domestic Swedish law. It examines how the right to adequate housing is implemented in Sweden. It scrutinises the right to social assistance, through which the right to housing is ensured in Sweden. The impact of the provision in the Social Services Act on vulnerable EU citizens' access to housing is analysed. The fifth, and last, chapter (5) summarizes the conclusions and answers the research questions. It moreover discusses further considerations.

2 The Right to Housing under Human Rights Law

This chapter examines the right to housing within the first legal regime - human rights law. The aim is to map out the regulations regarding housing in international and European human rights law, in order to establish what obligations Sweden have. The personal scope of the right to housing is studied, to determine whether the ICESCR and the RESC applies to everyone. The purpose is to determine whether Sweden has an obligation to ensure the right to housing, both in regard of regular and irregular vulnerable EU citizens. The legal status of vulnerable EU citizens will be examined in chapter three. For the purpose of this chapter, it will be assumed that not all vulnerable EU citizens have a right of residence in Sweden.

2.1 International and European Human Rights Law

The two following sub-sections provides an introduction to the right to housing, firstly within international human rights law and secondly within European human rights law. The purpose is to establish what obligations Sweden has. The right to adequate housing was first established in the UDHR.¹⁹ The UDHR is not legally binding upon states,²⁰ but has had a great impact on subsequent international treaties.²¹ For example, the Convention on the Rights of the Child requires states to provide parents with housing assistance in case of need.²² Moreover, the Convention on the Elimination of All Forms of Discrimination against Women establishes that all rural women shall enjoy adequate housing.^{23,24} However, the

¹⁹ Art. 25 of the UDHR.

²⁰ There is an ongoing debate whether the UDHR is binding as customary international law, for a further discussion on the issue see Alston, Philip & Goodman, Ryan, *International Human Rights*, Oxford University Press, Oxford, 2013, p. 145ff.

²¹ Hohmann, Jessie, *The right to housing: law, concepts, possibilities*, Hart Publishing, Oxford, 2013, p. 16.

²² Art. 27.3 of the *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

²³ Art. 14.2(4) of the *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

²⁴ See also art. 5(iii) of the *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195; art. 21 of the *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations,

main international provision on the right to housing is established in the ICESCR.²⁵ This thesis is therefore focusing on this Covenant. The main regional provision is established in the European Social Charter²⁶ (ESC).²⁷ There are two versions of the ESC, the original Charter from 1961 and the revised European Social Charter from 1996. Sweden is a signatory to the RESC,²⁸ and this is the reason why the focus is on that version.

2.1.1 The Right to Housing in the ICESCR

Article 11.1 of the ICESCR lays down that:

”The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”²⁹

Thus, it establishes a right to adequate housing for everyone. The article shall be read in conjunction with article 2.1 ICESCR, which establishes that states must use all appropriate means, to the maximum of its available resources, to achieve full realization of the rights. This includes the adoption of legislation.³⁰ Moreover, the right must be ensured without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.³¹ The Committee on Economic, Social and Cultural Rights (CESCR) has stated that the right to adequate housing shall be interpreted as a right to live somewhere in security, peace and dignity. Merely having a roof over one’s head is not sufficient.³²

Treaty Series, vol. 189, p. 137; and art 28.1 of the Convention on the Rights of Persons with Disabilities, 13 December 2006, United Nations, Treaty Series, vol. 2515, p. 3

²⁵ Art. 11.1 of the ICESCR.

²⁶ Council of Europe, *European Social Charter*, 18 October 1961, ETS 35.

²⁷ Art. 31 of the RESC.

²⁸ Council of Europe webpage, *Signatures & ratifications*, <http://www.coe.int/en/web/turin-european-social-charter/signatures-ratifications>. Accessed: 2016-04-26.

²⁹ Art. 11 of the ICESCR.

³⁰ Art. 2.1 of the ICESCR.

³¹ Art. 2.2 of the ICESCR.

³² CESCR, *General Comment No. 4: The right to Adequate Housing*, 13 December 1991, E/1992/23, para. 7. (Hereinafter CESCR, *General Comment No. 4*).

Article 11.1 of the ICESCR refers not just to housing, but to *adequate* housing. It is therefore of importance to establish the definition of adequate. The CESCR has identified seven aspects which are required if housing should be regarded as adequate; *legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location and cultural adequacy*. *Legal security of tenure* means that all persons shall be guaranteed legal protection against forced evictions. This applies to everyone, including persons occupying land or property, irrespective of the sort of tenure. *Availability of services* includes a right for every household to have sustainable access to resources, such as drinking water, energy and heating. *Affordability* implies that the cost of housing must be at such level that other basic needs are not compromised. *Habitability* means that every house must be habitable, for example protect from cold, heat, rain, wind or other threats to health. Houses must also be *accessible* to everyone, including disadvantaged groups, such as elderly, children, the physically disabled and the mentally ill. *The location* of adequate housing must be close to schools, health-care services and work options. Lastly, the expression of *cultural identity* must be enabled through the way housing is constructed and in the policies controlling this.³³ The CESCR has furthermore stressed that the right to adequate housing cannot be seen in isolation from other human rights. Housing is central for the enjoyment of both civil and political rights, and economic and social rights. Moreover, non-discrimination and the concept of human dignity is closely linked to the enjoyment of housing.³⁴

Asbjørn Eide has stated that the right to housing includes a place to live for everyone. It should be a physical space which provides security, basic infrastructure, privacy, heating on cold days and protection against heat on warm days. Eide has furthermore stressed that the right to housing is both a passive and active duty for states. It does not necessarily imply that states must find somewhere to live for everyone. Most people have to find their own housing. However, states have a passive duty to accept individuals' choice of housing and to not conduct forced evictions. Moreover, states have an active duty to protect people from evictions by third parties, for example through adoption of legislation. Lastly, states must facilitate for everyone to find affordable housing, and in exceptional cases provide housing to vulnerable groups or individuals who cannot find a place

³³ CESCR, *General Comment No. 4*, para. 8.

³⁴ *Ibid.* para. 9.

to live themselves.³⁵ The CESCR has stressed that states must prioritise vulnerable groups, and take immediately measures to ensure housing for those who are living under unfavourable conditions.³⁶

To conclude, the right to adequate housing entails not only a right to a roof over one's head, but to a legal secure tenure and a place to live in security, peace and dignity. Sweden is a party to the ICESCR and therefore bound by its provisions. Hence, Sweden has an obligation to use all appropriate means available to realise the right to adequate housing for everyone.

2.1.2 The Right to Housing in the revised European Social Charter

There are two main rights in the RESC dealing with housing – article 16 and article 31. Sweden has accepted both rights.^{37,38} Article 31 is the most comprehensive of the two articles and establishes that:

“With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:

1. to promote access to housing of an adequate standard;
2. to prevent and reduce homelessness with a view to its gradual elimination;
3. to make the price of housing accessible to those without adequate resources.”³⁹

Thus, there are three obligations under article 31. Firstly, states must promote access to housing of an adequate standard, in particular to vulnerable groups.⁴⁰ The

³⁵ Eide, Asbjørn, *Adequate Standard of living*, in Moeckli, Daniel, Shah, Sangeeta, Sivakumaran, Sandesh & Harris, David (red.), *International human rights law*, Oxford University Press, Oxford, 2010, p. 241ff.

³⁶ CESCR, *General Comment No. 4*, para. 11.

³⁷ Council of Europe webpage, *Treaty office of the Council of Europe*, http://www.coe.int/en/web/conventions/home//conventions/treaty/163/declarations?p_auth=WJV6lDyP. Accessed: 2016-02-19.

³⁸ The RESC does not require states to accept all rights, since there are major economical and social difference between the Member States. Instead, states must accept at least 16 out of 31 Articles, see Khaliq, Urfan and Churchill, Robin, *The European Committee of Social Rights: Putting flesh on the Bare Bones of the European Social Charter*, in Langford, M. (2008). *Social rights jurisprudence : emerging trends in international and comparative law*. Cambridge : Cambridge University Press, 2008, p. 429.

³⁹ Art. 31 of the RESC.

Council of Europe (CoE) has interpreted *housing of an adequate standard* to imply acceptable standard with regard to health requirements. It is left to the national authorities in each state to define appropriate housing standards.⁴¹ It must be defined in law, and national authorities shall adopt measures to ensure that housing is adequate.⁴² The ECSR has interpreted adequate housing standards as, “*Dwelling which is structurally secure, safe from a sanitary and health point of view and not overcrowded, with secure tenure supported by the law*”.⁴³ A housing is considered to be safe from a sanitary and health point of view if it covers all basic needs, such as water, heating, waste disposal and electricity. The ECSR has interpreted *overcrowded* as when the size of a dwelling is not suitable to the number of persons living there. Moreover, security of tenure implies that forced evictions shall not be carried out. Tenures or occupiers must also have access to an impartial and affordable remedy.⁴⁴

The second obligation under article 31 is to reduce homelessness. The ECSR considers a person to be homeless if s/he does not have access to a dwelling or any other form of adequate shelter. Temporary shelter is not considered to be sufficient. States shall take both reactive and preventive measures to reduce homelessness.⁴⁵ Long-lasting solutions of re-integration are necessary, and states must take action to prevent vulnerable groups from becoming homeless in the first place. Moreover, measures shall be taken to help people overcome difficulties that result in homelessness.⁴⁶ This requires for example procedures to avoid evictions.⁴⁷

The third obligation is to ensure affordable housing to those without adequate resources. A house is considered affordable when a household can pay the initial cost, the current rent and other possible costs on a long-time basis and still be able to afford a minimum standard of living. To fulfil this obligation, states shall ensure financially accessible social housing. This must include housing benefits for low-

⁴⁰ European Social Charter, *Collected texts*, 7th edition, 1 January 2015, p. 330. (Hereinafter *Collected texts*, 2015).

⁴¹ Council of Europe, *Explanatory report on the Revised European Social Charter*, 1996, para. 118-119.

⁴² *Collected texts*, 2015, p. 330.

⁴³ European Committee on Social Rights, *Conclusion 2003: Sweden*, 2003, p. 650. (Hereinafter *Conclusion 2003: Sweden*).

⁴⁴ *Conclusion 2003: Sweden*, p. 650-652.

⁴⁵ *Ibid.* p. 653.

⁴⁶ *Collected texts*, 2015, p. 330.

⁴⁷ *Conclusion 2003: Sweden*, p. 655.

income earners and vulnerable groups.⁴⁸ The ECSR has referred to article 13 of the RESC, which establishes a right to social and medical assistance, for a definition of *adequate resources*.⁴⁹ However, neither article 13, nor the case law regarding the article, offers any definition of adequate resources. Thus, the reference to article 13 does not answer how adequate resources is defined. The ECSR has defined assistance to be adequate if it covers the cost of living in the concerned state.⁵⁰ This could be viewed as an indication for how adequate resources should be interpreted. Thus, it would imply that a person lacks adequate resources, if s/he doesn't have sufficient resources to cover the cost of living.

The ECSR has ruled that article 31 cannot be interpreted as imposing an obligation of result on states. However, the ECSR has stressed that the rights must take a practical and effective form, not purely a theoretical. States must therefore adopt legal, financial and operational means to ensure progress towards a full realisation of the right.⁵¹ The ECSR has further emphasised that the RESC should be interpreted in the light of the ICESCR, and attached great importance to the general comments on the right to housing by the CESCR.⁵²

Article 16 establishes the right of the family and includes an obligation to promote provisions on family housing.⁵³ It does not have as precise scope regarding the right to housing as article 31. However, since only 12 states have ratified article 31, article 16 has played a significant role, being more widely accepted. The ECSR found in the case of *ERRC v Bulgaria* that the notion of adequate housing is identical under articles 16 and 31. The ECSR concluded that although the personal and material scope of the two articles are different, they overlap in respect of the right to housing.⁵⁴ Thus, the sole difference between the two rights is that article 16 only applies to families. The ECSR has stated that family shall be defined as in domestic law. It is not restricted to families based on marriage, and can cover

⁴⁸ *Conclusion 2003: Sweden*, p. 655f.

⁴⁹ Council of Europe, *Explanatory report on the Revised European Social Charter*, 1996, para. 118.

⁵⁰ Harris, David J. & Darcy, John, *The European Social Charter*, 2.ed., Transnational Publishers, Ardsley, NY, 2001, p. 166.

⁵¹ *International Movement ATD Fourth World v. France*, Complaint No. 33/2006, Decision on the merits, 5 December 2007, para. 58-59.

⁵² *Ibid.* para. 71.

⁵³ Art. 16 of the RESC.

⁵⁴ *European Roma Rights Centre v Bulgaria*, Complaint No. 31/2005, Decision on the Merits, 18 October 2006, para. 13-17.

single-parent families as well.⁵⁵ Furthermore, it is up to the states how to provide the social, legal and economic protection offered to families under article 16. However, there must be an adequate supply of family housing of appropriate standard and with basic amenities. The size of the house must be compatible with the size of the family.⁵⁶

To sum up, article 16 and 31 of the RESC requires states to ensure housing of an adequate standard. States have an obligation to prevent homelessness and ensure affordable housing to persons without adequate resources. The RESC does not require immediate result, but states must adopt legal, financial and operational measures to achieve progress.

2.2 The Personal Scope of the Right to Housing

As seen in the previous section, there is a human right to adequate housing both in international and European human rights law. It does not obligate states to provide everyone with a house, but a minimum level of shelter should be ensured, in particular for vulnerable groups. How can it be that many vulnerable EU citizens are denied this right? This section examines the personal scope of the human rights treaties. The first two sub-sections discuss the application of RESC and ICESCR, in order to establish whether the right to housing is applicable to all human beings, regardless of legal status. It will be assumed that not all vulnerable EU citizens have a legal right of residence. The last sub-section discusses human rights and sovereignty, in the context of the personal scope. It analyses the consequences for vulnerable EU citizens, to determine whether the reason for the denied possibility to access housing can be found in human rights law.

2.2.1 The revised European Social Charter

The Appendix to the RESC defines the personal scope of the Charter to include nationals of other parties lawfully residing or working regularly within the territory

⁵⁵ Council of Europe, *Digest of the case law of the European Committee of Social Rights*, 1 September 2008, p. 115.

⁵⁶ Harris & Darcy, 2001, p. 190f.

of the state.⁵⁷ Thus, the RESC is only applicable to persons who are lawfully residing. This implies that vulnerable EU citizens who have a right of residence shall be protected by all provisions of the Charter, providing that their state of origin is a party to the RESC. Vulnerable EU citizens who have no right of residence are, on the other hand, not covered by the RESC. However, the ECSR has noted that state parties have guaranteed rights enshrined in the RESC to a wider scope of persons by adopting other human rights treaties, for example the ECHR. The ECSR has therefore stated that certain specific situations can require a state to apply provisions in the RESC equally to all nationals and foreigners.⁵⁸

The Parliamentary Assembly of the CoE has stressed that, as a starting point, human rights are applicable to everyone, regardless of nationality or status. The Assembly has furthermore emphasised that irregular migrants are a vulnerable group and therefore particularly in need of human rights, including economic and social rights.⁵⁹ The Parliamentary Assembly has therefore concluded that the right to housing must be ensured to irregular migrants.⁶⁰ This is also confirmed by the Committee of Minister, in a recommendation to the Member States. The Committee held that basic needs, such as shelter, are a requirement for the dignity and existence of every human. The Committee recommended all Member States to put into practice a domestic law that recognise an individual, universal and enforceable right to basic material needs, including shelter.⁶¹ The Committee further emphasised that the right should be applicable to everyone, citizens as well as foreigners, regardless of legal status.⁶²

FIDH v France was the first case where the ECSR found that the RESC can apply to persons illegally residing in a state. It concerned article 13 of the RESC, which establishes a right to social and medical assistance. The ECSR has interpreted the article to include not only monetary assistance, but all types of assistance. Hence, it

⁵⁷ Para. 1 of the Appendix to the RESC.

⁵⁸ European Committee of Social Rights, *Conclusion XVII-1*, 2004, p. 10.

⁵⁹ Parliamentary Assembly of the Council of Europe, *Human rights of irregular migrants*, Doc. 10924, 2006, para. 5.

⁶⁰ *Ibid.* para. 12-13.

⁶¹ Committee of Ministers of the Council of Europe, *Recommendation No. R (2000) 3 on the Right to Satisfaction of Basic Material Needs of Persons in Situation of Extreme Hardship*, 19 January 2000, principle 1 and 2.

⁶² *Ibid.* principle 4.

could include housing assistance.⁶³ The ECSR stated that access to medical assistance is connected to the right to life and the dignity of a human being. The ECSR moreover stressed that human dignity is at the core of European human rights law. It would therefore be contrary to the Charter to deny medical assistance to persons within the territory of the state, even if they reside there illegally.⁶⁴

The ECSR expanded this interpretation to article 31 and the right to housing in the case of *DCI v the Netherlands*. It concerned discrimination of children unlawfully residing in the state. The ECSR stated that the rights of the RESC shall take a practical and effective form, rather than a theoretical. They are to be interpreted in the light of relevant international instruments, such as the UN Convention on the Rights of the Child. Thus, the ECSR found itself bound by the principle of the best interest of the child.⁶⁵ The ECSR stressed that children cannot, regardless of their legal status, be denied basic care or live under intolerable conditions. However, the ECSR also stated that the denial of adequate housing does not automatically result in a denial of basic care. The ECSR considered that if states were obliged to provide housing to unlawfully residing children, it would run counter to states' right to control the entry of non-citizens. The ECSR therefore concluded that children who are unlawfully present in a state does not fall under the personal scope of article 31 § 1.⁶⁶ Nonetheless, the ECSR found that the obligation to reduce homelessness under article 31 § 2 did apply, regardless of the legal status of the child. The ECSR reasoned that the purpose with the provision is to protect vulnerable persons, and all children can be regarded as vulnerable. Moreover, it stressed that the right to shelter is closely connected to the right to life and hence the respect of human dignity.⁶⁷ Thus, the ECSR concluded that states have an obligation to provide adequate shelter to children as long as they are under the jurisdiction of the state. The living conditions within those shelters must uphold human dignity, including safety, health and hygiene.⁶⁸

⁶³ Khaliq, Urfan & Churchill, Robin, *The European Committee of Social Rights: Putting flesh on the Bare Bones of the European Social Charter*, in Langford, Malcolm, *Social rights jurisprudence: emerging trends in international and comparative law*. Cambridge University Press, Cambridge, 2008, p. 441.

⁶⁴ *International Federation of Human Rights Leagues (FIDH) v. France*, Complaint No. 14/2003, Decision on the Merits, 8 September 2004, para. 30-32.

⁶⁵ *Defence for Children International (DCI) v. the Netherlands*, Complaint No. 47/2008, Decision on the Merits, 20 October 2009, para. 27-29.

⁶⁶ *Defence for Children International (DCI) v. the Netherlands*, Complaint No. 47/2008, Decision on the Merits, 20 October 2009, para. 44-45.

⁶⁷ *Ibid.* para. 46-48.

⁶⁸ *Ibid.* para. 61-65.

In the case of *COHRE v France*, which concerned forced evictions of Roma, the Government argued that the right to housing should not be applicable since the persons concerned were in the country unlawfully.⁶⁹ However, the ECSR reaffirmed that the definition of the personal scope in the appendix cannot deprive people of their rights linked to life and dignity.⁷⁰ The ECSR found that the conditions under which the evictions had been carried out was not in compliance with human dignity. It therefore constituted a violation of article 31 § 1 in conjunction with the non-discrimination provision in article E of the RESC. The ECSR urged states to pay close attention to the matter, since it concerned fundamental standards of the RESC, such as human rights, democracy and the rule of law.⁷¹ In the case of *COHRE v Italy*, the group concerned included vulnerable EU citizens of both regular and irregular status. The ECSR held that it was extremely complex to distinguish between the two groups, and that even the irregular group could not be deprived of their rights linked to life and dignity.⁷² The ECSR found that there had been a violation of the right to housing established in article 31 § 1.⁷³ However, in the case of *DCI v Belgium*, the ECSR stressed that the RESC can only be applicable to irregular migrants in certain, exceptional cases and under certain circumstances.⁷⁴

To conclude, the ECSR has ruled that the RESC applies to irregular migrants in cases where the right to life and human dignity otherwise would be deprived. The ECSR has furthermore stressed that the right to housing is closely linked to the right to life and human dignity. Vulnerable EU citizens without a right of residence must therefore be guaranteed a right to housing in certain cases.

⁶⁹ *Centre on Housing Rights and Evictions (COHRE) v France*, Complaint No. 63/2010, Decision on the Merits, 28 June 2011, para. 9.

⁷⁰ *Centre on Housing Rights and Evictions (COHRE) v France*, Complaint No. 63/2010, Decision on the Merits, 28 June 2011, para. 32.

⁷¹ *Ibid.* para. 53-54.

⁷² *Ibid.* para. 33.

⁷³ *Centre on Housing Rights and Evictions (COHRE) v Italy*, Complaint No. 58/2009, Decision on the Merits, 25 June 2010, para. 91.

⁷⁴ *Defence for Children International (DCI) v. Belgium*, Complaint No. 69/2011, Decision on the Merits, 23 October 2012, para. 35.

2.2.2 The ICESCR

The ICESCR establishes that states must take steps, towards a full realisation of the rights, in relation to its available resources.⁷⁵ Thus, states are not obliged to ensure the rights immediately, but must adopt measures in relation to its economic resources. The ICESCR enables developing countries to limit the application of the economic rights recognised in the Covenant to non-nationals.⁷⁶ However, this only applies to developing countries, and solely in regard of economic rights.⁷⁷ Hence, there is no general distinction between citizens and non-citizens in the ICESCR. Moreover, article 2.2 of the ICESCR requires states to ensure the rights without discrimination of any kind. This implies that developed countries have an obligation to ensure the rights enshrined in the ICESCR to everyone, nationals as well as non-nationals, to the maximum of its available resources. The CESCR has confirmed, in several general comments, that the Covenant applies to everyone within the jurisdiction of a state.⁷⁸

Judging from this, it is clear that the ICESCR applies to everyone. Non-nationals legally residing in the state shall be treated as nationals, and the ICESCR is thus applicable.⁷⁹ However, the question is whether *everyone* includes persons without a legal right to reside. Magdalena Sepúlveda claims that the CESCR has applied a lower standard to the treatment of irregular migrants, than to non-nationals legally residing.⁸⁰ The CESCR has not elaborated much on the issued, but stated that the principle of non-discrimination applies to everyone residing in the territory of a state, including irregular migrants.⁸¹ This implies that if a state apply different treatment for nationals and non-nationals, it must comply with the non-discrimination provision in article 2.2 of the ICESCR. Thus, the differentiation must be reasonable, objective and pursue a legitimate aim. Non-nationals cannot be

⁷⁵ Art. 2.1 of the ICESCR.

⁷⁶ See art. 2.3 of the ICESCR.

⁷⁷ Principle 44 of the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, 1987.

⁷⁸ See for example CESCR, *General Comment No. 1: Reporting by States Parties*, 27 July 1981, E/1989/22, para. 3; and CESCR, *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10, para. 34.

⁷⁹ Sepúlveda, Magdalena. *The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, Intersentia, Antwerpen, 2003, p. 262.

⁸⁰ Sepúlveda, 2003, p. 264-271.

⁸¹ See for example CESCR, *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10, para. 34.

treated differently based on the mere fact that they are not citizens of the state.⁸² It is however uncertain whether the CESCR is of the opinion that all rights in the ICESCR should apply to irregular migrants. Sepúlveda concludes that all rights do apply to everyone, but she also emphasised the importance of a clarification from the CESCR.⁸³

In concern of the right to housing, the CESCR has stressed that it shall apply to, “*Everyone, regardless of age, economic status, group or other affiliation or status or other such factors*”.⁸⁴ The CESCR has moreover emphasised that the enjoyment of the right to adequate housing cannot be subject to any form of discrimination. It is linked to the inherent dignity of the human person, and cannot be viewed in isolation from other human rights, both in the ICESCR and in the International Covenant on Civil and Political Rights.⁸⁵ Nonetheless, it is uncertain whether everyone in this context includes irregular migrants. However, the Special Rapporteur on Adequate Housing has stressed that a minimum level of housing assistance in accordance with human dignity shall be ensured for irregular migrants.⁸⁶ It should be kept in mind that recommendations by the Special Rapporteur are not binding upon states.

To conclude, the ICESCR applies to everyone. States are however not obliged to fully realise the rights immediately, but only to take steps towards a full realisation in relation to its resources. Irregular migrants cannot be treated differently solely on the ground that they are non-citizens. A differentiation must be reasonable, objective and pursue a legitimate aim. The Special Rapporteur has furthermore urged states to ensure at least a minimum level of housing assistance for irregular migrants. Hence, Sweden shall guarantee at least a minimum level of housing for vulnerable EU citizens without a right of residence. Although the ICESCR should apply to everyone and discrimination is prohibited, states do still exclude irregular migrants from the access. This issue is further discussed under the next sub-section, 2.2.3.

⁸² Sepúlveda, 2003, p. 264-271.

⁸³ Ibid. p. 271.

⁸⁴ CESCR, *General Comment No. 4*, para. 6.

⁸⁵ Ibid. para. 6, 7 and 9.

⁸⁶ UN General Assembly, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, A/65/261, 2010, para. 93.

2.2.3 Human Rights and State Sovereignty

The UDHR establishes that, “*All human beings are born free and equal in dignity and rights*”.⁸⁷ There is furthermore no distinction of any kind in the entitlement to rights and freedoms.⁸⁸ Judging from the text, the idea behind the UDHR was that human rights applies to everyone. Moreover, the ICESCR does not explicitly exclude non-citizens from the application of the Covenant. The wording of the right to adequate housing rather prescribes that it should apply to everyone. However, it is evident from the discussion under sub-section 2.2.2 above, that it is not obvious whether this is the case. The application for irregular migrants is uncertain and the CESCR has applied a lower level of protection for irregular migrants than for other non-citizens. States do limit the access to human right for non-citizens illegally residing within the state, although both the ICESCR⁸⁹ and the RESC⁹⁰ includes provision on non-discrimination of national origin. This sub-section discusses how this can be, and how it impacts vulnerable EU citizens’ access to the right to housing.

“*Human rights are universal*”.⁹¹ This is a common statement, and for many the core of human right. Jack Donnelly argues that the basic idea with human rights is that it is rights one have because one is human.⁹² He furthermore claims that human rights are equal rights, since one cannot stop being human. All humans should therefore have the same rights.⁹³ From this understanding it would seem obvious that the ICESCR applies to irregular migrants. However, the assumption that human rights are universal and inherent in the very essence of being human has been criticised by, among others, Hannah Arendt. She argues that the source of human rights is the nation-state and it is only through membership of a political community human rights can be ensured in a meaningful sense.^{94,95} This is supported by Marie-Bénédicte Dembour and Tobias Kelly, who argues that one of

⁸⁷ Art. 1 of the UDHR.

⁸⁸ Art. 2 of the UDHR.

⁸⁹ Art. 2.1 of the ICESCR.

⁹⁰ Art. E of the RESC.

⁹¹ See for example Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 27 June 1993, para. 5.

⁹² Donnelly, Jack, 2003, p. 7.

⁹³ Ibid. p. 10.

⁹⁴ Arendt, Hannah, *The Origins of Totalitarianism*, Allen and Unwin, London, 1968, p. 299.

⁹⁵ For a further discussion on Arendt’s arguments see Benhabib, Seyla, *The rights of others: aliens, residents, and citizens*, Cambridge University Press, Cambridge, 2004, p. 49-69.

the reasons migrants cannot access human rights is the link to the nation-state.⁹⁶ Human rights are individual rights recognised to every human being. However, the regime of human rights does not take precedence over the system of sovereignty. Arendt expressed this as “*a sphere that is above the nations does not exist*”.⁹⁷ Thus, human rights cannot operate independently of states. The idea with human rights is rather based in the system of sovereign states, and an effective implementation of the rights requires a state. Without a state which is willing and able to realise human rights, individuals have no possibility to access them.

Sovereignty is the right of every state to control all objects and subjects within its territory. It includes the authority to control the entry, residence and expulsion of non-citizens. The UDHR includes a right to emigrate, but not a right to immigrate.⁹⁸ Thus, there is no human right to enter another state. States are free to deport persons without a legal right to reside and is thereby controlling who to guarantee human rights to.⁹⁹ Thus, the interest of the state to control its borders conflict with the individuals’ interest to access human rights. Martti Koskenniemi points out that in modern doctrine, sovereignty seems to be an option for states to legitimise breaches of international obligations.¹⁰⁰ Non-citizens without a legal right to reside are in this sense excluded from the protection of human rights.

Gregor Noll has examined how the entitlement to human rights by virtue of humanity relates to the state’s power to exclude by virtue of its territorial and personal sovereignty. He questioned how the access to immediately applicable economic and social rights can be systematically banned for a vulnerable group of humans.¹⁰¹ Noll stressed that it is uncontroversial among states today to claim that they do not have an obligation to guarantee the same rights to irregular migrants as to nationals. He emphasised that states can argue that such statement only restricts the entitlement to rights at a certain time and in a certain place, not the enjoyment

⁹⁶ Dembour, Marie-Bénédicte & Kelly, Tobias, *Are human rights for migrants? critical reflections on the status of irregular migrants in Europe and the United States*, Routledge, London, 2011, p. 6.

⁹⁷ Arendt, 1968, p. 298.

⁹⁸ See art. 13 of the UDHR.

⁹⁹ Dembour & Kelly, 2011, p. 7.

¹⁰⁰ Koskenniemi, Martti, *From apology to utopia, the Structure of International Legal Argument*, Finnish Lawyers’ Publishing Company, 1989, p. 193.

¹⁰¹ Noll, Gregor, *Why human rights fail to protect undocumented migrants*, European Journal of Migration and Law 12, 2010, p. 244.

of human rights over all.¹⁰² If Sweden restricts the right to housing for vulnerable EU citizens, it does not necessarily imply that they cannot access this right somewhere else, for example in their home state. However, this statement presupposes that vulnerable EU citizens are ensured human rights in their states of origin. If this is not the case, it would imply that a vulnerable group of humans in practice have no access to human rights. Many vulnerable EU citizens are of Roma origin and leave their home states due to poor living conditions and human rights violations. The CoE Commissioner for Human Rights has stressed that no European country fully ensures and protects human rights of Roma.¹⁰³ The Commissioner furthermore reports of an extensive discrimination against Roma in the access to adequate housing, on all levels of the right. Racial discrimination is found to be the root of this.¹⁰⁴

A great part of vulnerable EU citizens in Sweden are from Romania or Bulgaria, where discrimination towards Roma is widespread. The Swedish report regarding the situation of vulnerable EU citizens concluded that many Roma in Romania and Bulgaria live in inadequate houses, without access to water, electricity and sanitation.¹⁰⁵ Thus, it is not certain that vulnerable EU citizens have access to adequate housing in their state of origin. If Sweden does not ensure the right either, vulnerable EU citizens have no right to housing, no matter where they find themselves. The argument that a limitation of the application of human rights to migrants only restricts the entitlement to a certain time and place, is then not accurate anymore. However, Sweden could still argue that it is the responsibility of vulnerable EU citizens' state of origin to ensure human rights, and therefore not Sweden's problem. It is an obvious problem with the human rights regime that a vulnerable group of persons can be denied basic human rights, due to the fact that no state is willing to take responsibility.

Noll presented two possible understandings of jurisdiction, a divisible version and a non-divisible version. In the non-divisible version, jurisdiction includes both powers that are beneficial for the individual and powers that are not. This suggests that a vulnerable EU citizen can claim his/her right to housing, but the state has the

¹⁰² Noll, 2010, p. 246.

¹⁰³ Commissioner for Human Rights, *Human rights of Roma and Travellers in Europe*, Council of Europe Publications, 2012, p. 32.

¹⁰⁴ *Ibid.* p. 137ff.

¹⁰⁵ SOU 2016:6, p. 134f and p. 145.

right to deport him/her after the claim has been made. The divisible version instead imply that human rights entail a legal immunity, protecting the person who make a human rights claim from being deported by the state. It divides jurisdiction into two categories, welfare jurisdiction and immigration jurisdiction.¹⁰⁶ However, this is not the case in Sweden today. There is no protection for a vulnerable EU citizen, who contacts the authorities in order to get his/her right to housing ensured, from being deported if s/he is found to have no right of residence. Noll concludes that there is a difference between being physically present on the territory, and being part of the political community. It is first when one is part of the political community, one's human rights will be ensured. Whether or not one can access human right is depended upon the politico-legal power structure of the state, not the physical presence on the territory.¹⁰⁷ This is the same line of thought as Arendt presented. It is also obvious that it is one of the reasons behind vulnerable EU citizens' inability to access the right to housing. Regardless of whether the ICESCR applies to irregular migrants, states have the freedom to expel them. Thus, they risk being deported from Sweden, to a state of origin where their right to housing is not ensured, by claiming their human right to a minimum level of housing.

Stefanie Grant argues that what is required in order to guarantee human right to irregular migrants is the development of jurisprudence which defines the limits of sovereignty in relation to economic and social rights. The text of the treaties does not prevent an interpretation where irregular migrants are ensured access to human rights. Hence, what is lacking is not a human rights regime applicable to irregular migrants, but an interpretation and acceptance among states to include everyone. Grant claims that the problem for irregular migrants is the lack of coherent, clear and accessible interpretation of the rules.¹⁰⁸ It is clear that the ECSR has taken steps in this direction, by widening the scope of the RESC more and more. The ECSR has recognised that there are certain rights linked to the dignity of every human, which can never be denied, regardless of the legal status of the person. However, it still remains of states to accept this. Moreover, it would not solve the issue that state can deport irregular migrants. Sovereignty is the foundation of the world system today. As long as the world is build up by nation-states, the problem

¹⁰⁶ Noll, 2010, p. 248.

¹⁰⁷ Ibid. p. 251.

¹⁰⁸ Grant, Stefanie, *The recognition of migrants' rights within the UN human rights system*, in Dembour & Kelly, 2011, p. 47.

will remain. Even if states would agree that the ICESCR and the RESC do apply to irregular migrants, it would not help individuals without a right of residence if the state is deporting them.

The International Council of Human Rights Policy (ICHRP)¹⁰⁹ has proposed an alternative to the system of sovereign states, with a supra-national form of government instead. The global government would ensure that violations of economic and social rights would be addressed. They take EU as an example of when states have given up a portion of their sovereignty, but still maintained their independence.¹¹⁰ However, as will be seen in the next chapter, EU has not resulted in a system where economic and social rights are ensured for everyone. Instead, the EU citizenship is only, in its entirety, applicable to economically active persons.

Thus, one of the issues with vulnerable EU citizens' access to the right to housing is the conflict between human rights and sovereignty. Although human rights can appear to be universal, and it is established that everyone should be entitled to adequate housing, the reality is more complex. Everyone does not necessarily mean every human being. Human rights requires a state which is willing to guarantee the rights, and when it comes to the crunch, it is in the hands of the state who to include in *everyone*.

2.3 Concluding Remarks

The right to adequate housing is enshrined both in the ICESCR and the RESC.¹¹¹ It includes a right to live somewhere in security, peace and dignity, and merely having a roof over one's head is not sufficient. RESC furthermore includes an obligation for states to reduce homelessness and ensure affordable housing to those without resources. It is not a positive obligation to provide houses for everyone. However, particular attention should be paid to housing of vulnerable groups. The Appendix to the RESC establishes that it only applies to non-nationals legally residing within the territory of the state. Nevertheless, the ECSR has widened the personal scope to include illegally residing immigrants in cases where the right is

¹⁰⁹ A former non-profit organisation set up by human rights advocates and scholars.

¹¹⁰ International Council of Human Rights, *Duties sans Frontières: Human rights and global social justice*, Geneva, 2003, p. 51.

¹¹¹ Art. 11 of the ICESCR & art. 16 and art. 31 of the RESC.

connected to life and human dignity. The ECSR has established that children who are illegally residing have a right to shelter, and that housing is closely linked to the right to life and human dignity. Moreover, the Parliamentary Assembly of the CoE has concluded that irregular migrants have a right to at least a minimum level of housing.

The ICESCR applies to everyone within the jurisdiction of states and obliges them to take steps, to the maximum of their available resources, towards a full realisation of the rights. However, states frequently limit the scope of human rights for irregular migrants unlawfully residing. It is uncontroversial among states, and justified by the principle of sovereignty. Sovereignty implies that states are free to decide on matters which are essentially within domestic jurisdiction. Human rights are not separated from the system of sovereign states, but part of it. The regime of human rights requires a state which is willing to ensure the rights. So long as states are free to regulate the entry and expulsion of non-citizens, it will in practice be difficult for irregular migrants to access human rights. As argued by Noll, the jurisdiction is non-divisible. This implies that vulnerable EU citizens have a right to claim access to at least a minimum level of housing. However, Sweden has at the same time a right to deport those who have no right of residence. This results in difficulties to access the right to housing for vulnerable EU citizens without a right of residence. It does not matter that several international treaties oblige states to ensure the right to housing. Hence, the system of sovereign states is both a prerequisite and a hindrance for the application of human rights. Moreover, a state which limits the access to human rights for irregular migrants can argue that they have access to the rights in their state of origin. However, many vulnerable EU citizens leave their states of origin due to lack of human rights. It is thus obvious that the human rights regime fails to protect this vulnerable group.

To sum up, Sweden has an obligation to ensure the right to adequate housing. It includes somewhere to live in security, peace and dignity. Vulnerable EU citizens who are unlawfully residing shall be ensured at least a minimum level of housing assistance. However, Sweden has also an opportunity to deport persons who have no right of residence. Hence, it is very difficult for persons who are unlawfully residing to access their right to housing. The next chapter discusses the right of residence of vulnerable EU citizens and under what circumstances they are here unlawfully.

3 Free Movement of Persons within EU

This chapter examines the second legal system, EU law. It is clear from the discussion in the previous chapter that the legal status of vulnerable EU citizens is important for the access to housing. If a person has no legal right to reside, his/her access to human rights, including the right to housing, can be restricted. One of the most fundamental principles within the EU is the free movement of persons. Article 20 of the TFEU establishes a citizenship of the Union. The article prescribes that, “*Every person holding the nationality of a Member State shall be a citizen of the Union*”. Furthermore, all citizens have the right to move and reside freely within the Member States.¹¹² However, article 21 of the TFEU stipulates that the free movement is subject to limitations and conditions.¹¹³ This chapter will examine these limitations, in order to determine the right of residence for vulnerable EU citizens. The definitions of worker, self-employed and unreasonable burden on the social assistance system of the host state is examined. This is necessary to determine who has a right of residence. It is moreover put into the context of vulnerable EU citizens and the two examples of begging and selling street paper is discussed. Lastly, it is questioned whether free movement really applies to everyone, and the impact on vulnerable EU citizens’ access to housing is analysed.

3.1 The Right of Residence under Directive 2004/38/EC

Directive 2004/38/EC, *the Free Movement Directive*, confirms that the free movement of persons is one of the fundamental freedoms of the internal market.¹¹⁴ However, it limits the freedom to reside in another state without any conditions to three months.¹¹⁵ After three months, the freedom of movement is only applicable to persons who are workers, self-employed or who have sufficient resources not to

¹¹² Art. 20.2(a) of the TFEU.

¹¹³ Art. 21.1 of the TFEU.

¹¹⁴ Para. 3 of the Preamble of Directive 2004/38/EC.

¹¹⁵ Art. 6 of Directive 2004/38/EC.

become a burden on the social assistance system of the host state.¹¹⁶ This also applies to persons who entered a host state in order to seek employment, and who can show that s/he is still looking for work and has a genuine chance of being employed.¹¹⁷ Moreover, it is not correct that the right of residence for three months applies without any conditions at all. EU citizens only have this right as long as they do not become an unreasonable burden on the social assistance system. Workers, self-employed persons or jobseekers cannot be expelled even if they become an unreasonable burden.¹¹⁸ Thus, the question is whether vulnerable EU citizens can be considered as an unreasonable burden on the host state, and thereby be expelled, or if they can be regarded as workers or self-employed persons and therefore have a right of residence. The following sub-sections are examining this. Many vulnerable EU citizens earn their living by begging on the streets or selling street papers.¹¹⁹ It is therefore of importance to determine whether begging or selling street papers can be considered as work or self-employment within the meaning of EU law.

3.1.1 Definition of Workers and Self-employed

Workers and self-employed persons have an extended protection under the Free Movement Directive. It is therefore important to examine whether someone fulfil the requirements to be considered as a worker under EU law. The CJEU has elaborated on the concept of workers in several cases. Already in the case of *Hoekstra* from 1964, the Court ruled that workers must be defined similar throughout the Union, and not by every state separately.¹²⁰ The case also established that the term workers shall be defined broadly, and apply not only to workers who are currently employed, but also to those who are unemployed but capable of taking another job.¹²¹ This case is older than the TFEU, and refers to other treaties. However, the Court has later confirmed that the interpretation applies to the provisions in the TFEU as well.¹²²

¹¹⁶ Art. 7.1(a)-(b) of Directive 2004/38/EC.

¹¹⁷ Art. 14.4 of the Directive 2004/38/EC.

¹¹⁸ See art. 14(1) and 14(4) of Directive 2004/38/EC.

¹¹⁹ SOU 2016:6, p. 22 and 74.

¹²⁰ *Hoekstra v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten*, C-75/63, 1964, p. 184.

¹²¹ *Ibid.* p. 185.

¹²² *Collins v Secretary of State for Work and Pensions*, C-138/02, 2004, para. 26.

The case law from the CJEU regarding the concept of workers was summarized by the Advocate General in the *Trojani* case. He found that the Court has established three criteria for when an employment relationship exists; the duration of the activity, a relationship of subordination and a remuneration.¹²³ The examination whether these three criteria are met must be objective. It must assess all circumstances of the case, both regarding the activities and the employment relationship. It is of no relevance what the person did before or after the employment, and this is therefore not to be taken into consideration.¹²⁴ The Advocate General furthermore stated that the Court has interpreted the concept of workers broadly, and included short-term employments of limited scope and with little remuneration.¹²⁵

The first criterion, the duration of the activity, was established in the case of *Levin*. The activity must be effective and genuine, and shall not be on such small scale as to be regarded as purely ancillary and marginal.¹²⁶ The Court has not established any minimum duration, but held in the case of *Ninni-Orasche* that a temporary work for two and a half month was sufficient.¹²⁷ It is up to the national courts to establish whether a work is effective and genuine. As stated above, this must be done objectively and after an assessment of all relevant circumstances. The Swedish Migration Court of Appeal has stressed that the criteria established by the CJEU are binding upon states, and that Sweden cannot interpret the concept of worker differently. The Court has thus ruled that a part-time job is sufficient to fulfil the criteria of effective and genuine.¹²⁸

The second criterion, the relationship of subordination, was established in the case of *Lawrie-Blum*. The Court held that the essential feature of an employment relationship is that a person performs services for and under the direction of another person.¹²⁹ The third criterion, remuneration, was elaborated on in the case of *Levin*. The Court held that remuneration lower than the guaranteed minimum

¹²³ Opinion of the Advocate General Geelhoed in the case *Michel Trojani v Centre public d'aide sociale de Bruxelles*, C-456/02, 2004, para. 35.

¹²⁴ *Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst*, C-413/01, 2003, para. 27-28.

¹²⁵ Opinion of the Advocate General Geelhoed in the case *Michel Trojani v Centre public d'aide sociale de Bruxelles*, C-456/02, 2004, para. 31.

¹²⁶ *D.M. Levin v Staatssecretaris van Justitie*, C-53/81, 1982, para. 17.

¹²⁷ *Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst*, C-413/01, 2003, para. 32.

¹²⁸ Migration Court of Appeal, MIG 2010:5, 24 March 2010.

¹²⁹ *Lawrie-Blum v Land Baden-Württemberg*, C-66/85, 1986, para. 17.

wage in a state can be sufficient. The right to free movement applies to those who wish to work part-time, and therefore obtain lower remuneration. This applies even if the income is lower than what is needed for living in the state.¹³⁰ The Court did not mention whether the income can be supplemented with social assistance, or if it requires another source of income.¹³¹

A person who has become unemployed keeps his/her status as worker for at least six months, as long as s/he register with the national employment office.¹³² Regarding jobseekers, all EU citizens have the right to move to another Member State and look for employment. However, states do not need to grant social assistance to jobseekers during the first three months.¹³³ The CJEU has ruled that benefits which are intended to facilitate access to the labour market do not fall within the scope of social assistance in article 24.2 of Directive 2004/38/EC.¹³⁴ Thus, jobseekers must have access to those benefits on an equal basis as nationals.

In order to be regarded as a jobseeker, the person needs to show that s/he is seeking employment and has a genuine chance of being employed. The CJEU has not defined what “*genuine chances of being employed*” constitutes. Instead, it is left to the national courts to determine whether it exist in the individual case. When doing this, the courts shall respect the principle of proportionality and not apply more criteria than what is necessary.¹³⁵ The Swedish Administrative Court of Appeal of Jönköping has ruled that a person who had studied Swedish and had a technical education, had a genuine chance of finding employment.¹³⁶ The CJEU has established that jobseekers are permitted to stay for at least six months. If a person is continuing to seek employment after this period and has a genuine chance of finding one, s/he shall be permitted to stay longer.¹³⁷ The period under which a jobseeker has a right of residence is, thus, dependent on the circumstances of the

¹³⁰ *D.M. Levin v Staatssecretaris van Justitie*, C-53/81, 1982, para. 16-18.

¹³¹ Opinion of the Advocate General Geelhoed in the case *Michel Trojani v Centre public d'aide sociale de Bruxelles*, C-456/02, 2004, para. 38.

¹³² Art. 7.3(b)-(c) of Directive 2004/38/EC.

¹³³ Art. 24.2 of the Directive 2004/38/EC.

¹³⁴ *Vatsouras and Koupatantze v Arbeitsgemeinschaft (ARGE) Nürnberg 900*, C-22/08, 2009, para. 45.

¹³⁵ European Commission, *Reaffirming the free movement of workers: rights and major developments*, 2010, p. 8.

¹³⁶ The Administrative Court of Appeal of Jönköping, Case No. 3248-07, 27 September 2007.

¹³⁷ *The Queen v. The Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen*, C-292/89, 1991, para. 21.

individual case. Hence, vulnerable EU citizens who can prove that they are jobseekers have a right to reside in another EU state for at least six months. However, the host state has no obligation to provide the jobseeker with social assistance for the first three months. It has, on the other hand, an obligation to ensure benefits which intendeds to facilitate access to the labour market.

The same protection that applies to workers, does also apply to self-employed persons. The right of self-employed persons is established in article 49 TFEU. It lays down that the freedom of establishment includes a right to set up companies and firms. The CJEU has held that any activity which a person performs outside a relationship of subordination, but under a certain amount of time and in return of remuneration, must be classified as an activity of self-employed character.¹³⁸ Thus, the difference between workers and self-employed persons is the lack of subordination. This implies that the activity must pass the test of “effective and genuine” established in the case of *Levin*. Activities which are purely marginal and ancillary are therefore excluded.¹³⁹ The person must perform an activity which is economic in nature, and by which the, “*provider satisfies a request by the beneficiary in return for consideration*”.^{140,141} Economic activities includes industrial and commercial activities, activities of craftsmen and of professionals.¹⁴² However, the remuneration can be payment in kind and the crucial circumstance is not the number of contracts for service, but the ability to carry out the contracts and the control the person exercise over the performance of the contracts.¹⁴³

To conclude, a worker needs to perform genuine and effective activities under a certain period of time, under the directions of another person and against remuneration. The same criteria apply to self-employed persons, except the one of subordination. Thus, the difference is that self-employed persons do not perform activities under the direction of someone else. Whether or not a vulnerable EU citizen classify as worker or self-employed needs to be examined in every

¹³⁸ *Jany v Staatssecretaris van Justitie*, C-268/99, 2001, para. 34. See also *Asscher v. Staatssecretaris van Financiën*, C-107/94, 1996, para. 26.

¹³⁹ Guild, Elspeth, *A Guide to the Right to Establishment under the European Agreements*, Baileys Shaw & Gillet, London, 1996, p. 9.

¹⁴⁰ *Jany v Staatssecretaris van Justitie*, C-268/99, 2001, para. 48.

¹⁴¹ Consideration is in this context defined as “*a reward or payment for a service*” in Hornby, Albert Sydney, *Oxford Advanced Learner’s Dictionary*, 7th Ed, Oxford University Press, Oxford, 2005.

¹⁴² Guild, 1996, p. 17.

¹⁴³ *Ibid.* p. 20.

individual case. The next sub-section discusses two examples of common activities among vulnerable EU citizens – begging and selling street papers.

3.1.2 Workers and Self-employed in the Context of Vulnerable EU Citizens

Since the Free Movement Directive only establishes a right of residence for workers and self-employed persons it is of utmost importance to know whether vulnerable EU citizens fall under any of these categories. This sub-section will examine two common activities for vulnerable EU citizens, begging and selling street papers. However, not all vulnerable EU citizens engage in any of these two activities. It is important that the authorities make an individual assessment in every case, and assess the activity of the person against the criteria stipulated by the CJEU. It must be remembered that work is defined broadly, and includes part-time, short-term work against little remuneration.¹⁴⁴

3.1.2.1 Begging

There is no internationally accepted legal definition of begging. The International Labour Organization (ILO) define begging as,

”A range of activities whereby an individual asks strangers for money on the basis of being poor or needing charitable donations for health or religious reasons.”¹⁴⁵

ILO has emphasised that it is a complex informal work sector. The Organisation has challenged to what extent it constitutes an economic activity and whether begging shall be regarded as an integrated economic sector.¹⁴⁶ In some countries, begging is illegal,¹⁴⁷ while in others it is not. Oliver Brito has examined the concept of begging and compared legal definitions in different Asian countries. He found a minimum definition of begging that most scholars could agree upon; “*A public request for money, food, or other goods, with little or nothing of value given in*

¹⁴⁴ See the discussion under sub-section 3.1.1 above.

¹⁴⁵ ILO, *A rapid assessment of bonded labour in domestic work and begging in Pakistan*, Collective for Social Science Research, Karachi, 2004, p. 31.

¹⁴⁶ *Ibid.* p. 4.

¹⁴⁷ For example England, Wales and Australia, see Lynch, Philip, *Understanding and responding to begging*, Melbourne University Law Review no. 2, 2005, p. 520.

return”.¹⁴⁸ Although beggars normally do not offer anything in return, it is regarded as a street-level economical activity. Brito found that some scholars compare and associate begging with labour, and that most beggars often consider their own activity as work. He furthermore stressed that there is an unequal relationship between the beggar and the giver, since begging is looked upon as something immoral, whereas giving is associated with goodness.¹⁴⁹ However, Brito concluded that since there is no international legal definition, it is difficult to analyse the boundaries between begging and work.¹⁵⁰

The situation of begging has not been elaborated upon in any case by the CJEU. Thus, there is no clear answer to whether begging can be regarded as work within EU. For it to be considered as work it would have to meet the three criteria established by the CJEU; a person needs to perform genuine and effective activities under a certain period of time, for another person under his/her directions and against remuneration.

The first criterion, the duration of the activity, can be argued to be fulfilled. The CJEU has ruled that this criterion is fulfilled as long as the activity is not purely ancillary and marginal.¹⁵¹ It is defined broadly, and includes part-time work for little remuneration.¹⁵² Remuneration is the second criterion, and is defined as, “*Money paid for work or service*”.¹⁵³ The person giving money to the beggar has not requested a service, and the beggar do normally not offer anything in return. However, Brito has challenged this statement. He has emphasised that a person performing or vending something on the street would be considered as a worker if s/he has an authorisation, but as a beggar if s/he has not. The line between worker and beggar will then be blurred in cases where a beggar offers something in return, for example a performance. Brito has also argued that giving money to a beggar can offer something in return to the giver on religious grounds, when it is perceived as an obligation within the religion. It can furthermore strengthen the givers

¹⁴⁸ Brito, Oliver, *Definitional Paradox and Legal Heterogeneity: Towards a Comprehensive and Operational Definition of Begging*, *Asian Social Work and Policy Review* 7, 2003, p. 232.

¹⁴⁹ *Ibid.* p. 232.

¹⁵⁰ *Ibid.* p. 239.

¹⁵¹ *D.M. Levin v Staatssecretaris van Justitie*, C-53/81, 1982, para. 17.

¹⁵² Opinion of the Advocate General Geelhoed in the case *Michel Trojani v Centre public d'aide sociale de Bruxelles*, C-456/02, 2004, para. 31.

¹⁵³ Oxford Dictionaries, <http://www.oxforddictionaries.com/definition/english/remuneration>. Accessed: 2016-04-27.

positive image and help people legitimize their privileged social position.¹⁵⁴ However, this would be a very broad interpretation of work and it has not been confirmed by the CJEU.

Moreover, it can be presumed that, in most cases, the criterion of subordination is lacking. There is no employment relationship if the person concerned is only begging for his/her own sake. In the case of *Trojani*, the CJEU held that the national courts shall, when examining whether someone is a worker, assess if the services performed can be regarded as part of the normal labour market.¹⁵⁵ It is difficult to argue that begging, as it is normally defined today, forms part of the “normal labour market”. Thus, it is most likely that the CJEU would conclude that begging is not work within the meaning of the EU law.

If one concludes that begging is not work, one must consider whether it can be regarded as self-employment. It is difficult to argue that the person concerned is satisfying a request by the beneficiary in return for consideration, i.e. performing a service in return for money. The person giving money to the person begging has not requested a service. It can therefore be assumed that vulnerable EU citizens who make their living from begging, cannot be regarded as self-employed persons either. Nonetheless, as in the case of workers, this needs to be examined in every individual case with consideration to the personal circumstances. In cases where the beggar is offering something in return, for example music or other entertainment, the situation might be different. However, if it is presumed that begging cannot be regarded as work or self-employment, the conclusion will be that those vulnerable EU citizens who earn their living from begging on the streets, are not protected by the extended protection of workers in the Directive 2004/38/EC.

3.1.2.2 Selling Street Papers

The next question is whether persons who are selling street papers shall be regarded as workers. Street papers are papers produced to be sold by homeless persons and other vulnerable groups, in return for a small profit.¹⁵⁶ The street paper

¹⁵⁴ Brito, 2003, p. 233.

¹⁵⁵ *Trojani v Centre public d'aide sociale*, C-456/02, 2004, para. 24.

¹⁵⁶ Cockburn, Partick J.L., *Street papers, work and begging: Experimenting at the margins of economic legitimacy*, *Journal of Cultural Economy*, 7:2, 2013, p. 147.

Faktum¹⁵⁷ classifies selling street paper as a “job”.¹⁵⁸ However, the question is whether it fulfils the three criteria within EU law.

The duration of the activity cannot be purely ancillary and marginal. Selling street paper is not limited to a short period of time, and this criterion should therefore be fulfilled. However, it must be assessed from case to case. The next criterion is the relationship of subordination. The essential element of this relationship is that the worker performs a services for and under someone else.¹⁵⁹ The person selling the paper is performing a service for the distributor of the paper. However, it can also be argued that this is not the case. In the example of Faktum, the person selling the paper is buying it from the distributor and then selling it to customers for a higher price.¹⁶⁰ The paper is consequently the property of the seller, and not of the distributor. It can therefore be argued that the seller is not performing a service for the distributor, but selling something s/he owns. This also constitutes a problem for the criterion of remuneration. The seller makes his/her earnings from the difference between the price s/he bought the paper for and the price s/he sells it for. Thus, it is not a remuneration paid from for example Faktum to the person selling the paper.

The CJEU held in the case of *Bettray* that work which is a means of rehabilitation or reintegration of persons cannot be regarded as an effective and genuine economic activity. The purpose of street papers is to offer work for vulnerable and homeless persons.¹⁶¹ Hence, it can be regarded as a means of rehabilitation or reintegration of vulnerable persons to the labour market. If this is the case, and if the Court would uphold the case law from the *Bettray* case, it is uncertain whether selling street paper would fall under the concept of worker within EU law. However, the CJEU held in the case of *Trojani* that the conclusions of the *Bettray* case can only be explained by the particular circumstances of that case. It furthermore held that the national courts must determine whether the paid activity is real and genuine. In doing this, they shall examine if it can be regarded as part of the normal labour market or not.¹⁶² Thus, it is left to the national courts to determine whether selling street papers is to be defined as work.

¹⁵⁷ A Swedish street paper established in 2001.

¹⁵⁸ Faktum, *Om faktum*, <http://faktum.se/om-faktum/>. Accessed: 2016-04-20.

¹⁵⁹ *Lawrie-Blum v Land Baden-Württemberg*, C-66/85, 1986, para. 17.

¹⁶⁰ Faktum, *Hur får försäljarna sina tidningar?*, <http://faktum.se/faq/>. Accessed: 2016-04-29. See also Cockburn, 2013, p. 145.

¹⁶¹ Faktum, *Vem får sälja faktum?*, <http://faktum.se/faq/>. Accessed: 2016-04-20.

¹⁶² *Trojani v Centre public d'aide sociale*, C-456/02, 2004, para. 19 and 24.

If one concludes that selling street paper is not work because there is no relationship of subordination, one alternative could be to argue that the person in question is self-employed. As discussed under section 3.1.1, self-employment requires an economic activity, performed during a certain period of time and in return of remuneration. Selling something must be regarded as an economic activity. The seller gets money in return for the paper, which satisfies a request by a beneficiary (the buyer) in return for consideration (money).

The Swedish social services have used registration certificates and corporate tax cards as evidence to establish if someone is self-employed.¹⁶³ The street paper Faktum state on their webpage that the sellers do not normally pay taxes, but that it would be possible for them to establish a firm.¹⁶⁴ This could argue against an interpretation that selling street paper is self-employment. It could also be used to argue against that selling street paper is work. The Swedish Tax Agency has stated that the distributors of street papers have a liability as employers and must thereby pay employer's distributions. However, a representative from the old street paper Aluma responded that the sellers are not employees, but customers.¹⁶⁵ The article is eleven years old and the legal position might have change. However, the Swedish Tax Agency has not clarified the liability to pay tax of street paper sellers, and it depends on the setup of the particular street paper. Every case needs to be examined individually and the answer is not given.

There is no Swedish case law regarding whether street papers are to be defined as either work or self-employment. However, a British court has ruled that a person selling the street paper *The Big Issue* was to be considered as self-employed within the meaning of EU law. The Court stressed that several aspects must be taken into consideration when examining this. For example, the period of employment, the number of hours worked, the level of remuneration and whether the work was regular or erratic. The appellant had worked for *The Big Issue* for more than three years, and she normally worked at least 16 hours a week. She earned between 90 – 150 pounds a week, but did not pay any taxes, since the earnings was bellow the threshold for tax. The Court found that the work was genuine and effective, and the

¹⁶³ Socialstyrelsen, *Rätten till socialt bistånd för medborgare inom EU/EES-området*, 2014, p. 15. (Hereinafter Socialstyrelsen, 2014)

¹⁶⁴ Faktum, *Skattar försäljarna?*, <http://faktum.se/faq/>. Accessed: 2016-04-29.

¹⁶⁵ Orrenius, Niklas, Sydsvenskan, *Aluma-försäljare skyldiga att betala skatt*, 29 April 2005, <http://www.sydsvenskan.se/lund/aluma-forsaljare-skyldiga-att-betala-skatt/>. Accessed: 2016-04-29.

appellant was therefore considered as a self-employed person. She was thus entitled to housing assistance.¹⁶⁶

If a Swedish court would make the same interpretation, it would imply that vulnerable EU citizens who are selling street papers have a right of residence and thereby a right to social assistance and housing. Moreover, begging and selling street papers are only two examples of activities vulnerable EU citizens perform. The authorities shall carry out an individual, objective assessment in every case, and there might perfectly well be many cases where the concerned person should be regarded as a worker or self-employed person. This would imply that the person has a right of residence in Sweden, and must thereby be treated equally to nationals.¹⁶⁷

3.1.3 Unreasonable Burden on the Host State

Article 14 of the Free Movement Directive establishes that EU citizens only have a right of residence for three months as long as they do not become an unreasonable burden on the social assistance system of the host state. This is also established in the Swedish Aliens Act.¹⁶⁸ After three months, persons who are not economically active only have a right to stay under the conditions that they have sickness insurance and sufficient resources not to become a burden on the social assistance system.¹⁶⁹ It is therefore relevant to establish how “unreasonable burden” is defined, and how the assessment whether someone constitutes an unreasonable burden should be done.

The Free Movement Directive prescribes that states shall only examine whether a person is a burden on the social assistance system in specific cases where there is reasonable doubt. Article 24.2 of the Directive establishes that states are not obliged to grant social assistance to EU citizens during the first three months. It is highly unlikely that a person who has no right to social assistance would become an unreasonable burden on the system.^{170,171} Furthermore, expulsion shall not be

¹⁶⁶ Bristol City Council v FV [2011] UKUT 494 (AAC) (21 December 2011).

¹⁶⁷ Art. 24 of the Directive 2004/38/EC.

¹⁶⁸ Chapter 8 Art. 9 of the Swedish Aliens Act, SFS 2005:716.

¹⁶⁹ Art. 7.1(b) of Directive 2004/38/EC.

¹⁷⁰ Chalmers, Damian, Gareth Davies, and Giorgio Monti, *European Union Law : Cases and Materials*. 2.ed., Cambridge University Press, Cambridge, 2010, p. 449.

carried out systematically and cannot be an automatic consequence when a person applies for social assistance.¹⁷² Hence, states are not allowed to automatically expel all persons living in, for example, informal caravan camps or on the streets. An individual assessment of whether every person constitutes an unreasonable burden must always be carried out. Collective expulsions are moreover prohibited by both the ECHR and the Charter of Fundamental Rights¹⁷³ of the EU (CFR).^{174,175} States must also take several aspects into consideration before an expulsion is carried out, *inter alia*, how long the person has resided in the state, his/her age, economic situation, social and cultural integration and his/her links to the country of origin.¹⁷⁶

Since the text of the directive stipulates *unreasonable* burden as the threshold, there ought to be a reasonable burden that states must accept. The CJEU held in the case of *Brey* that the Free Movement Directive recognises a certain degree of financial solidarity between nationals of the host state and nationals of other states. This does in particular apply if the difficulties which a person encounters are temporary.¹⁷⁷ The Court therefore concluded that,

“The mere fact that a national of a Member State receives social assistance is not sufficient to show that he constitutes an unreasonable burden on the social assistance system of the host Member State”.¹⁷⁸

However, it can be an indication that the person concerned does not have sufficient resources. A person who is economically inactive, but who had sufficient resources to not become a burden on the system when entering the state, has a right of residence. S/he shall therefore be treated equally to nationals of the state and has a right to social assistance. However, the state has a right, and an obligation, to assess the individual circumstances of the claim. An overall assessment of the burden the specific case would place on the system must always be carried out,

¹⁷¹ The Swedish Social Services Act is discussed under chapter 4.2.

¹⁷² Art. 14.2-4 of Directive 2004/38/EC.

¹⁷³ European Union, *Charter of Fundamental Rights of the European Union*, 2000/C 364/01, 7 December 2000.

¹⁷⁴ See art. 4 of Council of Europe, *Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto*, 16 September 1963, ETS 46; and art. 19 of the CFR.

¹⁷⁵ The CFR does not apply directly to citizens, but states shall respect the rights and observe the principles when implementing EU law, see art. 51 of the CFR.

¹⁷⁶ Art. 28.1 of the Directive 2004/38/EC.

¹⁷⁷ *Pensionsversicherungsanstalt v Brey*, C-140-12, 2013, para. 72.

¹⁷⁸ *Ibid.* para. 75.

including the personal circumstances of the individual case.¹⁷⁹ This implies that the person does not need to be a burden on the social assistance system yet. This was confirmed in the case of *Dano*, which concerned a Romanian woman living in Germany. The CJEU held that the financial situation of the person concerned shall be examined, without taking account of the social benefits. A person who is applying for social assistance has probably not a stable financial situation, and hence not sufficient resources. The Court moreover ruled that states only have an obligation to ensure access to social benefits if the persons concerned are residing on the territory of the state in accordance with the conditions of the Free Movement Directive. Hence, states are not obliged to grant benefits to persons who have no right of residence in the state. If the person does not have sufficient resources, s/he has no right to reside anymore and therefore no right to claim social assistance.¹⁸⁰ Thus, a person who is legally residing within the state will be deprived of his/her right of residence by the mere fact that s/he applied for social assistance. This leads to the conclusion that persons who actually are in need of social benefits, have no possibility to access it. The result is that vulnerable groups fall outside the scope of free movement within EU.

It has been argued that an individual person cannot become an unreasonable burden on the social assistance system, but that this can only be done by the total number of applications.¹⁸¹ The CJEU held in the case of *Brey* that states can, in order to determine the burden on the system, examine what proportion of the beneficiaries are EU citizens.¹⁸² Thus, the state shall consider the overall burden placed on the system. In the case of *Baumbast*, the CJEU ruled that national courts must comply with the principle of proportionality when determining whether someone has become an unreasonable burden. This implies that all measures must be necessary and appropriate to attain the objective pursued.¹⁸³ According to the Directive, states are not allowed to decide on a fix amount that they regard as sufficient resources.¹⁸⁴ Instead, an individual assessment of the personal situation must be carried out. Hence, there is no clear directive for when someone is an unreasonable burden. It must be examined in every individual case. Moreover, the person concerned is

¹⁷⁹ *Pensionsversicherungsanstalt v Brey*, C-140-12, 2013, para. 63-64.

¹⁸⁰ *Dano v Jobcenter Leipzig*, C-333/13, 2014, para. 80-81.

¹⁸¹ Poptcheva, Eva-Maria, *Freedom of movement and residence of EU citizens*, European Parliamentary Research Service, 2014, p. 19.

¹⁸² *Pensionsversicherungsanstalt v Brey*, C-140/12, 2013, para. 78

¹⁸³ *Baumbast v Secretary of State for the Home Department*, C-413/99, 2002, para. 90-91.

¹⁸⁴ Art. 8.4 of the Directive 2004/38/EC.

protected by strict procedural safeguards,¹⁸⁵ and has, for example, a right to appeal decisions taken against him/her.¹⁸⁶ The right to remedy is enshrined in the CFR, which establishes that everyone is entitled to a fair hearing and legal aid.¹⁸⁷ If an expulsion is carried out, the expelled person must be given at least one month notice.¹⁸⁸

To conclude, the question whether someone is an unreasonable burden on the social assistance system of the host state needs to be examined in every individual case. Applying for social assistance cannot automatically lead to expulsion, and vulnerable EU citizens cannot be collectively expelled. There is no fixed amount of sufficient resources a person must have to fall under the scope of the right of residence. However, it can be assumed that persons living in informal settlements and who earn their living by begging on the streets, would be considered to not have sufficient resources. Nevertheless, they do not have any right to social assistance for the first three months according to EU law. Without any right to social assistance it is difficult to become an unreasonable burden on the system. The Swedish law regarding social assistance is discussed under section 4.2.

3.2 Free Movement for Everyone?

It is evident from the previous sub-sections that free movement is not always available for everyone. Only persons who are workers, self-employed, jobseekers or who have sufficient resources not to become a burden on the social assistance system, have a right to reside in another Member State for longer than three months. EU was mainly an economic union from the beginning. Free movement was constructed to improve the productivity on the labour market. However, in the 1960s, people started to call for a wider concept of free movement, extended beyond the economic context. This was the background to the concept of an EU citizenship, available to all citizens of an EU state.¹⁸⁹ The purpose with the Free Movement Directive was to encourage citizens to use their right to move and reside

¹⁸⁵ Chalmers, Gareth and Giorgio, 2010, p. 452.

¹⁸⁶ Art. 31 of the Directive 2004/38/EC.

¹⁸⁷ Art. 47 of the CFR.

¹⁸⁸ Art. 30.3 of the Directive 2004/38/EC.

¹⁸⁹ Boswell, Christina & Geddes, Andrew, *Migration and mobility in the European Union*, Palgrave Macmillan, Basingstoke, 2011, p. 188f.

within other Member States.¹⁹⁰ However, it is evident that the free movement is still mainly available to economically active persons. This section is discussing the access to free movement, and how the failure to access the right of residence is impacting vulnerable EU citizens' access to housing.

It is of utmost importance for persons who wish to use their freedom of movement that they have the possibility to find work. If they are hindered to do this, and have no other financial resources, they are deprived of their right of residence. It is therefore essential that the labour market within EU is non-discriminatory. If it is discriminatory, the result is that people are excluded from the internal market. The CoE's Commissioner for Human Rights has concluded that many Roma are denied employment and discriminated on the labour market.¹⁹¹ The Swedish report *Framtid sökes* finds that 76 % of the Roma population in Bulgaria and up to 90 % in Romania is unemployed.¹⁹² A great part of the vulnerable EU citizens living in Sweden today are of Roma origin and thus affected by this. The Swedish white paper regarding the history of Roma reports a widespread discrimination on the labour market throughout the twentieth century, with no access to neither education nor regular employment.¹⁹³ Nevertheless, this is not just history. In a 1997 report from the Swedish government, it was concluded that discrimination towards Roma is still widespread. It was found that very few Roma have regular employment, due to reasons such as lack of education and language skills.¹⁹⁴ This was confirmed in a report by the Swedish Equality Ombudsman from 2004. It concluded that discrimination on the labour market is a result of a longstanding and general discrimination directed towards Roma.¹⁹⁵ Sweden has also been criticised by several UN committees for the situation of Roma in the country, and concern has been raised regarding discrimination on the labour market.¹⁹⁶ This was done as recently as March 2016 by the Human Rights Committee, which also raised

¹⁹⁰ Gehring, J. S, *Free Movement for Some: The Treatment of the Roma after the European Union's Eastern Expansion*, European Journal of Migration and Law 15, 2013, p. 15.

¹⁹¹ Commissioner for Human Rights, *Human rights of Roma and Travellers in Europe*, Council of Europe Publications, 2012, p. 147.

¹⁹² SOU 2016:6, p. 135 and p. 147.

¹⁹³ Ds 2014:8, *Den mörka och okända historien, vitbok om övergrepp och kränkningar av romer under 1900-talet*, Arbetsmarknadsdepartementet, 2014, p. 247ff.

¹⁹⁴ Ds 1997:49, *Romer i Sverige – tillsammans i förändring*, 1997, p. 38

¹⁹⁵ Diskrimineringsombudsmannen, *Diskriminering av Romer i Sverige*, 2003, p. 24.

¹⁹⁶ CERD, *Concluding observations of the Committee on the Elimination of Racial Discrimination – Sweden*, CERD/C/64/CO/8, 2004, para. 11; and CESCR, *Concluding observations of the Committee on Economic, Social and Cultural Rights – Sweden*, E/C.12/SWE/CO/5, 2008, para. 16.

concerns with the treatment of vulnerable EU citizens of Roma origin. The Committee recommended Sweden to take all measures necessary to ensure equal access to employment for Roma, including vulnerable EU citizens.¹⁹⁷

Thus, it is clear that Roma are discriminated on the Swedish labour market. The consequence of this, for vulnerable EU citizens of Roma origin, is that they are deprived of their possibility to reside legally. The discrimination is thereby affecting them on two levels. Firstly, by the fact that they cannot find a job. Secondly, by the fact that they cannot enjoy the right to free movement on equal terms as other EU citizens. The Free Movement Directive refers to the non-discrimination provision of the CFR. It establishes that any discrimination based on, *inter alia*, race, colour, ethnic or social origin, language, religion or belief and membership of a national minority is prohibited.¹⁹⁸ Hence, states are not allowed to discriminate on the ground of ethnic or social origin, for example Roma origin, when implementing the Directive. However, the consequence of a discriminatory labour market is that persons of Roma origin are indirectly discriminated in the implementation of the Free Movement Directive. Judging from the reports on discrimination of Roma discussed above, this is the case in Sweden today. Sweden must therefore take action to ensure that no one is discriminated on the labour market, to guarantee that the right to free movement is not violated. This is particularly important for vulnerable EU citizens, who have difficulties finding work in their states of origin as well.

Moreover, as seen in chapter two, the consequence of not legally residing is that it becomes more difficult to access human rights. Vulnerable EU citizens who cannot find work due to discrimination can therefore not access the right to adequate housing. The result of the EU system of free movement is that persons are deprived both of their right to free movement and of their right to housing. It claims to be a system of *free* movement available to all EU citizens, but in the end it fails to protect the most vulnerable groups. Thus, one of the issues in vulnerable EU citizens' access to housing is that free movement is not equally ensured for everyone. Instead, it contributes in creating irregular migrants without access to human rights protection. EU claims that "*human dignity, freedom, democracy,*

¹⁹⁷ Human Rights Committee, *Concluding observations on the seventh periodic report of Sweden*, CCPR/C/SWE/CO/7, 30 March 2016, para. 15.

¹⁹⁸ Para. 31 of the Preamble of the Directive 2004/38/EC. See also art. 21 of the CFR.

equality, the rule of law and respect for human rights” are embodied in all EU treaties.¹⁹⁹ The Council of the EU has emphasised that human rights are universal, and that the EU should guarantee human rights for everyone. The Council has furthermore stated that EU will speak out if states undermine the universality of human rights.²⁰⁰ It is contradictive when one of the fundamental freedoms of the Union is not accessible to everyone, and the result is an inability to access human rights. If the EU is serious about ensuring a universal application of human rights, it should start with guaranteeing that the system is not creating irregular migrants without protection of human rights violations.

Thus, free movement is not accessible for everyone. This although it is perceived as one of the fundamental cornerstones of the EU cooperation and therefore shall be restricted as little as possible.²⁰¹ It is clearly still a freedom mainly intended for economically active persons. The concept of the EU citizenship has been criticised on these grounds. Chalmers et. al argues that equality and solidarity are part of the essence of citizenship, and concludes that the EU citizenship does not deserve its name since the citizenship of today is only for those who are not poor or sick. They stress that the aim of preventing migrants from accessing social benefits in a host state must be balanced against the solidarity and openness of the EU citizenship.²⁰² Jacqueline S Gehring points out that EU has taken on the responsibility to ensure fundamental human rights and equal treatment to citizens of eastern EU Member States by their accession into the Union.²⁰³ However, this is obviously not the case today. Fundamental human rights of vulnerable EU citizens living in Sweden are not ensured. The EU citizenship of today is not a way to show solidarity between European states, but rather still an economic matter. This is evident from the fact that a large group of vulnerable persons is excluded from the main benefit stemming from the citizenship, i.e. the free movement. As long as this is the case, it is deceptive to talk about *free* movement and *citizenship*.

¹⁹⁹ European Union Webpage, *Human rights*, http://europa.eu/pol/rights/index_en.htm. Accessed: 2016-05-09.

²⁰⁰ Council of the European Union, *Human Rights and Democracy: EU Strategic Framework and EU Action Plan*, 11417/12, 2012, p. 3f.

²⁰¹ Opinion of the Advocate General Geelhoed in the case *Michel Trojani v Centre public d'aide sociale de Bruxelles*, C-456/02, 2004, para. 10(a).

²⁰² Chalmers, Gareth and Giorgio, 2010, p. 449f.

²⁰³ Gehring, 2013, p. 14.

3.3 Concluding Remarks

There is not one answer to the question whether vulnerable EU citizens have a right of residence. It must be assessed in every individual case. A vulnerable EU citizen who fulfils the requirements of worker or self-employed must be treated equally to nationals and hence has a right to social assistance and a right to housing. To be considered as a worker requires the performance of a genuine and effective activity under a certain period of time, under the directions of another person and against remuneration. The requirements for self-employment are fulfilled when someone satisfies a request from a beneficiary in return for consideration under a certain period of time. It is uncertain whether begging and selling street papers can be considered as work or self-employment. The CJEU has not decided on the issue. It is difficult to argue that begging is work or self-employment since there is no relationship of subordination. It does not form part of the normal labour market and the person giving money has not requested a service from the person begging. It is more likely that selling street paper can be considered as work or self-employment. This is clear from the UK case law, where it was concluded that a woman selling street paper was self-employed.

All EU citizens have a right to reside in another Member State for three months. However, if a state finds that a person is an unreasonable burden on the social assistance system, s/he can be expelled before three months have passed. There is no definition of when a burden is unreasonable. It must be assessed individually in every case. Moreover, persons who are not workers or self-employed, only have a right to reside longer than three months if they have sufficient resources not to become an unreasonable burden. As long as they have a right of residence, they have a right to social assistance. However, if a person is applying for social assistance, the authorities can make the assessment that s/he will become an unreasonable burden. States have no obligation to grant social assistance to persons who have no right of residence, according to the judgment of *Dano*. The result of this system is that a person who is legally residing can be deprived of this right by applying for social assistance. Thus, persons who are in actual need of social assistance, cannot access it.

It is evident that people have different rights depending on their social status according to the Free Movement Directive. Persons who cannot access the national

labour market, have no way to legally reside in another EU state, unless they have sufficient resources. Hence, the Directive differentiates between rich and poor EU citizens. There is a long tradition of discrimination against Roma within Europe. If Roma cannot find employment due to discrimination, and therefore not access the extended protection of workers, it implies that one of the fundamental freedoms of the EU is non-accessible to a certain group due to discrimination.

As established in the second chapter, there is a human right to adequate housing both within international law and European law. Vulnerable EU citizens who are legally residing must be ensured the right to housing on the same level as nationals. Moreover, at least a minimum level of housing assistance shall be ensured for everyone, legal as well as illegal residents. However, as also discussed in the second chapter, migrants which are illegally residing have difficulties accessing their human rights. The fact that many vulnerable EU citizens have no right of residence is therefore resulting in the failure to access the right to adequate housing. It can be questioned whether a Europe without internal borders really exists, if not every EU citizen can access their right to move and reside within other Member States. When it moreover results in an inability to access human rights, including the right to adequate housing, there is a severe inadequacy inherent in the system. A vulnerable group of persons has no possibility to take part in the free movement, due to the circumstance that they have no resources. The consequence of this is that a vulnerable group will become even more vulnerable. If EU was build on the idea of human rights, the fact that someone is vulnerable and has no resources would imply that they get help. However, in Europe today, the fact that someone has no resources instead implies that they are excluded from the benefits of the union.

4 Access to Housing on the National Level

This chapter examines the third, and last, legal system – domestic Swedish law. It is clear from the previous chapters that the reason why vulnerable EU citizens are unable to access housing lies in both the human rights regime and EU law. States can exclude irregular migrants from the protection of human rights obligations, such as the right to housing, on the ground that they are not citizens. The free movement of EU citizens is, moreover, only applicable to workers, self-employed and persons with sufficient resources. Thus, vulnerable EU citizens who are unable to access the labour market, and who lack resources, cannot benefit from the free movement for more than three months. The result is that they have no right of residence, and thereby can be deprived of their rights to adequate housing. This chapter examines how the right to housing is enshrined in domestic Swedish law. The purpose is to determine whether domestic law plays a role in vulnerable EU citizens' inability to access housing. Firstly, the Swedish provision regarding housing is examined. Further on, the Social Services Act is scrutinised more in detail, and vulnerable EU citizens' access to housing in Sweden is analysed.

4.1 The Right to Housing within Domestic Swedish Law

Sweden has a dualistic system. This implies that international human rights law need to be implemented into domestic legislation, to be applicable as law in Sweden.²⁰⁴ Thus, individuals cannot go to court and claim his/her right to adequate housing based on a provision in international human rights. However, Swedish authorities have an obligation to interpret the Swedish laws in consistence with international treaties. If there is a clear divergence between a provision in a Swedish law and a provision in international law, the Swedish law prevails.²⁰⁵ It is the state and hence the national government that normally signs and ratifies international human rights treaties. It is therefore only the state as a whole that is

²⁰⁴ Denza, 2010, p. 417.

²⁰⁵ SOU 2010:70 *Ny struktur för skydd av mänskliga rättigheter*, 2010, p. 20.

bound by human rights obligations.²⁰⁶ However, regional and local authorities, such as municipalities, have an important role to play in the implementation of human rights. Local authorities have a special ability to identify relevant human rights problems and take action to solve them, due to the close relationship between them and the citizens.²⁰⁷ The UN Human Rights Council has stated that local governments, for example municipalities, are in a better position to handle issues that require local knowledge.²⁰⁸ Whereas the national government has the primary responsibility to implement human rights, local municipalities are also obliged to comply with the obligations.²⁰⁹

There is no specific right to housing within Swedish law. Article 2 of the Instrument of Government establishes that public power shall be exercised with respect for the equality of everyone. Moreover, personal and economic welfare shall be the fundamental aim of public activities. Public institutions shall secure, *inter alia*, the right to housing.²¹⁰ This has, however, been interpreted as a goal for the society, not an enforceable right.²¹¹ Nonetheless, the Social Services Act establishes that individuals shall be ensured an adequate standard of living. Housing is included as one of the costs that social assistance can be granted for.²¹² Moreover, the social services shall foster the right to housing of individuals.

Housing allowance is also established in the Social Insurance Code and is offered to families or to persons between the age of 18-29.²¹³ It is applicable to persons who have their usual residence in Sweden. Non-citizens must be assumed to stay in the country for more than a year to be regarded as residents.²¹⁴ Hence, vulnerable EU citizens who are not workers or self-employed cannot access any housing allowances, since they only have a right of residence for three months. They can therefore not be assumed to stay for a year. Vulnerable EU citizens who are

²⁰⁶ UN Human Rights Council, *Role of local government in the promotion and protection of human rights*, A/HRC/30/49, 7 August 2015, para. 17.

²⁰⁷ The Congress of Local and Regional Authorities, *Role of local and regional authorities in the implementation of human rights*, Resolution 296, 2010, para. 2-4.

²⁰⁸ UN Human Rights Council, *Role of local government in the promotion and protection of human rights*, A/HRC/30/49, 7 August 2015, para. 8-9.

²⁰⁹ *Ibid.* para. 21.

²¹⁰ Art. 1 and 2 of the Swedish Instrument of Government [Regeringsformen], SFS 1974:152.

²¹¹ SOU 1975:75, *Medborgerliga fri- och rättigheter – Regeringsformen*, 1975, p. 164.

²¹² Chapter 4 Art. 1 and 3 of the Swedish Social Services Act, SFS 2001:453.

²¹³ Chapter 96 Art. 4-11 of the Swedish Social Insurance Code, SFS 2010:110.

²¹⁴ Chapter 5 Art. 2-3 of the Swedish Social Insurance Code, SFS 2010:110.

workers or self-employed must, on the other hand, enjoy equal treatment as citizens. They do therefore have a right to housing allowance if they stay more than one year. However, the personal scope of the housing allowance is very limited and not applicable to everyone. Hence, it is the Social Services Act that offer the best possibility to get one's right to housing ensured. This Act will therefore be more closely examined under section 4.2.

Both the CESCR and the ECSR have emphasised that the right to housing must be implemented into domestic law.²¹⁵ States shall adopt legislation to clarify how the right to housing is to be ensured, and adequate housing standards shall be defined in law. As of today, Sweden has no provision which establishes the right to housing. A bill has been put forward to establish the right to housing in a specific law, but the parliament refused the motion.²¹⁶ Sweden ought to adopt legislation in order to comply with international obligations. It would facilitate for individuals to access their right. It would also facilitate for municipalities and other authorities when ensuring the right, if there are clear provisions in Swedish law on what obligations the right entails. Moreover, it would guarantee that the right to housing is applied equally throughout all municipalities in Sweden. Thus, Sweden should implement the right to housing in domestic law.

4.2 The Social Services Act

The right to housing in Sweden is ensured through the right to social assistance in the Social Services Act. Social assistance can be granted in the form of income support, for, *inter alia*, housing expenses.²¹⁷ The Swedish Social Services Act stipulates that the municipality where a person is residing²¹⁸ is responsible for social services. If it is evident that another municipality is responsible, the responsibility of the municipality of residence is limited to emergency situations. If a person is domiciled in another municipality,²¹⁹ that municipality is responsible. A person is considered to be domiciled if s/he is permanently living there.²²⁰ The

²¹⁵ See section 2.1 above.

²¹⁶ Motion 2012/13:C447, *Bostad – en mänsklig rättighet*, 5 October 2012.

²¹⁷ Chapter 4 Art. 3 of the Swedish Social Services Act, SFS 2001:453.

²¹⁸ *Vistelsekommun* in Swedish. This is referred to as *municipality of residence* in this thesis.

²¹⁹ *Bosättningskommun* in Swedish.

²²⁰ Chapter 2a Articles 1-3 of the Swedish Social Services Act, SFS 2001:453.

National Board of Health and Welfare²²¹ has stated that if a person is not nationally registered²²² with the authorities in Sweden, it is the municipality of residence that is responsible.²²³ This section will examine how the concept of residence and emergency situations have been interpreted, and how it impacts vulnerable EU citizens' access to housing. The right to social assistance for the first three months is furthermore discussed. Lastly, the competence and responsibility of municipalities is examined, to determine whether it includes vulnerable EU citizens.

4.2.1 The Concepts of Residence and Emergency Situations

Swedish municipalities are obligated to ensure the right to social assistance for persons residing within the municipality. It is therefore of importance to establish who is considered to reside. The National Board has stated that EU citizens who have a right of residence, must be treated equally to Swedish citizens and therefore have a right to social assistance. The social services must make an individual assessment in every case, firstly assessing whether the person has a right of residence and secondly whether s/he has a right to social assistance.²²⁴ Hence, a vulnerable EU citizen who is a worker or self-employed is entitled to social assistance in Sweden, including assistance to pay for housing.

The Social Services Act does not distinguish between persons who have a right of residence and persons who have not. Instead, the law stipulates that the municipality is responsible for everyone who is residing²²⁵ within it. However, the National Board has stated that vulnerable EU citizens without a right of residence are only entitled to social assistance in emergency situations.²²⁶ The Board relied on the case law from *RÅ 1995 ref 70*, where the Court held that a person who could not be considered to have his actual home and residence in a Swedish municipality, was only entitled to emergency assistance. The case concerned a person with

²²¹ Hereinafter the National Board.

²²² *Folkbokförd* in Swedish.

²²³ SOU 2009:38, *Ingen får vara Svarte Petter – Tydligare ansvarsfördelning inom socialtjänsten*, 2009, p. 134.

²²⁴ Socialstyrelsen, 2014, p. 8.

²²⁵ *Vistas* in Swedish. Residing should not be confused with the right of residence, which is established in Directive 2004/38/EC.

²²⁶ Socialstyrelsen, 2014, p. 8.

temporary residence permit, who had only been in Sweden seven months over the last four years. The applicant's time in Sweden was regarded as visits, and he could not be considered as a resident. He was therefore not entitled to any social assistance, except in the case of emergency situations.²²⁷ The National Board has indicated that this applies to persons who have moved to Sweden without any real chances of finding work and therefore have to beg to provide for themselves.²²⁸ Thus, persons who exercise their right to move and reside freely for three months. The interpretation that a person without a right of residence has no right to social assistance is supported by the case of *Dano*.²²⁹ The CJEU ruled that if a person does not have sufficient resources, s/he has no right of residence and therefore no right to claim social assistance.²³⁰ This is reinforced by the interpretation of the Swedish Ministry of Health and Social Affairs, which concluded that persons who are in Sweden without a right of residence, only have a right to social assistance in emergency situations.²³¹ It is also supported by several judgments from Swedish courts.²³²

Thus, the authorities must assess the person's right of residence before assessing whether s/he has a right to social assistance. However, it can be questioned whether it is relevant to still rely on the case law from *RÅ 1995 ref. 70*. The case is over 20 years old, and the circumstances are not identical to the situation of vulnerable EU citizens. In *RÅ 1995 ref. 70*, the person concerned had work and income in his home country. This is normally not the case for vulnerable EU citizens, who are exposed to discrimination in their states of origin.²³³ The person in *RÅ 1995 ref. 70* had not been living in Sweden over a longer time, but only for a couple of months at a time. It is not certain that this is the case with all vulnerable EU citizens. However, vulnerable EU citizens without work or sufficient resource only have a right to stay for three months. The National Board has stated that EU citizens who come to Sweden without any real chances of finding work only have a right to social assistance in emergency situations. Nonetheless, all EU citizens have a right of residence for three months, regardless if they have any real chances of finding

²²⁷ Supreme Administrative Court, RÅ 1995 ref. 70, 27 November 1995.

²²⁸ Socialstyrelsen, 2014, p. 8.

²²⁹ See sub-section 3.1.3 above.

²³⁰ *Dano v Jobcenter Leipzig*, C-333/13, 2014, para. 80-81.

²³¹ SOU 2005:34, *Socialtjänsten och den fria rörligheten*, 2005, p. 155.

²³² See for example Administrative Court of Appeal in Gothenburg, Case No. 4229-09, 15 March 2010.

²³³ See the discussion under 3.2 above.

work or not. The right to social assistance for the first three months is discussed under sub-section 4.2.2 below.

The benchmark of the Social Services Act is that the municipality is responsible for everyone within its area. The only time the municipality can deviate from this responsibility is if it is clear that another municipality is responsible.²³⁴ This implies that it must be assessed whether another municipality is responsible in every individual case. The case of *RÅ 1997 ref 70* did not elaborate on this, and neither has the National Board. Instead, the interpretation is that a person without his/her actual home and residence in a Swedish municipality is only entitled to emergency assistance. Neither the Court nor the National Board have elaborated upon how the assessment whether someone has his/her actual home and residence should be done. The National Board has only stated that an individual assessment must be done.

One possible interpretation is that the state of origin is regarded as responsible in cases of vulnerable EU citizens, and thereby limits the responsibility of the Swedish municipality. However, this interpretation can be questioned. Civil Rights Defenders has raised concerns regarding the use of a division of responsibilities intended for Swedish municipalities, on a division of responsibilities between two states. EU has no common welfare system, and it is not certain that the person has the same right to social assistance in his/her home country as in Sweden.²³⁵ The Social Services Act presupposes that the other municipality is taking responsibility and offers social assistance. However, if the other municipality is in another state, and that state is not offering any social assistance due to, for example, discrimination, the persons concerned will not be able to access any help. A vulnerable group of persons will thereby become even more vulnerable. It is clear that the Social Services Act is not intended for situations of non-citizens, where other states are involved. It does not stipulate any exceptions for non-citizens or irregular migrants. Nonetheless, the National Board and several other authorities are clearly of the opinion that non-citizens without a right of residence can be excluded from the protection. This conclusion is drawn without any real support in the law. The Swedish legislator should therefore clarify how the situation of

²³⁴ Chapter 2a Art. 1-2 of the Swedish Social Services Act, SFS 2001:453.

²³⁵ Civil Rights Defenders, *Utsatta Unionsmedborgare i Sverige: Statens skyldigheter enligt internationella människorättsnormer, EU-rätt och svensk rätt*, 2015, p. 25.

irregular migrants, including vulnerable EU citizens without a right of residence, should be handled.

It is not arguable that all municipalities have a responsibility to help vulnerable EU citizens in emergency situations. Emergency situations are defined in the *travaux préparatoire* to the Social Services Act. It includes situations which emerge unexpectedly, and other cases when the person in question cannot wait to get help from another municipality. Which measures are needed and required, must be assessed individually in every case. However, it includes, *inter alia*, occasional food, short-term shelter and a ticket home.²³⁶ Both the National Board and the Swedish Association of Local Authorities and Regions have stated that a ticket home is an appropriate measure in emergency situations.²³⁷ A Swedish Government Official Report concluded that it is the municipality where a person is residing when a need of help is emerging that is responsible. It does not matter how long the person has been residing. It was moreover stated that if a person is only temporary residing, and the needs can be satisfied if the person is sent back home, a ticket home is sufficient.²³⁸ This can be interpreted as implying that if the needs would not be satisfied, a ticket home is not sufficient. Thus, if the circumstances in the state of origin indicates that the person would not have access to any social assistance or housing, a ticket home should not be sufficient.

If a person has left his/her state of origin due to poor living conditions, it is unlikely that s/he will return home voluntarily. However, if the person is not willing to accept a ticket home due to his/her living conditions in the home state, the municipality will probably not offer any other assistance. Hence, the person concerned will live under poor living conditions no matter what s/he does. The *travaux préparatoire* to the Social Services Act raises the question of what responsibility the municipalities have if a person does not want to return immediately. The Government concludes that the responsibility is then still limited to emergency measures.²³⁹ It is uncertain exactly what this responsibility entails.

²³⁶ Regeringens proposition 2010/11:49, *Ansvarsfördelning mellan bosättningskommun och vistelsekommun*, 13 January 2011, p. 36f.

²³⁷ Socialstyrelsen, 2014, p. 8; and Sveriges Kommuner och Landsting, *Några juridiska frågor gällande utsatta EU-medborgare*, 2014, p. 4.

²³⁸ SOU 2009:38, *Ingen får vara Svarte Petter – Tydligare ansvarsfördelning inom socialtjänsten*, 2009, p. 133.

²³⁹ Regeringens proposition 2010/11:49, *Ansvarsfördelning mellan bosättningskommun och vistelsekommun*, 13 January 2011, p. 37.

However, municipalities do still have a responsibility and this should proceed as long as the person in need of help is residing in the municipality. Thus, municipalities should not be able to circumvent their responsibility by only offering a ticket home. The municipality should be obliged to at least offer emergency shelter as long as the person concerned is within the municipality.

To conclude, Swedish authorities have made the interpretation that only persons with a right of residence are entitled to social assistance. Vulnerable EU citizens without a right of residence are therefore only entitled to emergency assistance. However, the authorities need to make an individual assessment of every case, and must always assess whether or not the person has a right of residence. Thus, vulnerable EU citizens' denied access to the free movement and the right of residence is affecting their right to social assistance in Sweden. The denied access to social assistance is, in turn, affecting their possibilities to access housing. However, emergency assistance should include shelter for as long as the person is in the municipality, although this is not the case in many Swedish municipalities today.

4.2.2 The Right to Social Assistance for the First Three Months

The Free Movement Directive establishes that states are not obliged to grant social assistance for the first three months.²⁴⁰ However, the Swedish Social Services Act does not include this exception from equal treatment.²⁴¹ The Free Movement Directive only prescribes that states are not obliged to confer entitlement to social assistance, it does not prohibit states from granting such assistance. Sweden is therefore allowed to grant a greater protection to vulnerable EU citizens than the protection offered by EU law. The National Board has stated that EU citizens who have a right of residence, have a right to social assistance on the same grounds as Swedish citizens.²⁴² As discussed under chapter three, all EU citizens have a right to reside freely within any other Member State for three months. Thus, the question is whether a person exercising his/her right to reside in Sweden for three months, has a right to social assistance according to the Social Services Act.

²⁴⁰ Art. 24.2 of Directive 2004/38/EC.

²⁴¹ Civil Rights Defenders, *Utsatta Unionsmedborgare i Sverige: Statens skyldigheter enligt internationella människorättsnormer, EU-rätt och svensk rätt*, 2015, p. 24.

²⁴² Socialstyrelsen, 2014, p. 8.

According to the Swedish Aliens Act, EU citizens have a right of residence first after three months has passed.²⁴³ Hence, EU citizens have a right to reside in Sweden for three months, but not a right of residence. This is different from the Free Movement Directive, which stipulates that everyone has a right of residence for three months.²⁴⁴ The National Board has stated that only those who have a right of residence are entitled to equal treatment as nationals.²⁴⁵ Thus, it is of importance whether or not someone falls under the scope of the right of residence. The fact that the Swedish law does not grant a right of residence to EU citizens residing for three months, do therefore have an impact on vulnerable EU citizens' access to social assistance. If the Swedish law would have been consistent with the Free Movement Directive, and established a right of residence for everyone within three months, they would have been entitled to social assistance.

Thus, Sweden has not implemented the Free Movement Directive correctly. This is severe, since the authorities has made the implementation that only those with a right of residence have a right to social assistance. The Free Movement Directive establishes that states are not obliged to grant social assistance for the first three months. If Swedish legislatures intend this exception to apply in Sweden, it should be implemented into the Swedish Social Services Act. It would be an easy way to make clear that EU citizens have no right to social assistance for the first three months. As it is today, the law is unclear and the interpretation is built on a wrongful implementation of the Free Movement Directive.

The principle of supremacy applies within EU. It implies that if a domestic law is in conflict with an EU law, the provision in the EU law prevails. Thus, it can be argued that the provision in the Free Movement Directive, which establishes that everyone has a right of residence for three months, should prevail over the Swedish Aliens Act. It would mean that vulnerable EU citizens in Sweden have a right of residence for three months. The implementation by the National Board, that everyone with a right of residence has a right to social assistance, would then lead to the conclusion that those persons have a right to social assistance. However, the state has a right to suspend the right of residence if someone becomes an

²⁴³ Chapter 3a Art. 1 of the Swedish Aliens Act, SFS 2005:716.

²⁴⁴ See art. 6 of Directive 2004/38/EC.

²⁴⁵ Socialstyrelsen, 2014, p. 7.

unreasonable burden on the social assistance system.²⁴⁶ If EU law prevails over the Swedish Aliens Act, vulnerable EU citizens have a right of residence for three months. They do have a right to social benefits as long as they have a right of residence. But they do not have a right of residence if they become an unreasonable burden on the social assistance system. This implies that vulnerable EU citizens have no access to social benefits within the first three months under this interpretation either.

Thus, the system of free movement entails that persons can be deprived of both their right to social assistance and their right of residence by applying for help. Instead of being an additional argument for granting social benefits, the circumstance that someone does not have sufficient resources, prevents them from getting help. However, this is in compliance with EU law. The CJEU has ruled that Member States are allowed to deny access to social benefits for persons who have no legal right to reside, as long as the conditions for obtaining a right of residence is in compliance with EU law.^{247,248} It can be argued that the conditions for obtaining a right of residence according to the Swedish Aliens Act is not in compliance with EU law, since EU citizens cannot obtain a right of residence for the first three months. If Sweden does not want to grant social assistance to everyone, the legislatures must adopt a provision which excludes EU citizens from a right to social assistance for the first three months.

Sweden could also decide to go the other way and give access to social benefits for vulnerable EU citizens. Although the Free Movement Directive does not stipulate a right to social assistance for the first three months, nothing in the Directive prohibits states from granting a more beneficial treatment. By doing this, municipalities could avoid costly evictions. Instead of spending large sums of money on evicting people, the money could be invested to avoid informal settlements. One common argument against granting social benefits to everyone, is that the number of persons seeking their way to Sweden would increase.²⁴⁹ Hans-Werner Sinn argued that an enlargement of EU would lead to “welfare shopping”

²⁴⁶ Art. 14 of Directive 2004/38/EC. See also chapter 8 art. 9 of the Swedish Aliens Act, SFS 2005:716.

²⁴⁷ *Pensionsversicherungsanstalt v Brey*, C-140/12, 2013, para. 44-45.

²⁴⁸ See sub-section 3.1.3 for a further discussion on this.

²⁴⁹ Pieter van der Mei, Anne, *European Union Citizenship, freedom of movement and social assistance benefits*, in Berghman, Jos (red.), *Social security in transition*, Kluwer Law International, The Hague, 2002, p. 93.

between states, which would eventually result in failure of the welfare system.²⁵⁰ However, nothing proves that this fear is accurate. Anne Pieter van der Mei argues that the concern is incorrect and states that social, cultural and linguistic obstacles prevent many persons from moving to other states. She also refers to the United States, where no evidence has been found on the existence of “social tourism”.²⁵¹ This is also confirmed by Georgiana-Christina Rentea, who emphasises that there is no evidence that “social tourism” existence within EU.²⁵² Thus, there is no hard evidence suggesting that expanding the right to social assistance would lead to an influx of EU citizens moving to Sweden. However, it is certain that it would increase the access to human rights of vulnerable EU citizens.

In conclusion, the Swedish Aliens Act prescribes that EU citizens are entitled to a right of residence first after three months. The Free Movement Directive, on the other hand, prescribes that everyone is entitled to a right of residence for three months. The Swedish provision affects vulnerable EU citizens, who are residing in Sweden legally for three months, since only those with a right of residence are entitled to social assistance. Sweden ought to correct the law and make sure it is in compliance with the Free Movement Directive. If Sweden wants to exclude EU citizens from a right to social assistance, the legislators should adopt the exception from equal treatment prescribed in the Directive. It stipulates that states are not obliged to grant social assistance to EU citizens within the first three months.

4.2.3 The Responsibility of Municipalities

It is clear that municipalities have a responsibility to ensure social assistance for persons residing within the municipality, at least in emergency situations.²⁵³ However, it has been argued that vulnerable EU citizens do not fall within the competence of municipalities.²⁵⁴

²⁵⁰ Sinn, Hans-Werner, *EU Enlargement and the Future of the Welfare State*, Scottish Journal of Political Economics, 49(1), p. 105.

²⁵¹ Pieter van der Mei, 2002, p. 103f.

²⁵² Rentea, Georgiana-Christina, *Mobility within the European Union and the access to social benefits: challenges of social policies*, Revista de Asistența Socială, anul XIV, nr. 3/2015, p. 105.

²⁵³ See sub-section 4.2.1 above.

²⁵⁴ See The Administrative Court of Linköping, Case No. 611-14, Judgment of 9 June 2014; and SOU 2016:6, p. 70.

There is moreover no consensus among Swedish municipalities on how to handle the issue of housing for vulnerable EU citizens. The municipality of Lund has reserved 700.000 SEK aimed at accommodation for vulnerable EU citizens. A homeless hostel is open from October to March, and particularly vulnerable persons are offered accommodation throughout the year. The Social Welfare Committee has stressed that vulnerable EU citizens have a right to reside in Lund for three months, and shall be met with respect and dignity.²⁵⁵ The neighbouring municipality of Malmö has, on the other hand, not handled the issue in the same way. In November 2015, a large informal settlement with around 150-200 dwellers was evicted. The municipality of Malmö only offered a ticket home and accommodation for a couple of nights for the vulnerable EU citizens who were afflicted.²⁵⁶ A church and a civil society organisation, Kontrapunkt, intervened and offered temporary shelter for the persons concerned. However, the municipality of Malmö imposed a conditional fine for both the church and Kontrapunkt in April 2016, if they did not stop offering shelter.²⁵⁷ Thus, the municipality of Malmö has actively opposed any solution for the housing issue of vulnerable EU citizens in Malmö.

The Swedish Local Government Act established that municipalities shall handle matters which concern the municipality and which are not to be handled by the government solely.²⁵⁸ Swedish municipalities are not entitled to handle matters which do not comply with these conditions. The Administrative Court of Linköping has ruled that vulnerable EU citizens are a concern of the municipality.²⁵⁹ This would imply that municipalities have a responsibility to handle the “matter” of vulnerable EU citizens. However, the national coordinator Martin Valfridsson has questioned whether municipalities are legally authorized to offer shelter or organise camp sites for vulnerable EU citizens. He argued that municipalities are only allowed to offer social assistance in emergency situations. Long-term shelters or camp sites would fall outside the scope of emergency

²⁵⁵ Socialnämnden i Lund, *Handlingsplan för arbete med utsatta EU-medborgare som vistas i Lunds kommun*, Dnr SO 2015/0023, 3 June 2015, p. 2ff.

²⁵⁶ Höök, Lovisa & Lovén, Maria, Sydsvenskan, *Nu rivs Sorgenfrilägret*, 3 November 2015, <http://www.sydsvenskan.se/malmo/migrantlagret-toms-just-nu/>. Accessed: 2016-02-03.

²⁵⁷ Sydsvenskan, *EU-migranter tvingas ut på gatan*, 1 April 2016, <http://www.sydsvenskan.se/sverige/eu-migranter-tvingas-ut-pa-gatan/>. Accessed: 2016-04-25.

²⁵⁸ Chapter 2 Art. 1 of the Swedish Local Governments Act, SFS 1991:900.

²⁵⁹ Administrative Court of Linköping, Case No. 611-14, Judgment of 9 June 2014.

assistance, and therefore not be allowed. Valfridsson further argued that it could constitute unfair competition towards private camp sites to offer cheap accommodation for a particular group. He therefore concluded that municipalities are only allowed to offer short-term shelter to vulnerable EU citizens.²⁶⁰

This conclusion can however be challenged. Valfridsson stated himself that it is uncertain whether municipalities can offer long-term shelter. Hence, it is not certain that it is illegal. He further justified his statement with the argument that it would not be within the competence of municipalities according to the Swedish Local Government Act. However, the Administrative Court has ruled otherwise, and concluded that vulnerable EU citizens are the concern of municipalities. The Court also concluded that the municipality has a responsibility to offer social assistance in emergency situation, and to offer shelter did not fall outside the scope of this.²⁶¹ The judgment of the Administrative Court is not a prejudice and therefore not binding upon other courts. However, it is an indication for how courts interpret the law.

Valfridsson did, moreover, not mention the right to adequate housing at all. As discussed under chapter two, the state has an obligation to ensure the right to housing. At least a minimum level of housing assistance must be ensured for everyone, regardless of legal status, according to both the CESCR and the ECSR. This obligation is not limited in time, but applies as long as the individuals are within the jurisdiction of the state. It has not been specified exactly what minimum level of housing assistance constitutes. However, both the CESCR and the ECSR have emphasised that the dignity of the persons concerned must be upheld. To offer homelessness shelter and camp sites must be regarded as a minimum level of assistance, which the state thus has an obligation to ensure. Swedish law should be interpreted in the light of international obligations. Hence, municipalities should be allowed, and obliged, to offer shelter and camp sites for vulnerable EU citizens.

The Swedish Government introduced a national coordination of the work with vulnerable EU citizens, in April 2016. The purpose is to strengthen the cooperation and coordination between national authorities and municipalities. An advisory body will be established, in order to help municipalities in their work with

²⁶⁰ SOU 2016:6, p. 70f.

²⁶¹ The Administrativ Court of Linköping, Case No. 611-14, Judgment of 9 June 2014.

vulnerable EU citizens. The Government emphasised that many vulnerable EU citizens are living under difficult social and economic conditions, both in their states of origin and in Sweden. The aim is that measures shall be appropriate and equitable throughout Sweden after the coordination.²⁶² However, the Government did not mention anything regarding what measures will be taken or how the help will be directed. It remains to be seen if it will be an improvement in the assurance of the right to housing for vulnerable EU citizens.

4.3 Concluding Remarks

Domestic Swedish law does not include an explicit right to housing. The right to housing is instead ensured through social assistance. Both the CESC and the ECSR have emphasised the importance of implementing the right to housing within domestic law, and Sweden should therefore adopt such provision in domestic legislation. It would improve individuals' access to the right, and make it more apparent for the municipalities what obligations they must ensure.

The Social Services Act stipulates that the municipality of residence is responsible for ensuring social services, if it is not evident that another municipality is responsible. In those cases, the municipality of residence is only responsible for emergency assistance. If a vulnerable EU citizen has a right of residence, s/he also has a right to social assistance on the same grounds as Swedish citizens. If a vulnerable EU citizen has no right of residence, the obligation of the municipality is limited to emergency assistance, according to Swedish authorities. Thus, the right of residence for vulnerable EU citizens is of importance for the right to social assistance within the Swedish system. Every case must be assessed individually, and it is of utmost importance that not all vulnerable EU citizens are viewed as one homogenous group. The interpretation that vulnerable EU citizens without a right of residence should only be granted emergency assistance, can be questioned. The Social Services Act does not stipulate any exception for non-citizens, and the text of the Act establishes that the municipality is responsible for every person residing within the municipality. Swedish legislator should clarify the situation for irregular

²⁶² Socialdepartementet, *Uppdrag om nationell samordning avseende utsatta EU/EES-medborgare som saknar uppehållsrätt i Sverige*, S2016/00724/FST, 14 April 2016.

migrants, including vulnerable EU citizens without a right of residence, if the intention with the Social Services Act is that it should not apply to everyone.

According to the Free Movement Directive, all EU citizens have a right to reside in Sweden for three months and the Swedish Social Services Act does not explicitly exclude these persons. However, the Swedish Aliens Act establishes that EU citizens have a right of residence first after three months. Thus, the Swedish Aliens Act is not in compliance with the Free Movement Directive. It results in a failure to access social assistance, since Swedish authorities have interpreted the law as only granting social assistance to persons with a right of residence. Sweden must therefore make sure that the domestic law is in compliance with EU law.

It has been argued that the responsibility to help vulnerable EU citizens falls outside the competence of municipalities. However, human rights law prescribes that everyone should be ensured at least a minimum level of housing, compatible with human dignity. It is moreover not arguable that the municipalities have an obligation to help in emergency situations. Emergency assistance should include shelter for as long as the person concerned is within the municipality. Today, municipalities only offer a ticket home in many cases. This is normally not a formal expulsion, but only an offer. If the person concerned chooses to stay in Sweden, municipalities can argue that they did fulfil their responsibility. The person is then still in need of help, but unable to access it. It is not compliant with human dignity to be left to sleep in informal settlements or on the street. The municipality should therefore have an obligation to ensure shelter for as long as the vulnerable person is in the municipality. It should not be possible to circumvent this responsibility by offering tickets home.

5 Conclusion

This thesis has examined what role human rights law, EU law and domestic Swedish law play in vulnerable EU citizens' inability to access housing. The purpose was to study why the right to housing is not ensured for vulnerable EU citizens in Sweden. The aim was, moreover, to examine whether the problem lies within one of the three legal regimes or if there are issues with all of them. In order to facilitate the study, three sub-questions were formulated.

The first sub-question was what obligations Sweden has under the right to housing in human rights law and whether it applies to non-citizens. The right is established in both international and European human rights law. The right to adequate housing in the ICESCR includes a right to live somewhere in security, peace and dignity. The right to housing under RESC constitutes an obligation for states to promote access to housing, reduce homelessness and ensure affordable housing to those without resources. Neither right includes an obligation for states to provide a house for everyone, but special attention should be paid to housing of vulnerable groups. States must take steps, to the maximum of its available resources, to ensure the rights under the ICESCR. The RESC obliges states to adopt legal, financial and operational measures to ensure progress. Thus, states shall ensure the right to housing in relation to its resources. Sweden is a relatively rich country and should therefore have resources to ensure basic housing for everyone. Both the UN Special Rapporteur on adequate housing and the Parliamentary Assembly of the CoE have urged all states to ensure at least a minimum level of housing for irregular migrants.

The appendix of the RESC limits the personal scope of the Charter to persons legally residing within the state. However, the ECSR has expanded the scope and emphasised that the RESC shall apply to persons illegally residing if the right is linked to human dignity and the right to life. This is only applicable in certain exceptional cases. The ECSR has stated that the right to housing is closely linked to life and human dignity, and thus emphasised that it can be applicable to irregular migrants in certain cases. States have, for example, an obligation to ensure shelter for children, regardless of legal status, as long as they are under the jurisdiction of the state.

The ICESCR does not include a general distinction between citizens and non-citizens. It is, however, not controversial among states to limit the access to human rights for persons without a legal right to reside. The reason for this is that human rights are not independent from the system of sovereign states, but part of it. If human rights are to be meaningful, it requires a state which is willing to ensure them. Sovereignty implies that states are free to decide on matters which are essentially within domestic jurisdiction, and includes a right to regulate the entry and expulsion of non-citizens. Thus, a person without a right of residence risks being deported if s/he contacts the authorities to claim help with housing. This is entirely within the right of the state, but results in a system where not everyone has access to human rights. It does not matter that international and regional treaties oblige states to ensure a right to housing for everyone, including irregular migrants. As long as states are free to control the entry and expulsion of non-citizens, there is no way for them to access the right without risking deportation.

The second sub-question was how the right of residence is determined according to the Free Movement Directive. EU Member States have given up the right to regulate the entry of non-citizens to a certain degree, by accepting the freedom of movement. However, this freedom is, after three months, only available to workers, self-employed persons or persons who have sufficient resources not to become a burden on the social assistance system. Vulnerable EU citizens who fall under any of these categories have a right of residence in Sweden, and thereby a right to housing. Whether or not a vulnerable EU citizens have a right of residence must be assessed in every individual case. A “worker” is defined as someone who performs a genuine and effective activity under a certain period of time, under the directions of another person and against remuneration. The same requirements apply to self-employment, except the criterion of subordination. Many vulnerable EU citizens support themselves by begging or selling street papers. The CJEU has not considered whether this can be regarded as work or self-employment. It is difficult to argue that begging complies with the requirements of work. However, I am arguing that selling street paper should be considered as self-employment. This is supported by British case law.

All EU citizens have a right to reside in another Member State for three months, as long as they do not become an unreasonable burden on the social assistance system. Moreover, a person who is not a worker or self-employed only have a right

to reside longer than three months if s/he has sufficient resources not to become a burden. These persons have a right of residence and thereby a right to social assistance. However, only as long as they do not become an unreasonable burden. The consequence of this is that a person with a right of residence will risk losing his/her right to reside by applying for social assistance, although s/he is entitled to it. It is evident that people have different rights according to the Free Movement Directive depending on their social status. The right to free movement is only applicable to those who can get a job or have sufficient resources to support themselves. Thus, a person who cannot access the national labour market for any reason, is deprived of his/her right to free movement. There is a long history of discrimination towards Roma on the Swedish labour market. Many vulnerable EU citizens are of Roma origin, and do therefore have difficulties finding work. The result of this is that many vulnerable EU citizens cannot enjoy the freedom of movement. Thus, my conclusion is that the fundamental freedom to move is not available to all EU citizen, due to discrimination. EU claims to stand up for a universal application of human rights. However, if EU was built on the idea of human rights, the fact that someone is vulnerable and have no resources would imply that they get help. In Europe today, the fact that someone has no resources implies that they are excluded from the benefits of the union.

The third sub-question was how the right to housing is implemented in Sweden. Sweden has a dualistic system, which means that international law must be implemented in domestic legislation to apply as positive law. However, there is no explicit right to housing in domestic Swedish law. Both the CESCR and the ECSR have emphasised the importance of adopting domestic legislation to ensure the right to housing. Thus, Sweden must adopt a domestic law on the right to housing. As of today, the right to housing in Sweden is ensured through social assistance. It is therefore essential to have access to social assistance. According to the Swedish Social Services Act, the municipality of residence is responsible for granting social assistance to individuals. This does not apply in cases where it is evident that another municipality is responsible. In those cases, the municipality of residence is only responsible for emergency situations. The CJEU held in the *Dano* case that states have no obligation to ensure social assistance to persons without a right of residence. However, if a vulnerable EU citizen has a right of residence, s/he is entitled to social assistance on an equal basis as Swedish citizens. The Swedish National Board of Health and Welfare has stated that vulnerable EU citizens

without a right of residence are only entitled to social assistance in emergency situations. Such assistance can consist of a ticket home and shelter for a few nights. However, I am arguing that this interpretation can be questioned. The Social Services Act does not stipulate any exception for non-citizens, and the text of the Act establishes that the municipality is responsible for every person residing within the municipality. The only exception is if it is evident that another municipality is responsible. No Swedish authority or court has clarified how this is interpreted in the case of non-citizens. If the intention is that the Social Services Act is not applicable to non-citizens, this ought to be clarified in the law.

The Swedish Social Services Act does not exclude persons who are in Sweden for less than three months. However, the Swedish Aliens Act establishes that EU citizens have a right of residence first after three months. This implies that EU citizens have a right to reside in Sweden for three months, but that they do not fall under the scope of the right of residence until after three months have passed. This is not in compliance with the Free Movement Directive, which establishes that everyone has a right of residence for three months. It results in a failure to access social assistance, since Swedish authorities have interpreted the law as only granting social assistance to persons with a right of residence. It is therefore of utmost importance that Sweden adopts a law which is in compliance with the Free Movement Directive.

Thus, the answer to why vulnerable EU citizens cannot access adequate housing is found in all three legal regimes. Human rights law prescribes a right to adequate housing for everyone. However, it is not controversial for states to limit the access to human rights for irregular migrants. Vulnerable EU citizens cannot access their right to housing, due to the fact that they risk being deported if they contact the authorities. Thus, *everyone* does not necessarily mean all human beings. Furthermore, EU law creates a system where not everyone is entitled to the fundamental freedom of movement. It is limited to economic active persons. Persons of Roma origin, which face discrimination on the labour market, therefore have a hard time accessing this freedom. Moreover, domestic Swedish law does not include a right to housing. Swedish authorities have interpreted the Social Services Act to imply that persons must be legally residing in order to qualify for social assistance. The legal status of vulnerable EU citizens does therefore have an important impact on the application of the Swedish law as well.

Thus, the main reason why many vulnerable EU citizens are unable to access housing, is that they fall outside the scope of the right to residence. Additionally, as long as states allow themselves to discriminate on the ground of citizenship, human rights will not be applicable to everyone. The problem is not that there exists no right to adequate housing for everyone. The problem is that states can limit the access to human rights for persons illegally residing. This is severe when the legal right of residence is inaccessible due to discrimination. Vulnerable EU citizens are being deprived of their access to human rights on the mere fact that they are vulnerable and lack resources. This will not change as long as states exclude persons from the protection of human rights based on citizenship, and the right to free movement is only applicable to persons with resources.

It is a matter of opinion whether states should have an obligation to ensure human rights for everyone. It can be argued that states do not have a responsibility for citizens of other states. However, I am of the opinion that human rights should be universal. We are all humans and should therefore be entitled to the same rights. The main purpose with human rights should be to protect vulnerable groups. It is therefore, from my point of view, a failure of the system when certain vulnerable groups are not protected. It is, moreover, a severe failure for the EU cooperation, when a large group of persons are excluded from the fundamental freedom of movement. It is not fair to talk about free movement and a citizenship of the Union, when not all citizens are able to enjoy this.

It is of utmost importance that Swedish authorities always make an individual assessment of the circumstances in every case. Vulnerable EU citizens who are workers or self-employed have a right of residence on an equal basis as all other EU citizens. They do therefore have a right to social assistance and a right to housing. Sweden should moreover ensure a minimum level of housing for irregular migrants as long as they are within the jurisdiction of Sweden. This is required both by the obligation to ensure emergency assistance under the Social Services Act, and by the ICESCR and the RESC. Furthermore, Sweden must implement the right to adequate housing into domestic Swedish law, and adopt a provision which clarifies the right of the individuals. It is also crucial that Sweden amends the Aliens Act so it is in compliance with the Free Movement Directive. All EU citizens have a right of residence for three months. This is a fundamental principle within EU, and it is therefore important that Sweden emphasised this in the law.

5.1 Further Considerations

Writing this thesis has given rise to a couple of issues that can be further examined and discussed. Firstly, one of the main problems with vulnerable EU citizens' access to housing is the system of sovereign states. There is no point in talking about universal human rights and the right to adequate housing of *everyone*, when *everyone* does not include persons without a right of residence. This is a fundamental issue with all human rights, and a huge problem for vulnerable groups around the world. There is no easy solution, and it is difficult to imagine a world without sovereign states any time soon. It is a well-known problem and it has been widely discussed. However, if human rights are to be effective, the world community must somehow find a way to solve this issue. It is therefore important that this question is further discussed.

Secondly, the system of free movement within EU leaves a lot to be desired. The question is raised how EU can defend and uphold a directive regarding one of the fundamental freedoms, which clearly separate people on social and economic grounds, and at the same time refer to respect for human rights and equality as the foundation of all treaties. It moreover creates a system where many EU citizens have no possibility to access the right of residence. This does not go hand in hand with open borders and free movement. Thus, the implementation of human rights within EU law can be further discussed and criticised.

Lastly, the question is raised why Sweden has not implemented the right to housing within domestic Swedish law. Sweden has ratified the ICESCR and must therefore implement the rights, including the right to adequate housing. It can thus be further examined how Sweden should implement the right.

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