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Sufficient resources and residence rights under
Directive 2004/38

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SUFFICIENT RESOURCES AND RESIDENCE RIGHTS UNDER DIRECTIVE 2004/38

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Abstract

This paper seeks to investigate the meaning of the concept of sufficient resources under Directive 2004/38. The question when an inactive citizen has sufficient resources is dealt with by looking at the history of the concept, the national approaches and the Dutch case law on this issue. Then it gives an overview of the relevant case law of the ECJ, distinguishing two important topics: the level of resources in relation to social assistance benefits and the origin of the resources. Attention is also paid to the other condition laid down in Article 7(1)(b) Directive 2004/38, the obligation to have a comprehensive sickness insurance.

Keywords

Sufficient resources, social benefits, EU citizenship, residence rights

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Introduction

According to Article 7(1) (b) of Directive 2004/38/EC Union citizens, who are not workers or self-employed, only have the right of residence on the territory of another Member State for a period of longer than 3 months if they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State.

This paper seeks to investigate the meaning of the concept of sufficient resources under Directive 2004/38.¹ In section one the question when an inactive citizen has sufficient resources is dealt with by looking at the history of the concept, the national approaches and the Dutch case law on this issue. The second section gives an overview of the relevant case law of the ECJ, distinguishing two important topics: the level of resources in relation to social assistance benefits and the origin of the resources. This section addresses the most challenging problems of this moment. The third section pays attention to the other condition laid down in Article 7(1)(b) Directive 2004/38, to have a comprehensive sickness insurance.

1. Sufficient resources

Directive 2004/38/EC makes a distinction between residence up to 3 months, residence from 3 months to 5 years and residence for longer than 5 years. Different preconditions for residence apply in each of these three categories.² Furthermore, the treatment of economically inactive persons differs from the treatment of economically active persons.

The directive gives in Article 6 all EU citizens a right to entry to any EU Member State without any conditions or formalities, other than the requirement to hold a valid identity card or passport, for 3 months. It is, however, explicitly stated in Article 24(2) that the host Member State shall not be obliged to confer any entitlement to social assistance during these first 3 months of residence. According to Article 7(1) of Directive 2004/38/EC Union citizens only have the right of residence on the territory of another Member State for a period of longer than 3 months if they

¹ It does not deal with the concept of sufficient resources as it is developed in other Directives, like the Family Reunification Directive 2003/86.

² Directive 2004/38/EC (OJ 2004, L 158/77).

- (a) are workers or self-employed persons in the host Member State;
- or (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State;
- or (c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and – have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or
- (d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

When Union citizens have resided legally for a continuous period of 5 years in the host Member State they shall have the right of permanent residence there.³ This right of permanent residence is given to Union citizens (and their family members), without any further conditions, even if these persons do not have sufficient resources or comprehensive sickness insurance cover any more after these five years.

For the purpose of this chapter I will limit myself to the category of inactive EU citizens who fall under Article 7(1)(b) and who need sufficient resources (and a comprehensive sickness insurance) to have a right to reside under Directive 2004/38. But it is good to emphasize that these conditions regarding sufficient resources and comprehensive sickness insurance neither apply to workers and self-employed persons, nor to persons who stopped being economically active but who do retain this status pursuant to Article 7(3) Directive 2004/38. Nor do they apply to jobseekers who entered the territory of the host Member State in order to seek employment. Such persons may not be expelled for as

³ Article 16(1) Directive 2004/38.

long as they can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.⁴

Sufficient resources are also of relevance for the persons who fall under the scope of Articles 12 and 13 of Directive 2004/38. According to these articles family members in the event of death or departure of the Union citizen or in the event of divorce, annulment of marriage or termination of registered partnership retain under conditions their right of residence. But it is explicitly provided that (unless they are workers or self-employed persons) before acquiring the right of permanent residence they are required to have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State.

1.2 When does an inactive Union citizen have sufficient resources?

One of the crucial questions is when do inactive Union citizens have sufficient resources in order to obtain a right of residence under Directive 2004/38. The Commission has tried to provide some guidance in answering this question in its guidelines, published in 2009. According to these guidelines the notion of 'sufficient resources' must be interpreted in the light of the objective of the Directive, which is to facilitate free movement, as long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State.⁵

The first step to assess the existence of sufficient resources should be whether the EU citizen (and family members who derive their right of residence from him or her) would meet the national criteria to be granted the basic social assistance benefit. EU citizens have sufficient resources, according to the Commission's guidelines, where the level of their resources is higher than the threshold under which a minimum subsistence benefit is granted in the host Member State. Where this criterion is not applicable, the minimum social security pension should be taken into account.

4 Article 14(4)(b) Directive 2004/38. See F. VAN Overmeiren, E. Eichenhofer and H. Verschueren, 'Social Security Coverage of Non-Active Persons Moving to Another Member State', in E. Guild, C. Gortazar Rotaeche and D. Kostakopoulou (Eds.), *The Reconceptualization of European Union Citizenship*, Leiden- Boston: Nijhoff, 2014, p. 231.

5 COM (2009) 313 final, Communication from the Commission to the European parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, Section 2.3.1. Sufficient resources.

At the same time Article 8(4) of Directive 2004/38, which is the important provision in this context, prohibits Member States from laying down a fixed amount to be regarded as "sufficient resources", either directly or indirectly, below which the right of residence can be automatically refused. The authorities of the Member States must take into account the personal situation of the individual concerned. The text of this provision fully reads:

"Member States may not lay down a fixed amount which they regard as "sufficient resources", but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State"

Unfortunately, this text has a rather ambivalent character. On the one hand a fixed amount is prohibited, but on the other hand a threshold at the level of a social assistance benefit is indicated. During the negotiations in 2002 and 2003 on the establishment of Directive 2004/38 the wording of this provision regarding the determination of what 'sufficient resources' should mean was highly debated by some Member States and the Commission, which has probably contributed to this ambivalence in the text.

1.3 History of the concept of sufficient resources under Directive 2004/38⁶

Regarding an earlier proposed text of at that time paragraph 5 of Article 8 that Member States may not lay down an amount which they regard as sufficient resources, scrutiny reservations were made during the negotiations in July 2002 by Denmark, Germany and the Netherlands. According to these countries the Member State should be able to decide what were sufficient resources, e.g. by reference to the level of resources below which the host Member State granted social assistance to its nationals.⁷ The Commission however could not share that view, arguing that:

⁶ This paragraph is partly based on H.Oosterom-Staples, Artikel 8 Richtlijn 2004/38/EG, *SDU Commentaar Europees Migratierecht*, Den Haag: SDU, 2013.

⁷ Students are simply required to assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during the period of residence.

- the concept of "sufficient resources" depended on numerous factors (free accommodation, benefits arising from links with other people, etc.) and could not be assessed by the person alone;
- there were no conditions on the personal possession of resources; they could come from another person;
- financial situations can change and it would be unrealistic to regard the fact that at a given moment a person possessed a given amount of resources as a guarantee;
- the declaration constituted an undertaking by the person, which, as such, carried legal consequences.

The Commission also said that the system which was proposed to extend to all EU citizens was already being applied in the case of students.⁸

In answer to the question asked during the negotiations in February 2003: "Should the proposal define a sufficient level of resources? If so, on what basis and at what level?" Germany, Italy and Austria thought that it was not necessary. But Denmark and the Netherlands, now supported by Belgium, Spain and the UK replied that a sufficient level of resources should be defined. Denmark and the Netherlands thought that the condition of resources at, or above, the threshold below which the host Member State may grant social assistance to its nationals should be applied to all categories of people, apart from students. Belgium proposed that it should also be specified that the means of subsistence had to be the person's own resources. Spain and the United Kingdom held the opinion that Member States should be entitled to set the amount of resources they considered sufficient.⁹ The German delegation then submitted the following amendment proposal:

*"Member States may not lay down schematically an amount, which they regard as sufficient resources for Union citizens and to support themselves and their families. The possibility of taking into account the specific circumstances of a given case must not be ruled out."*¹⁰

This did not solve the problem at that time. Italy, Portugal and Spain preferred the Commission proposal, Denmark and Austria preferred the German proposal but the Netherlands and the United Kingdom had a scrutiny reservation on the German proposal.

⁸ Council Doc. 10572/02, p. 25, nt. 45.

⁹ Council Doc. 6147/03, p. 23, nt. 38.

¹⁰ Council Doc. 6147/03, p. 23, nt. 39.

The Commission was opposed to this German proposal, believing that it introduces the concept of a threshold of resources which was contrary to the underlying idea of the initial proposal and that was contrary to the existing acquis concerning students.

In the political agreement of 5 September 2003 there is a text which is very similar to the text of what has become Article 8(4) in the end. As far as the definition of a sufficient level of resources is concerned, Belgium, Denmark, Spain, the Netherlands, Sweden and the UK supported this new wording and entered a positive scrutiny reservation. Germany welcomed the first part but entered a scrutiny reservation on the restrictive second part that:

“In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State”.

Greece and Portugal had scrutiny reservations as well, preferring the initial Commission proposal based on a declaratory system.¹¹ But the final text did not change any more.

1.4 National approaches regarding sufficient resources

This ambivalence of prohibiting a fixed amount but indicating a threshold at social assistance benefit level at the same time is reflected in the practice of various Member States as well.

A comparative study of the application of Directive 2004/38 published in 2009 showed that the approaches regarding the definition of sufficient resources differed in the various Member States. Some Member States set out an amount as to what constitutes sufficient resources (France, Greece, Hungary, Ireland, Italy, Latvia, Luxembourg, Romania, Slovenia and the United Kingdom), others apply a threshold together with an examination of the personal circumstances of the citizen (Belgium, the Netherlands and Luxembourg). The study distinguishes four trends in the Member States. Firstly, some Member States have given a liberal and expansive definition to sufficient resources to the point of eliminating any resources requirements for EU migrants. Spain, for instance, does not require EU migrants to provide any information related to resources and in Poland the documentation related to sufficient resources has been kept to a minimum as Union citizens are only requested to provide a declaration to

¹¹ Council Doc. 12218/03, p. 22, nt. 22.

the authorities stating that they have sufficient resources (no supporting evidence is required). Secondly, some Member States have inserted a requirement of sufficient resources in their legislation but have not set out how the sufficient resources threshold may be satisfied. This has, for example, been the case for the implementation of the Directive into Estonian law. Although this does not necessarily mean that a restrictive approach could be taken, the absence of clear published guidelines can result in uncertainty and can itself act as an obstacle to free movement. The lack of transparency and the amount of discretion given to individual officials can result in unequal treatment and can deter Union citizens from taking advantage of their residence rights.

Thirdly, the nature of transposing legislation may be ambiguous, causing problems for citizens. An example is the transposition by the United Kingdom. The legislation specifies that resources are regarded as sufficient if they exceed the maximum level for resources which a UK national may possess if he is to become eligible for social assistance under the United Kingdom benefit system, whereas Article 8(4) of the Directive stipulates that sufficient resources 'shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance'. This transposition creates, at the very least, unnecessary ambiguities, in fact, the terminology prescribed in this case is detrimental to transparency for Union citizens as the figure representing the 'maximum level of resources which a UK national may possess if he is to become eligible for social assistance' remains difficult to quantify.

Fourthly, other Member States have chosen to include additional requirements not provided for in the Directive. Italy, for example, has retained a law which requires Union citizens to prove the legality and authenticity of their sufficient resources.

In sum, the large number of definitions linked to the concept of 'sufficient resources' will undoubtedly give rise to confusion amongst Union citizens exercising their free movement rights. In particular, the evidence required to prove sufficient resources, the lack of transparency and the varying attitudes in different Member States result in a patchwork of uneven legislation.¹²

When we try to look at more recent national practices, there is little information available. Shaw and Nic Shuibhne describe that in most of the national reports,

¹² European citizen action service, Comparative study on the application of Directive 2004/38/EC 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, European Parliament's committee on Legal Affairs, PE 410.650, Brussels, 2009, p. 165 ev.

written for the 2014 FIDE conference on Union citizenship, it was clear that national implementing measures expressly incorporate the obligation to evaluate the personal circumstances of the individual concerned, as required by Article 8(4) of the Directive.¹³ But it was less clear what this exactly meant for the amount of money involved. In the report for Poland, for example, it is noted that proof of sufficient resources can be demonstrated by means such as the possession of a credit card 'or a certification of having funds at a bank or other financial institution confirmed by a seal and a signature of an authorized officer of the bank or institution, issued one month before submitting an application for registration of stay at the latest'. The report for France alludes to the fact that, as confirmed by EU case law, financial resources can be provided on behalf of the Union citizen by a third person;¹⁴ but the relevant national guidance requires, in such situations, that the Union citizen must justify the sufficiency and duration of such resources. However, more problematically, it also appears that some States either have in the past imposed or continue to impose minimum quantitative thresholds for the determination of sufficient resources. There is a reference to the reports for Cyprus, Denmark, and France. In Denmark a person who was in possession of less than € 35 (corresponding to the price of a night at a hostel) was regarded as lacking sufficient resources. In Cyprus these conditions are not addressed only to citizens who are not engaged in economic activity; but administrative practice requires also that workers demonstrate certain income for themselves and their families to recognise their right to residence under Article 7(1) Directive 2004/38.'

1.5 Dutch case law on sufficient resources

Based on the information of the FIDE 2014 report the impression is justified that there is not much case law available on the issue of sufficient resources and its consequences in the Member States. In the Netherlands for example, only a few court cases on this issue could be detected. A very noteworthy judgment was given by the Dutch State Council on the issue of the granting of a residence permit.¹⁵ This case concerned a Dutch-Jordanian couple who stayed (involuntarily) in Belgium for a period of five months in the Antwerp University Hospital, due to necessary emergency medical treatment for the Dutch husband. The Jordanian wife who had travelled to the Netherlands on a short term visa just the day before the unexpected hospitalization of her husband took

13 J. Shaw and N. Nic Shuibhne, 'General Report: Union Citizenship: Development, Impact and Challenges' in U. Neergaard, C. Jacqueson and N. Holst-Christensen (eds), *Union Citizenship: Development, Impact and Challenges, The XXVI FIDE Congress in Copenhagen*, Copenhagen: DJØF Publishing, 2014, p. 91.

14 E.g. Case C-200/02, *Zhu and Chen*, EU:C:2004:639.

15 State Council 12 November 2009, *Rechtspraak Vreemdelingenrecht* 2009, 31, ECLI:NL:RVS:2009:BK3910.

place, stayed during that entire period in the hospital guesthouse in Belgium. After returning to the Netherlands the couple applied for a residence permit for the Jordanian wife based on European law. The Dutch immigration authorities and the District Court rejected this application on the basis that the couple did not have sufficient resources during their stay in Belgium and therefore need not built up a residence right based on Article 7(1)(b) Directive 2004/38 in Belgium so European law was not applicable. The State Council however granted the application referring to Article 8(4) of the Directive arguing that the personal situation of the individual concerned has to be taken into account. In this case all the hospital costs had been paid by the sickness insurance company and the couple had not applied for any social assistance during their stay in Belgium and therefore were supposed to fulfill the condition of sufficient resources and had residence on the basis of article 7(1)(b) Directive 2004/38 for the last two months of the five months they stayed in Belgium.

In another court case the Dutch District Court of the Hague (Zutphen) ruled that the Dutch authorities were not allowed to request from two Romanian citizens that they have to fulfill a threshold income equivalent to a Dutch social assistance benefit to have a residence right under Article 7(1)(b) Directive 2004/38. Both Romanians did not have a social assistance benefit but stated to rely on the income of their father and partner and could proof the income of the father and the partner. According to the Court the approach of the Dutch authorities that the norm of the Dutch Social Assistance Act is an absolute minimum norm, is not in line with Article 8(4) Directive 2004/38, and therefore the Dutch authorities had to reconsider their decision.¹⁶

Another case of the District Court of The Hague concerned a German minor who asked for registration as an EU citizen by the Immigration and Naturalization Service (IND). This was refused because the IND held the opinion that the mother of the child did not have sufficient resources because she did not meet the threshold of a one parent standard under the Dutch Social Assistance Act. The Dutch Court ruled that this decision was not in line with Article 8(4) Directive 2004/38, because the personal situation of the mother was not taken into account. The fact that the mother received a monthly alimony allowance of € 600 (which is substantially lower than the given Social Assistance Act threshold) was seen as sufficient resources. The Court took also in account the fact that the

¹⁶ District Court The Hague (Zutphen) 4 November 2009, *Rechtspraak Vreemdelingenrecht* 2009, 33, ECLI:NL:RBSGR:2009:BK3936.

mother already during more than two year lived on this alimony allowance without applying for any social assistance benefit.¹⁷

The District Court of The Hague (Middelburg) ruled in September 2014 that the decision of the immigration authorities that a bank declaration of € 8000 was not seen as sufficient resources for a Moroccan woman to stay with her Spanish children in The Netherlands could not hold. The financial help of her sisters as well as the alimony paid by the Spanish former husband for the children had to be taken into account as well. According to the Court the 2009 guidelines of the European Commission clearly forbid the requirement of a fixed standard as well as the requirement of a sustainable amount of money.¹⁸

In another case before the Dutch State Council the condition of sufficient resources was discussed in the context of the situation of a German minor who wanted to attend a primary school in The Netherlands. His financial means were supported by his father, who holds the Turkish nationality and who did not have a regular income himself, but received a monthly donation by an Islamic foundation. The Dutch authorities had rejected the application for a residence permit because the child did not had sufficient resources of his own. According to the State Council the origin of the resources (referring to the judgments of the ECJ in *Zhu and Chen and Commission v. Belgium*) is not of importance for the decision on the right of residence in the Netherlands. The amount of the monthly donation of € 800, which is below the threshold of the Dutch social assistance benefit, is seen as sufficient resources by the State Council.¹⁹ From these Dutch court cases it can be concluded that the Dutch immigration authorities tend to apply a fixed amount at the level of a social assistance benefit as a condition of sufficient resources, not taking into account Article 8(4) Directive 2004/38, while the courts do take into account the personal situation of the EU citizen and tend to accept a lower amount of money to fulfill the condition of sufficient resources. But it has to be stated that in all these court cases it seems that no application for a social assistance benefit has been made.

2. Sufficient resources in the case law of the ECJ

When we have a look at the case law of the ECJ regarding sufficient resources two important issues can be distinguished. The first issue concerns the level of

¹⁷ District Court The Hague 14 November 2011, ECLI:RBSGR:2011:BV1155.

¹⁸ District Court The Hague (Middelburg) 18 September 2014, *Jurisprudentie Vreemdelingenrecht* 2014/362, ECLI:NL:RBDHA:2014:11638.

¹⁹ State Council 3 September 2013, *Rechtspraak Vreemdelingenrecht* 2013, 33, ECLI:NL:RVS:2013:1068.

resources and the relation to social assistance benefits, the other issue concerns the origin of the resources.

The case *Commission v Netherlands* made clear that Member States could not require standard norms regarding sufficient resources.²⁰ In order to obtain a residence permit, the Dutch authorities required that non-active and retired EU citizens had to prove that they had sustainable resources, which meant they had to prove in a systematic way having enough resources to be able to stay for at least a year, based on the threshold of a social assistance benefit. The Court declared that the Netherlands by requiring this condition had failed to fulfill its obligations under the Directives, regulating the right of residence before they were replaced by Directive 2004/38.²¹ The personal situation of the person concerned must be taken into account to establish the amount of sufficient resources, according to the Court.

The judgment of the Court in the *Ziolkowski and Szeja* case could be seen as a support of the approach that EU citizens having a social assistance benefit will never fulfill the sufficient resources condition of Article 7(1) Directive 2004/38 and therefore do not have a right of residence based on Directive 2004/38.²² Mr Ziolkowski and Mrs Szeja, Polish nationals, arrived in Germany before the accession of Poland to the European Union and were granted a right of residence on humanitarian grounds, which was duly extended in accordance with German law. In 2005, after the accession of Poland to the European Union, they applied for permanent residence in Germany under Article 16 of Directive 2004/38, which was refused on the grounds that they were not in employment and were unable to prove that they had sufficient resources to support themselves. Since entering Germany Mr Ziolkowski had been entitled to social assistance benefits²³ and Ms Szeja and her children were not in a position to support themselves and were informed in 2005 that they would be expelled to Poland.²⁴

²⁰ Case C-398/06, *Commission v. Netherlands*, EU:C:2008:214.

²¹ Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, Council Directive 90/364/EEC of 28 June 1990 on the right of residence and Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity.

²² Case C-424/10 and C-425/10, *Ziolkowski and Szeja*, EU:C:2011:866.

²³ The English version of the Conclusion of AG Bot where this information can be found speaks by mistake of social security benefits, but the German version speaks of 'Sozialhilfe', the Dutch version of 'socialebijstandsuitkeringen' and the French version of 'l'assistance sociale'. See Opinion AG, para 16, EU:C:2011:575.

²⁴ Opinion AG para 27, EU:C:2011:575.

The Court recalls that for periods of residence of longer than three months, the right of residence is subject to the conditions set out in Article 7(1) of Directive 2004/38 and, under Article 14(2), that right is retained only if the Union citizen and his family members satisfy those conditions.²⁵ The concept of legal residence implied by the terms ‘have resided legally’ in Article 16(1) of Directive 2004/38 should be construed as meaning a period of residence which complies with the conditions laid down in the directive, in particular those set out in Article 7(1).²⁶ Consequently, a period of residence which complies with the law of a Member State but does not satisfy the conditions laid down in Article 7(1) of Directive 2004/38 cannot be regarded as a ‘legal’ period of residence within the meaning of Article 16(1).²⁷ Therefore Article 16(1) of Directive 2004/38 must be interpreted as meaning that a Union citizen who has been resident for more than five years in the territory of the host Member State on the sole basis of the national law of that Member State cannot be regarded as having acquired the right of permanent residence under that provision if, during that period of residence, he did not satisfy the conditions laid down in Article 7(1) of the directive.²⁸

In the *Brey* case this tension between the condition of sufficient resources and applying for a social assistance benefit is also at the heart of the problem.²⁹ This case concerned a German national, who was in receiving a German invalidity pension of € 1.087,74 and who had transferred together with his wife his residence to Austria where he applied for an Austrian compensatory supplement which aimed at guaranteeing the person concerned a minimum subsistence income in Austria.³⁰ The Austrian authorities refused to grant this benefit because Mr Brey did not meet the conditions required to obtain the right to reside, due to a lack of sufficient resources. The Court held the view that the fact that an economically inactive national from another Member State may be eligible, in the light of a low pension, to receive that compensatory supplement benefit, could be an indication that the national in question does not have sufficient resources to avoid becoming an unreasonable burden on the social assistance system of the host Member State, for the purposes of obtaining or retaining the right to reside under Article 7(1)(b) of Directive 2004/38. However, this is just ‘an indication’. The Court recalls that it should be noted that the first

²⁵ Case C-424/10 and C-425/10, *Ziolkowski and Szeja*, para 40.

²⁶ Case C-424/10 and C-425/10, *Ziolkowski and Szeja*, para 46.

²⁷ Case C-424/10 and C-425/10, *Ziolkowski and Szeja*, para 47.

²⁸ Case C-424/10 and C-425/10, *Ziolkowski and Szeja*, para 51. See also case C-325/09, *Dias*, EU:C:2011:498, para 55.

²⁹ Case C-140/12, *Brey*, EU:C:2013:565

³⁰ Case C-140/12, *Brey*, para 63.

sentence of Article 8(4) of Directive 2004/38 expressly states that Member States may not lay down a fixed amount which they will regard as 'sufficient resources', but must take into account the personal situation of the person concerned.³¹ Therefore, it follows that, although Member States may indicate a certain sum as a reference amount, they may not impose a minimum income level below which it will be presumed that the person concerned does not have sufficient resources, irrespective of a specific examination of the situation of each person concerned.³² National authorities first have to carry out an overall assessment of the specific burden which granting that benefit would place on the national social assistance system as a whole, by reference to the personal circumstances characterizing the individual situation of the person concerned. The ECJ stressed that any limitation upon the freedom of movement as a fundamental principle of EU law, must be construed narrowly and in compliance with the limits imposed by EU law and the principle of proportionality. The Member States' room for manoeuvre may not be used in such a manner as to compromise attainment of the objective of Directive 2004/38, more specifically its objective to facilitate and strengthen the primary right to free movement.³³ On the basis of these elements the Court confirms that EU law recognizes a certain degree of solidarity between nationals of a host Member State and nationals of other Member States. The mere fact that a national of a Member State receives social assistance is not sufficient to demonstrate that he constitutes an unreasonable burden on the social assistance system of the host Member State. For that reason the Austrian legislation, by virtue of which the mere fact that an economically inactive migrant EU citizen has applied for the 'compensatory supplement' is sufficient to preclude that citizen from receiving it, is not compatible with EU law.³⁴ This automatic refusal keeps the national authorities from carrying out an overall assessment of the specific burden.³⁵

Although the Court does not explicitly refer to this, in my opinion it can be concluded that Mr. Brey has a residence right under Article 7(1)(b) Directive 2004/38, even if he receives this compensatory supplement.

31 Case C-140/12, *Brey*, para 67.

32 Case C-140/12, *Brey*, para 68.

33 Case C-140/12, *Brey*, paras 65-71.

34 Case C-140/12, *Brey*, para 77

35 See in more detail H.Verschueren, 'Free Movement or Benefit Tourism: The Unreasonable Burden of Brey', 16 *European Journal of Migration and Law*, (2014), 147-179.

In his case note under the *Brey* judgment Verschueren refers to the final judgment the Austrian Supreme Court delivered after the ruling of the ECJ.³⁶ The Austrian Supreme Court recognized that the host Member State of a migrant not economically active Union citizen may limit this person's right to reside on its territory when he becomes an unreasonable burden on its social assistance system.³⁷ In order to assess this unreasonability, the national authorities must take into account the various elements to which the ECJ refers in *Brey*. A mechanism, as in place in the Austrian legislation, whereby nationals of other Member States who are not economically active are automatically barred from receiving a particular social security benefit, does not enable the competent authorities of the host Member State to carry out such an assessment. Yet, the Austrian Supreme Court, concluded that as long as Union citizens reside lawfully in Austria, they may rely on EU law, including as regards the principle of equal treatment, to receive social benefits, even if this could subsequently compromise their right of residence. Until the competent Austrian authorities have put an end to the lawful residence of Mr Brey by a formal decision, including in this case the withdrawal of the certificate of residence in accordance with the provisions of Directive 2004/38, he has the right to equal treatment for social benefits, such as in this case the 'compensatory supplement', according to the Austrian Supreme Court.

A year later, however, the ECJ delivered its judgment in the *Dano* case and here the approach on the issue of sufficient resources is different from the one in *Brey*.³⁸ In this case two Romanian nationals, mother and son Dano, who lived in Germany were refused to be granted access to benefits under the German basic provision. Ms Dano had not entered Germany to seek employment and although she applied for benefits reserved to job-seekers the case file showed that she had not been looking for a job. She had no professional qualifications and had not exercised any profession in Germany nor Romania. The Court held that nationals of other Member States as regards their access to social benefits are only entitled to be treated equally as a national of the host Member State if their residence in the territory of the host Member State meets the requirements of Directive 2004/38. According to the Court, the directive thus seeks to prevent Union citizens from using the host Member State's social assistance system to fund their means of subsistence. The Court consequently considers in paragraphs 77 and 78 that the possibility that Union citizens who have

36 H.verschueren, 'Free Movement or Benefit Tourism: The Unreasonable Burden of Brey', 16 *European Journal of Migration and Law*, (2014), 147-179.

37 OGH 17 December 2013, ECLI:AT:OGH0002:2013:0100BS00152.13W.1217.000. To be consulted on: www.ris.bka.gv.at.

38 Case C-333/13, *Dano*, EU:C:2014:2358.

used their freedom of movement and of residence are being treated differently from the host Member State's own nationals with regard to social benefits is an inevitable consequence of Directive 2004/38. This potentially unequal treatment is in fact based on the link between sufficient resources being a residence requirement on the one hand and, on the other, the desire to prevent the burden on the social assistance system of the Member States, established by the Union legislator in Article 7 of that directive. A Member State must therefore, in accordance with Article 7 of that directive, have the possibility of refusing to grant social benefits to economically inactive Union citizens who exercise their right to free movement for the sole purpose of obtaining another Member State's social assistance, although they do not have sufficient resources in order to qualify for a right of residence. According to the Court, Ms Dano and her son lack sufficient resources and, pursuant to Directive 2004/38, are therefore not entitled to a right of residence in Germany, nor are they entitled to benefits under the German basic provision.

A big problem with this approach in the *Dano* case is that it does not clarify what role could still be played by the provision of Article 8(4) Directive 2004/38 to which the Court does not refer at all. The fact that Ms Dano asked for a social assistance benefit is seen by the Court as proof that she had no sufficient resources. It is even stated without any further investigation that she did not have any sufficient resources upon arriving in Germany. It should be recalled that at the moment of application for the German basic provision Ms Dano received child benefits amounting to € 184 per month and an advance on public maintenance payments of € 133 per month and she had accommodation because she lived in the home of her sister. Given the wording and history of Article 8(4) Directive 2004/38 in my view it could be defended that given her personal situation she would have had sufficient resources (and therefore a right of residence on the basis of Article 7(1)(b) Directive 2004/38) during the time she did not ask for social assistance. The judgment in the *Dano* case seems to imply that the fact that economically inactive EU citizens (residing for less than five years in another Member State) apply for a social assistance benefit would mean automatically that they have no sufficient resources (and no residence right under Directive 2004/38) anymore.³⁹ This reasoning would also lead to the paradox that such a Union citizen would only be entitled to any

³⁹ See also D. THYM, *The elusive limits of solidarity: residence rights of social benefits for economically inactive Union citizens*, 52 *Common Market Law Review*, 2015, p. 42.

social assistance if he has sufficient resources and therefore is not in need of any social assistance.⁴⁰ This seems to be a real Catch-22 situation.

The latest development in seeking a balance between the requirement of fulfilling the condition of sufficient resources and the possibility to apply for social assistance is given in the opinion of Advocate General Wathelet, delivered in the *Alimanovic* case on 26 March 2015.⁴¹

Ms Alimanovic and her three children, are all Swedish nationals. The three children were born in Germany. After living abroad for ten years, the family re-entered Germany in June 2010. Between then and May 2011, Ms Alimanovic and her elder daughter, worked for less than a year in short-term jobs or under employment-promotion measures in Germany. The two women have not worked since. From 1 December 2011 to 31 May 2012, they received subsistence allowances for beneficiaries fit for work ('SGB II benefit'), while the other children received social allowances for beneficiaries unfit for work. Subsequently, the competent German authority stopped paying those allowances, because according to the German legislation, non-nationals (and members of their family), whose right of residence arises solely out of the search for employment, may not claim such benefits.⁴² The conclusion of the AG takes as a starting point that following the *Dano* judgment, it is established that the Member States may — but are not obliged to — refuse to grant social assistance to Union citizens who enter their territory without intending to find a job and without being able to support themselves by their own means.⁴³ The AG notes that the unusual stir that that Court judgment has caused in the European media and all the political interpretations that have accompanied it confirm the importance and sensitivity of the subject.⁴⁴ This case however is concerned with the situation in which a Union citizen, after working for less than a year in the territory of a Member State of which he is not a national, applies for subsistence benefits in the host State.⁴⁵ But, unlike in the *Vatsouras and Koupatantze* case⁴⁶

40 See H. Verschueren, Preventing "benefit tourism" in the EU: A narrow or broad interpretation of the possibilities offered by the ECJ in *Dano*?, 52 *Common Market Law Review*, 2015, p. 381.

41 Opinion AG of 26 March 2015, Case C-67/14, *Alimanovic*, EU:C:2015:210.

42 This was a consequence of the fact that Germany had excluded this SGB II benefit from the scope of the European Convention on Social and Medical Assistance on 19 December 2011. See P. Minderhoud, 'Directive 2004/38 and Access to Social Assistance', in E. Guild, C. Gortazar Rotaeché and D. Kostakopoulou (Eds.), *The Reconceptualization of European Union Citizenship*, Leiden- Boston: Nijhoff, 2014, p. 216.

43 Opinion AG of 26 March 2015, Case C-67/14, *Alimanovic*, para 5.

44 Opinion AG of 26 March 2015, Case C-67/14, *Alimanovic*, para 4.

45 Opinion AG of 26 March 2015, Case C-67/14, *Alimanovic*, para 7.

46 C-22/08 and C-23/08, EU:C:2009:344.

, the contested SGB II benefit is now primarily seen as a social assistance benefit and not as a benefit facilitating access to the labour market.⁴⁷

According to the AG restrictions of the grant of social assistance to Union citizens who have not, or no longer, a worker status, that are established on the basis of Article 24(2) of Directive 2004/38, must be legitimate.⁴⁸ The AG therefore proposes that three situations should be distinguished. Firstly, a national of one Member State who enters the territory of another Member State and stays there (for less than three months or for more than three months) *without* the aim of seeking employment there, may, as the Court held in the judgment in *Dano*, legitimately be excluded from social assistance benefits, in order to maintain the financial equilibrium of the national social security system. Secondly, such exclusion is also legitimate, for the same reasons, in respect of a national of one Member State who moves to the territory of another Member State in order to seek employment there.⁴⁹

On the other hand, as regards, thirdly, a national of one Member State who stays for more than three months in the territory of another Member State and has worked there, the Advocate General considers that such a person (like Ms Alimanovic) may not automatically be refused the benefits in question.

It is true that an EU citizen having worked in national territory for less than one year may, in accordance with EU law, lose the status of worker after six months of unemployment.⁵⁰ Nevertheless, it runs counter to the principle of equal treatment to exclude automatically an EU citizen from entitlement to social assistance benefits such as those at issue beyond a period of involuntary unemployment of six months after working for less than one year without allowing that citizen to demonstrate the existence of a genuine link with the host Member State.⁵¹ In that regard, in addition to matters evident from the family circumstances (such as the children's education), the fact that the person concerned has, for a reasonable period, in fact genuinely sought work is a factor capable of demonstrating the existence of such a link with the host Member State. Having

47 Opinion AG of 26 March 2015, Case C-67/14, *Alimanovic*, para 58-72.

48 Opinion AG of 26 March 2015, Case C-67/14, *Alimanovic*, para 86.

49 This category is also called first time jobseekers.

50 Based on Article 7(3)(c) Directive 2004/38. This happened in the case of Ms Alimanovic and her daughter in December 2011.

51 Opinion AG of 26 March 2015, Case C-67/14, *Alimanovic*, para 110.

worked in the past, or even the fact of having found a new job after applying for the grant of social benefits, should also be taken into account to that end.⁵² The Court avoids any reflections on the importance of a possible demonstration of the existence of such a 'genuine link' on the access to social benefits in its judgment which was delivered on 15 September 2015.⁵³ It first confirms that the contested SGB II benefit is a social assistance benefit and not a benefit facilitating access to the labour market, revoking its earlier position in the *Vatsouras and Koupatantze* judgment definitively. According to the Court Ms Alimanovic and her daughter were not covered by the Directive as former workers anymore because on the basis of art. 7(3)(c) of the Directive Union citizens who have worked in a host Member State for less than a year retain their right of residence for at least six months after becoming unemployed, after which the Member State (as Germany did) can terminate the worker status. It is only for those six months that they are entitled to equal treatment with nationals of the host State.⁵⁴

This does not mean, however, that Ms Alimanovic and her daughter can be expelled.⁵⁵ As long as they are job seekers and they continue to have a genuine chance of being engaged expulsion is not possible. But after six months of job seeking, they no longer retain the status of worker and go back to being first-time job seekers who are not entitled to social assistance (para 58).⁵⁶ Interestingly, according to the ECJ Ms Alimanovic and her daughter can rely in that situation on a right of residence directly on the basis of Article 14(4)(b) Directive 2004/38.⁵⁷ The big difference between Ms Alimanovic and Ms Dano is that the first one has a residence right under Directive 2004/38 and the latter does not. The resemblance is that they both have no access to social assistance benefits.

It is interesting that, going beyond the referred questions in this case, the AG emphasized that, if it is demonstrated that the two children are duly continuing their education within an establishment in Germany (which it is for the German court to ascertain), they – like their mother – enjoy a right of residence in German territory under Article 10 Regulation 492/2011. The children of a national of one Member State who works or has worked in the host Member State

⁵² Opinion AG of 26 March 2015, Case C-67/14, *Alimanovic*, para 111.

⁵³ Case C-67/14, *Alimanovic*, EU:2015:597.

⁵⁴ Case C-67/14, *Alimanovic*, para 53.

⁵⁵ Case C-67/14, *Alimanovic*, para 54.

⁵⁶ Case C-67/14, *Alimanovic*, para 58.

⁵⁷ Case C-67/14, *Alimanovic*, para 52 and 57.

and the parent who is their primary carer can claim a right of residence in the latter State owing to the sole fact that EU law confers on those children a right of access to education. Referring to the *Ibrahim and Teixeira* cases of the ECJ, the AG recalls that that right of residence is not dependent on the conditions laid down in Directive 2004/38 and therefore there are no requirements of having sufficient resources and a comprehensive sickness insurance.⁵⁸ In those circumstances, according to the AG, the exclusion from the SGB II benefit, is not applicable to the situation of Ms Alimanovic or to that of her two younger children, since this applies only to persons 'whose right of residence arises solely out of the search for employment and their family members'.⁵⁹ It should, however, be noted that Ms. Alimanovic derives her right of residence in this situation from Regulation 492/2011 and not from Directive 2004/38 and this right could end if all children reach the age of majority. The Court did not reflect on this alternative possibility in any way.

2.1 Origin of the sufficient resources

Another important issue the Court of Justice had to deal with was the origin of the sufficient resources. Regarding this issue the Court of Justice has made clear that these need not to be generated by the EU citizen himself or herself, but could be provided by someone else such as a family member. In the *Zhu and Chen* case a young minor (baby Catherine) got a right of residence in the UK because she had sufficient resources, provided by her parents.⁶⁰ According to the Court it was clear from the order for reference that Catherine had both sickness insurance and sufficient resources, provided by her mother, for her not to become a burden on the social assistance system of the host Member State.⁶¹ The objection raised by the Irish and United Kingdom Governments that the condition concerning the availability of sufficient resources means that the person concerned must, in contrast to Catherine's case, possess those resources personally and may not use for that purpose those of an accompanying family member, such as Mrs Chen, is unfounded.⁶² According to the very terms of Article 1(1) of Directive 90/364 it is sufficient for the nationals of Member

58 Case C-310/08, *Ibrahim and Secretary of State for the Home Department*, EU:C:2010:80, paras 56 and 59 and case C-480/08, *Teixeira*, EU:C:2010:83, para 70.

59 But I doubt whether it would be as simple as that. In my view Ms Alimanovic would still be excluded in that case but now on the base of point 1 (and not point 2) of the second sentence of paragraph 7(1) SGB II, which excludes: "foreign nationals who are not workers or self-employed persons in the Federal Republic of Germany and do not enjoy the right of freedom of movement under Paragraph 2(3) of the Law on freedom of movement of Union citizens [(Freizügigkeitsgesetz/EU, "the FreizügG/EU")], and their family members, for the first three months of their residence".

60 Case C-200/02, *Zhu and Chen*, EU:C:2004:639.

61 Case C-200/02, *Zhu and Chen*, para 28.

62 Case C-200/02, *Zhu and Chen*, para 28.

States to 'have' the necessary resources, and that provision lays down no requirement whatsoever as to their origin.⁶³ The Court argues that the correctness of that interpretation is reinforced by the fact that provisions laying down a fundamental principle such as that of the free movement of persons must be interpreted broadly.⁶⁴ An interpretation of the condition concerning the sufficiency of resources within the meaning of Directive 90/364, in the terms suggested by the Irish and United Kingdom Governments would add to that condition, as formulated in that directive, a requirement as to the origin of the resources which, not being necessary for the attainment of the objective pursued, namely the protection of the public finances of the Member States, would constitute a disproportionate interference with the exercise of the fundamental right of freedom of movement and of residence upheld by Article 18 EC (now Article 21 TFEU) according to the Court.⁶⁵

Another important case in this respect is *Commission v Belgium* on the right of residence of a Portuguese woman who was living with a Belgian man who financially supported her. The Belgian authorities excluded this income of the Belgian partner in the absence of an agreement concluded before a notary and containing an assistance clause.⁶⁶

The Court repeats its considerations of the *Zhu and Chen* case holding that according to the very terms of the first subparagraph of Article 1(1) of Directive 90/364, it is sufficient for the nationals of Member States to 'have' the necessary resources, and that provision lays down no requirement whatsoever as to their origin.⁶⁷ An interpretation of the condition concerning the sufficiency of resources within the meaning of Directive 90/364 to mean that the person concerned must himself have such resources and may not rely on the resources of a member of the family accompanying him would add to that condition, as formulated in that directive, a requirement as to the origin of the resources which, not being necessary for the attainment of the objective pursued, namely the protection of the public finances of the Member States, would constitute a disproportionate interference with the exercise of the fundamental right of freedom of movement and of residence upheld by Article 18 EC (now Article 21 TFEU).⁶⁸ Therefore Belgium had failed to fulfill its obligations under Article 18

⁶³ Case C-200/02, *Zhu and Chen*, para 30. Directive 90/364, OJ EG 1990, L180/26 is one of the predecessors of Directive 2004/38.

⁶⁴ Case C-200/02, *Zhu and Chen*, para 31.

⁶⁵ Case C-200/02, *Zhu and Chen*, para 33.

⁶⁶ Case C-408/03, *Commission v Belgium*, EU:C:2006:192.

⁶⁷ Case C-408/03, *Commission v Belgium*, para 40.

⁶⁸ Case C-408/03, *Commission v Belgium*, para 41.

EC and Council Directive 90/364/ EEC of 28 June 1990 on the right of residence when applying that directive to nationals of a Member State who wish to rely on their rights under that directive and on Article 18 EC.

Guild et al. raised in this context the question whether an economically inactive Union citizen may always be regarded as possessing sufficient resources if such resources are derived from his or her third country national spouse.⁶⁹ According to them the approach to considering this question will depend upon whether it is claimed that sufficient resources exist prior to the move or whether it is argued that the citizen would possess sufficient resources only if the third country national spouse were permitted to access the labour market of the host Member as contemplated by Article 23 Directive 2004/38, which authorizes family members of Union citizens to engage in economic activity in the host Member State.

If prior to relocating a Union citizen can be shown that the family unit has sufficient resources, it is in their view immaterial whether such resources derive from the Union citizen or from another person, including a third national family member. The situation is less clear-cut where an economically inactive Union citizen claims that he would have sufficient resources if the spouse were permitted to take up employment in the host Member State. On a strict interpretation, third country nationals would only be able to derive a right to reside and work after the Union citizen has established his right of residence, which, in turn, is conditional on that citizen having met the conditions laid down in Article 7(1). On the other hand could a teleological approach lead to an opposite conclusion. As the primary objective of Directive 2004/38 is to facilitate free movement and the sufficient resources requirement is a restriction designed to prevent excessive pressure being placed on the social assistance system of the host Member State, once a family unit is self-sufficient, this system is not burdened and therefore it should be immaterial whether the source derives from the Union citizen or the third-country national family member.

This problem was extensively dealt with by Advocate General Mengozzi in the *Alokpa* case.⁷⁰ This case concerned a Togolese national with French children (born in Luxembourg) and a dispute regarding a refusal to grant Ms Alokpa a right of residence and an order for her to leave Luxembourg. Ms Alokpa and her children were reliant on the Luxembourg State although she had been offered a job, which her lack of residence and work permit prevented her from

⁶⁹ E. Guild, S. Peers and J. Tomkin, *The EU Citizenship Directive. A Commentary*, Oxford: OUP, 2014, p. 129.

⁷⁰ Case C-86/12, *Alokpa*, EU:C:2013:645.

commencing. Unlike in the *Zhu and Chen* case, Ms Alokpa did not possess sufficient resources for herself and her children so she had to rely on Luxembourg's social security system. AG Mengozzi considered that 'sufficient resources' for the purpose of Article 7(1)(b) of the Directive were capable of being satisfied by the definite prospect of future resources which would stem from the offer of a job of unlimited duration.⁷¹ He suggested that the referring court should, in principle, examine the job offer with a view to determining whether the Union citizen children would have sufficient resources under the Directive should Ms Alokpa commence work. According to the AG it was clear from the order for reference that Ms Alokpa never intended to become a burden on the Luxembourg State and that she has been offered a job for an indefinite period in Luxembourg, subject to the sole condition that she obtained a residence permit and a work permit in Luxembourg.⁷² Consideration must be given to the relevance of the job offer, and therefore to the possibility of taking into account resources which are not current but rather future or potential, for the purposes of satisfying the condition of 'sufficient resources' laid down in Article 7(1)(b) of Directive 2004/38.⁷³ Like the German Government and the Commission, the AG considered that the condition of 'sufficient resources' is capable of being satisfied by the definite prospect of future resources which would stem from a job offer to which a Union citizen or a member of his family responded successfully in another Member State. A different interpretation would deprive the freedom of movement enjoyed by citizens of the Union of its practical effect, whereas the objective of Directive 2004/38 is precisely to strengthen the right to freedom of movement.⁷⁴

The AG recalls that with regard to the amount of sufficient resources, Article 8(4) of Directive 2004/38 requires Member States to take into account the personal situation of the person concerned. Accordingly, when taking into account the specific situation of a person, the fact that he has been offered a job from which he will be able to derive income enabling him to satisfy the condition laid down in Article 7(1)(b) of Directive 2004/38 cannot be overlooked. Any interpretation to the contrary would lead to the individual situations of Union citizens and their family members being treated unfairly, thus rendering Article 8(4) of that directive meaningless, according to the AG.⁷⁵

71 AG Opinion 21 March 2013, EU:C:2013:197.

72 AG Opinion 21 March 2013, Case C-86/12, *Alokpa*, para 23.

73 AG Opinion 21 March 2013, Case C-86/12, *Alokpa*, para 24.

74 AG Opinion 21 March 2013, Case C-86/12, *Alokpa*, para 28.

75 AG Opinion 21 March 2013, Case C-86/12, *Alokpa*, para 29.

In interpreting Article 7(1)(b) of the Directive, the Court, referring to the *Zhu and Chen* case, found indeed that to 'have' sufficient resources means that these resources are available to the Union citizens, regardless of its origin. But unlike AG Mengozzi, the Court did not consider whether the promise of future earnings meant sufficient resources for the Union citizen children to 'have', and instead left this as a question of fact for the referring court. If the conditions of Article 7(1) of the Directive were not satisfied, Article 21 TFEU would be interpreted as not precluding Luxembourg from refusing a right of residence to Ms Alokpa.⁷⁶

A more explicit and detailed answer could have been given by the Court on this issue regarding preliminary questions asked by the High Court of Ireland in May 2014 in the *Singh and Others* case.⁷⁷ This case concerned three third country nationals who got a right of residence in Ireland as spouse of an EU citizen and who wanted to retain this right after the EU citizen had left Ireland and a divorce had become official. The sufficient resources for the former right of residence of the EU citizen had been partly based on resources of the non-EU citizen spouse. According to the Irish Minister for Justice and Equality this is problematic because this interpretation of the concept of sufficient resources could lead to situations of abuse in which Union citizens could easily start working for a short period of time to create a right to work for their third country national spouse and stop working themselves immediately afterwards. The most important part of this case is on the question whether the right of residence of the three foreign husbands in Ireland could be retained when the divorce took place after their EU wives had left the country, which right was denied by the ECJ. But the High Court also asked the following two questions:

“Are the requirements of Article 7(1)(b) of Directive 2004/38/EC met where an EU citizen spouse claims to have sufficient resources within the meaning of Article 8(4) of the Directive partly on the basis of the resources of the non-EU citizen spouse? If the answer to the second question is 'no', do persons such as the applicants have rights under EU law (apart from the Directive) to work in the host Member State in order to provide or contribute to 'sufficient resources' for the purposes of Article 7 of the Directive?”

The Court answered in line with the *Zhu and Chen* judgment that Article 7(1)(b) of Directive 2004/38 must be interpreted as meaning that a Union citizen has sufficient resources for himself and his family members not to become a burden

⁷⁶ Case C-86/12, *Alokpa*, para 27-30.

⁷⁷ Case C-218/14, *Singh and Others*, (Reference for a preliminary ruling from High Court of Ireland (Ireland) made on 5 May 2014).

on the social assistance system of the host Member State during his period of residence even where those resources derive in part from those of his spouse who is a third-country national.⁷⁸ And therefore did not have to answer the third question.

3. The condition of a comprehensive sickness insurance

Article 7(1)(b) imposes not only a requirement that economically inactive EU migrants have sufficient resources to avoid becoming a burden on social assistance, but also that they have a comprehensive sickness insurance. So far, it seems that there has not been paid much attention to this condition, not at the level of the Member States, nor at European level. The first 1979 proposal of which became later Directive 2004/38 did not even require economically non-active EU citizens to have any sort of sickness insurance cover.⁷⁹ There is for instance also no mention made on the (lack of) fulfillment of this condition in both the *Brey* judgment and the *Dano* judgment. The only important information in the case law of the ECJ on this issue is provided in the *Baumbast* case⁸⁰, in which the Court said that under the circumstances of that case the refusal to allow Mr Baumbast to exercise the right of residence which is conferred on him by Article 18(1) EC (now Article 21(1) TFEU) by virtue of the application of the provisions of Directive 90/364 (one of the predecessors of Directive 2004/38) on the ground that his sickness insurance did not cover the emergency treatment given in the host Member State would amount to a disproportionate interference with the exercise of that right.⁸¹ Important for this decision in my opinion was that Mr. Baumbast fulfilled all other conditions, as emphasized by the Court in para 92:

“In respect of the application of the principle of proportionality to the facts of the Baumbast case, it must be recalled, first, that it has not been denied that Mr Baumbast has sufficient resources within the meaning of Directive 90/364; second, that he worked and therefore lawfully resided in the host Member State for several years, initially as an employed person and subsequently as a self-employed person; third, that during that period his family also resided in the host Member State and remained there even after his activities as an employed and self-employed person in that State came to an

⁷⁸ Case C-218/14, *Singh and Others*, EU:C:2015:476, para 77.

⁷⁹ Proposal for a Council Directive on a Right of Residence for Nationals of Member States in the Territory of another Member State, COM(1979)215 final of 26 July 1979. See M. Meduna ET AL, 'Institutional report', in U. Neergaard, C. Jacqueson and N. Holst-Christensen (eds), *Union Citizenship: Development, Impact and Challenges, The XXVI FIDE Congress in Copenhagen*, Copenhagen: DJØF Publishing, 2014, p. 236.

⁸⁰ Case C-413/99, *Baumbast*, EU:C:2002:493.

⁸¹ Case C-413/99, *Baumbast*, para 93.

end; fourth, that neither Mr Baumbast nor the members of his family have become burdens on the public finances of the host Member State and, fifth, that both Mr Baumbast and his family have comprehensive sickness insurance in another Member State of the Union.”

The Commission defined in the 2009 guidelines⁸² a sickness insurance as any insurance cover, private or public, contracted in the host Member State or elsewhere, which would be acceptable in principle, as long as it provides comprehensive coverage and does not create a burden on the public finances of the host Member State. In protecting their public finances while assessing the comprehensiveness of sickness insurance cover, Member States must act in compliance with the limits imposed by Community law and in accordance with the principle of proportionality.⁸³ Pensioners fulfill the condition of comprehensive sickness insurance cover if they are entitled to health treatment on behalf of the Member State which pays their pension.⁸⁴ The European Health Insurance Card offers such comprehensive cover when the EU citizen concerned does not move the residence in the sense of Regulation (EEC) No 1408/71 (now Regulation 883/2004) to the host Member State and has the intention to return, e.g. in case of studies or posting to another Member State.

Sickness insurance does not necessarily have to derive from the host Member State: it may be contracted in another Member State if cover is granted in the host Member State too. Differences between Member States arise from the fact that whilst some Member States have a national health service (e.g. Denmark, Finland, Ireland, Italy and the UK), others have a health insurance scheme (e.g. Belgium, Germany, Luxembourg, the Netherlands and Romania). If we have a closer look at the level of the Member States problems in the United Kingdom and in Sweden can be detected.

3.1 Problems in the United Kingdom

Anyone who is ‘ordinarily resident’ in the United Kingdom is entitled to use the public National Health System (NHS). But according to the UK authorities the NHS cannot be seen as a comprehensive sickness insurance for economically

82 COM (2009) 313 final, Communication from the Commission to the European parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, Section 2.3.2.

83 Here the guidelines make a reference to the *Baumbast* case.

84 A reference is made to Articles 27, 28 and 28a of Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to the members of their families moving within the Community. As of 1 March 2010, Regulation (EC) No 883/04 has replaced it but the same principles apply.

inactive EU migrants.⁸⁵ For this category the UK authorities require a private health insurance. However, according to the Commission the UK has breached EU law by not considering entitlement to treatment by the NHS as sufficient to allow EU citizens who live but have no job in the UK to stay in the country for more than three months. The Commission has launched an infringement procedure in 2012 against the UK, requesting it to comply with EU rules by considering NHS cover as sufficient sickness insurance when assessing whether or not a non-active EU citizen is entitled to remain in the UK under the free movement rules. The UK is required to amend national rules and to bring UK law in line with EU law.⁸⁶ The Commission has not yet taken any decision whether or not to bring the matter before the Court of Justice. They are still analysing the possible impact of the *Brey* and *Dano* judgments on this issue.⁸⁷

The UK Court of Appeal (CA) supports the view of the UK authorities and considered in July 2014 in *Ahmad v Secretary of State for the Home Department (SSHD)* that the requirement on an EEA national who is exercising a treaty right in the UK as a student to have comprehensive sickness insurance, cannot be met by having access to the NHS.⁸⁸ The UK Court used the argument that the public healthcare system of the host state could not be included because that would defeat the object of the Directive, namely relieving the state of the cost of providing healthcare in the first five years of the EEA national's presence in that state. According to the UK Court the conditions in Article 7(1) Directive 2004/38 must not be interpreted dynamically. Instead, in line with the ECJ decision in *Brey* the conditions required strict and literal interpretation but remained subject to the general principles of EU law such as proportionality.⁸⁹

Against this opinion of the UK Court of Appeal one could point out the fact that the part of Article 7 Directive 2004/38 which says 'not to become a burden on the social assistance system of the host Member State' only refers to the sufficient resources requirement and not to the comprehensive sickness insurance requirement. This indicates that even in a strict and literal interpretation the

85 See S. DE MARS, Economically inactive EU migrants and the United Kingdom's National Health Service: unreasonable burdens without real links, *European Law Review* 6 (2014), p.770-789.

86 See http://europa.eu/rapid/press-release_IP-12-417_en.htm?locale=en

87 Information received from DG Justice on 12 February 2015.

88 *Ahmad v Secretary of State for the Home Department* [2014] EWCA Civ 988, 16 July 2014.

89 <https://asadakhan.wordpress.com/2014/07/21/arden-lj-on-csic-and-permanent-residence/>.

appeal to the NHS can not be regarded as an appeal to the social assistance system of the Member State.⁹⁰

3.2 Problems in Sweden

Different problems can be identified in Sweden. A 2014 publication by the Swedish National Board of Trade shows that getting the right health insurance is not always an easy task.⁹¹ In Sweden an S1 form grants an EU citizen access to health care if he or she does not live in the country where he or she is insured. The person must request such an S1 form from the home country's social insurance agency (in Sweden, this is the Swedish Social Insurance Agency). According to Union law it is up to each Member State to organise its healthcare system and to decide when to grant an S1 form. But the differences between Member States can mean that one Member State requests an S1 form from the home country when the home country will not grant one. The publication gives the example of a Hungarian pensioner who wanted to move to Sweden, joining her son there. In order to exercise her right of residence and to be entered into the Swedish population registry, she needed an S1 form from Hungary. But in order to obtain an S1 form from Hungary, she had to prove that Swedish authorities considered her a resident of Sweden. And again, Swedish authorities required an S1 from Hungary before they would allow her to reside in Sweden. The problem was not resolved, and the pensioner could not be entered into the Swedish population registry.

The alternative to an S1 form is to purchase a private insurance coverage. But this can lead to problems as well. In evaluating private insurance policies, the Swedish Tax Agency requires that several conditions be met. The policy must be personal, and must not have a monetary ceiling for necessary health care. Private insurance policies may contain no disclaimers that deny coverage for certain illnesses, and they must cover health care for injuries resulting from sports, risky activities, and so on. The National Board of Trade contacted about twenty insurance companies to learn whether they sell insurance policies that comply with these criteria. None of them did. A person without an S1 form therefore has difficulty acquiring the comprehensive sickness insurance that is required by the Swedish Tax Agency. In sum, EU citizens who plan to work in Sweden for less than one year and those who are non-workers have difficulty

⁹⁰ See F. van Overmeiren, E. Eichenhofer and H. Verschueren, 'Social Security Coverage of Non-Active Persons Moving to Another Member State', in E. Guild, C. Gortazar Rotaache and D. Kostakopoulou (Eds.), *The Reconceptualization of European Union Citizenship*, Leiden- Boston: Nijhoff, 2014, p. 254.

⁹¹ National Board of Trade, *Moving to Sweden; Obstacles to the Free Movement of Citizens*, Stockholm 2014, p.7-8. See: http://www.kommers.se/Documents/dokumentarkiv/publikationer/2014/Moving-to-Sweden_webb.pdf

gaining access to health care in Sweden because they encounter obstacles involving the population registry. The report gives another example of two German EU citizens, who had difficulty obtaining an S1 form from Germany and therefore bought a private insurance that was equivalent to the German state insurance. However, because the policy included disclaimers that denied coverage of care for self-inflicted injuries and addiction, this insurance was not accepted by the Swedish Tax Agency. These EU citizens were therefore denied inclusion in the population registry.⁹²

4. Conclusion

This chapter focused on the position of inactive EU citizens who need sufficient resources (and a comprehensive sickness insurance) to have a right to reside under Article 7(1)(b) Directive 2004/38. The question when an inactive citizen has sufficient resources is not an easy one to answer. The history of the negotiations regarding the concept of 'sufficient resources' shows that there is an ambivalence in prohibiting a fixed amount of money on one side and the indication of a threshold at social assistance benefit level on the other side. This ambivalence is reflected in the practice of various Member States as well. The approaches regarding the definition of sufficient resources vary between the various Member States. It appears that there is not much case law available on the issue of sufficient resources and its consequences at the level of the Member States. From the scarce Dutch case law it can be concluded that the Dutch immigration authorities tend to apply a fixed amount at the level of a social assistance benefit as a condition of sufficient resources, while the courts do take into account the personal situation of the EU citizen and tend to accept a lower amount of money to fulfill the condition of sufficient resources. It should be noted that in all the presented court cases neither the EU citizen nor the family member seem to have made an application for a social assistance benefit.

When we have a look at the case law of the ECJ regarding the notion of sufficient resources two important issues can be distinguished. The first issue concerns the level of resources and the relation to social assistance benefits, the other issue concerns the origin of the resources. Regarding the origin of the resources it is clear from the case law of the ECJ that to 'have' sufficient resources means that these resources are available to the Union citizens, regardless of its origin. They can be derived from another person, including a third national family member. But it is still disputed whether the prospect of future earnings can mean that the condition of sufficient resources is fulfilled as well. Another ques-

⁹² National Board of Trade, *Moving to Sweden; Obstacles to the Free Movement of Citizens*, Stockholm 2014, p. 8.

tion to be solved concerns the interpretation of the concept of sufficient resources in situations in which Union citizens start working only for a short period of time to create a right to reside and work for their third country national spouse and stop working themselves immediately afterwards.

Article 7(1)(b) imposes not only a requirement that economically inactive EU migrants have sufficient resources, but also that they have a comprehensive sickness insurance. So far, the impression is given that there has not been paid much attention to this second condition, not at the level of the Member States, nor at European level. Only problems in the UK and in Sweden could be detected. According to the UK authorities the public National Health System cannot be seen as a comprehensive sickness insurance for economically inactive EU migrants. For this category the UK authorities require a private health insurance. The European Commission has a different view on this issue and has started in 2012 an infringement procedure against the UK. In Sweden EU citizens who are non-workers have difficulty gaining access to health care because they encounter obstacles involving the population registry. Administrative differences between Member States result in not providing the right forms, which leads to insurance problems. Non recognition of private insurances from other Member States is another problem.

Most interesting at the moment is the challenge for the Court to find a balance between the requirement of fulfilling the condition of sufficient resources and the possibility to apply for social assistance. The shift noted in the case law – from asking for social assistance being an indication of lack of resources to becoming a certainty that no longer requires an individualized examination of the case and decision – raises some fundamental questions about the scope of EU citizenship and seems to go against the Court's well established way of interpreting EU citizenship rights that emphasis proportionality and the need for individual assessment. The Court's approach in *Dano* and *Alimanovic* will undoubtedly have an impact upon how fundamental EU citizenship is as a status and whom it can actually capture. An interpretation where economically non-active EU citizens must always have resources sufficient not to qualify for any social assistance benefit may lead to an effective exclusion of most economically non-active EU citizens by providing for a social benefit with a very high resource threshold in national laws.