Solidarity (Still) in the Making or a Bridge Too Far?

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1. Introduction

This paper concentrates on two central themes

1. The issue of welfare tourism, which has been strongly in the spotlight of the political debates concerning the free movement of (poor) EU citizens (mainly from the newer EU Member States). However, there is no evidence that welfare tourism takes place on a wide scale in the EU.

2. An analysis of the case law of the Court of Justice of the European Union on issues of social rights and EU citizenship which shows a noticeable shift towards stricter interpretations of the scope of social solidarity for mobile EU citizens. The main question is who can still move freely within the EU?

Today the EU institutions are increasingly called to defend the fundamental character of the rules on free movement of EU citizens and show that welfare tourism is not a reality, but an exception. The contestation of mobility is very much linked to cries of welfare tourism and the portrayal of mobile citizens as 'abusers' who move in order to benefit from the better welfare provisions of their host states.[1] This debate is not new; it is ongoing since the introduction of EU citizenship and its expansive interpretation by the Court in relation to the principle of equality. Nonetheless, at present it has taken on new dimensions as politicians question the fundamental character of free movement of persons, with David Cameron as its most explicit example.[2] Legally, the main issue seems

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[1] For an overview see, H. Verschueren, 'Free Movement or Benefit Tourism: The Unreasonable Burden of *Brey*', (2014) 16 EJML, 47-179

[2] D. Cameron, 'Free movement in Europe needs to be less free', *Financial Times* (26 November 2013); E. Guild 'Cameron's proposals to limit EU citizens' access to the UK: lawful or not, under EU rules?' (CEPS 2013) Commentary,

to be whether economically inactive persons should be entitled to access social assistance and special non-contributory benefits (which sit at the intersection of social assistance and social security) in their host states.

2. Who can move? Who actually moves? Who should move?

Who can move? The right to free movement of persons is one of the original four fundamental freedoms making up the basis of what is now the European Union. Although initially limited to workers and self-employed persons, the right to move was extended to various categories of economically inactive persons in the 1990s. This process was cemented with the introduction of the legal status of European Union citizenship by the Maastricht Treaty (1992). Thus, legally the answer to the question who can move can be found in Article 21 TFEU: "*every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect*." Articles 45 and 49 TFEU are seen as special legal provisions dealing with workers and respectively, self-employed persons. The text of the Treaty clearly suggests that although in theory any EU citizen can move, s/he will nevertheless need to fulfil certain conditions when doing so and that the right is also subject to limitations. These limitations and conditions are further spelled out in Directive 2004/38, which is the main piece of secondary legislation that details the rules applicable to the exercise of the right to move and reside freely in another Member State.[3] It applies to EU citizens irrespective of their economic participation and to their family members irrespective of nationality.

Who actually moves?

The number of EU citizens who move has increased considerably after the 2004 enlargements and it is estimated that in 2013 there were 13,7 million citizens living in another EU state (2,7% of the entire EU population).

Most research into the characteristics of intra-EU movers shows that they are young, mainly move for work and contribute to the social system of their host state. A 2014 study by ECAS into the fiscal impact of EU migrants in Austria, Germany, the Netherlands and the UK confirmed that most EU migrants fall into the 20-44 age group, are generally younger and

http://www.ceps.eu/system/files/EG%20Commentary%20Cameron%27s%20Proposals.pdf

[3] 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 [2004] OJ L158/77)

with fewer children than nationals, while their main objective in moving to one of the 4 states investigated was to find work.[4]

Giulietti's empirical research showed that there is no strong support for the welfare magnet hypothesis, nor for arguments that immigrants are more likely to use and abuse social programs.[5] He argues that "*immigration is primarily driven by differentials in unemployment and wages between sending and destination countries, by the presence of social networks and by geographical proximity*."

Who should move?

In 2013, the interior ministers of 4 EU Member States wrote a letter to the EU Commission asking for restrictive measures that would curb the abuse of the right to free movement and protect the national welfare systems that were being 'abused' by EU citizens. The letter also suggested that the only EU citizens whose mobility should be encouraged are workers, students and those wishing to set up a business in another Member State.[6] The lack of reliable data showing that benefit tourism is actually taking place on a large scale in the EU was quoted by the European Commission and the Visegrad countries (Czech Republic, Hungary, Poland and Slovakia)[7] in their reactions to this 2013 letter of the Austrian, German, Dutch and UK ministers calling for a reform of the free movement rules.

Since 2013, a host of studies were published that tried to bring data to understand the impact of intra-EU mobility, most of which suggests that benefit tourism is not taking place on a large scale and that generally EU migrants have positive effects upon the economies of their host states.[8] A comprehensive study was commissioned by the European Commission which concluded that the share of non-active intra-EU migrants is small,

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[4] ECAS *Fiscal Impact of EU migrants in Austria, Germany, the Netherlands and UK*, (ECAS 2014), 13

[5] C. Giulietti, *The welfare magnet hypothesis and the welfare take-up of migrants* (IZA World of Labour 2014) 37, doi: 10.15185/izawol.37; See also his study with Kahanec that reached similar conclusions: C. Giuletti and M. Kahanec 'Does generous welfare attract immigrants? Towards evidence-based Policy-Making,' in E. Guild and S. Carrera (eds) *Social Benefits and Migration: A Contested Relationship and Policy Challenge in the EU*, (CEPS 2013)

[6] Y. Pascouau, *Strong attack against freedom of movement of EU citizens: turning back the clock* (European Policy Centre 2013)

[7] Joint statement from the Foreign Ministers of the Visegrad countries of 04.12.2013 (JAI 1115 FREMP 205 MI 1129 POLGEN 255 SOC 1019)

[8] E. Guild, S. Carrera & K. Eisele, *Social Benefits and Migration: A Contested Relationship and Policy Challenge in the EU* (CEPS 2013) and ECAS (2014), above fn.5, for a review of several studies

that such migrants account for a very small share of special non-contributory benefits (SNCB) recipients, that the budgetary impact of SNCB claims made by non-active EU citizens is low and that costs associated with the take-up of healthcare by non-active intra-EU migrants is very small. The study highlighted that the main driver of intra-EU migration is employment.[9]

In spite of now existing data, the political debate concerning free movement continues to be fuelled by a series of political parties from a select group of Member States.

According to European Parliament Research Service research conducted on the topic of social benefits and EU citizenship "*the discussion ... has long gone beyond proof by numbers, and some member states feel they have lost control over one of the core competences of a sovereign state, namely, their welfare system, not by agreeing to such a shift of competences, but through the back door of EU citizenship.*"[10]

3. Free movement and social rights under Directive 2004/38

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. Furthermore, the treatment of economically inactive persons differs from the treatment of economically active persons. All EU citizens have the right to enter any EU Member State without any conditions or formalities, other than the requirement to hold a valid identity card or passport, for 3 months.[11]

Residence for longer than 3 months is however made conditional upon being a worker or having sufficient resources and health insurance not to become a burden on the social assistance system of the host state.[12]

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. This right of permanent residence is given to Union

[9] ICF/GHK, *A fact finding analysis on the impact on the member States' social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence*, Final report submitted by ICF GHK in association with Milieu Ltd., DG Employment, Social Affairs and Inclusion via DG Justice Framework contract, 2013

[10] E-M Poptcheva, *Freedom of movement and residence of EU citizens – Access to social benefits*, (European Parliamentary Research Service 2014), 4

[11] Directive 2004/38, art 6.

[12] Directive 2004/38, art 7 (1)

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.

Inactive citizens who reside less than 5 years in another Member State face most problems. They need sufficient resources and a comprehensive sickness insurance to have a right of residence under Directive 2004/38. These conditions regarding sufficient resources and comprehensive sickness insurance do not apply to workers, self-employed persons, or persons who stopped being economically active but who retain worker or self-employed status pursuant to Article 7(3) Directive 2004/38.

Jobseekers who enter the territory of the host Member State in order to seek employment are another category of citizens for whom sufficient resources and sickness insurance are not relevant. Such persons may not be expelled for as long as they can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged. Union citizens who have resided legally and for a continuous period of 5 years in the host Member State have a right of permanent residence there. Union citizens (and their family members) enjoy this right without any further conditions, even if they no longer have sufficient resources or comprehensive sickness insurance cover.

So far, based on the Court's jurisprudence it is not possible to argue that EU citizens enjoy unconditional access to social assistance benefits in their host State. A first condition is always that the applicant has to have legal residence in the host State. In several cases the CJEU has formulated additional conditions to the extent that the applicant should "*have a genuine link with the employment market of the State concerned*" [13] or "*need to demonstrate a certain degree of integration into the society of the host State*".[14] Equally, the CJEU recognises the right of the host Member State to stop the right of residence of the person concerned, but this should not become "*the automatic consequence of relying on the social assistance system*"[15]

The *Brey* case of 19 September 2013 seeks to find a balance between satisfying the condition of sufficient resources and applying for a social assistance benefit.[16] This case concerned a German national, who was in receipt of a German invalidity pension of €1.087,74 and who moved together with his wife to Austria. He applied for an Austrian compensatory

[13] Case C-138/02 *Collins*, EU:C:2004:172, paras 67-69
[14] Case C-209/03 *Bidar,* EU:C:2005:169, para 57
[15] Case C-184/99 *Grzelczyk,* EU:C:2001:458, para 43; Case C-456/02 *Trojani,* EU:C:2004:488, para 36
[16] Case C-140/12 *Brey*, EU:C:2013:565

supplement which aimed at guaranteeing the person concerned a minimum subsistence income in Austria. The Austrian authorities refused to grant this benefit because, in their view, Mr Brey did not meet the conditions required to obtain the right to reside, due to a lack of sufficient resources.

According to the Court the fact that an economically inactive national from another Member State may be eligible, in the light of a low pension, to receive a 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.

It is important to stress that we are only in the presence of an'indication', not of an established fact. To this end, the Court recalls that the first 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. 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. National authorities must 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 CJEU 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 the attainment of the objective of Directive 2004/38, more specifically its objective to facilitate and strengthen the primary right to free movement. Relying on these elements, the Court confirmed 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. This automatic refusal prevents the national authorities from carrying out an overall assessment of the specific burden.

4. Possibility to ask social assistance or not?

After the introduction of Directive 2004/38, one can argue that an inactive EU citizen applying for a social assistance benefit because s/he lacked sufficient resources, kept a right of residence under Directive 2004/38 until the moment this right was withdrawn, on the ground that s/he was supposed to have become an unreasonable burden to the social assistance system. A combined reading of Articles 14, 24 and of recital 16 of the preamble of Directive 2004/38 suggests that access to social assistance is not out of the question as long as the citizen does not become an unreasonable burden on the social assistance system of the host Member State.

5. The Dutch approach

In the Netherlands, the Aliens Act Implementation Guidelines[17] provide very detailed information in the form of a sliding scale about when a demand on social assistance results in the termination of the EU citizen's lawful residence by the immigration authorities (IND). Each application for social assistance during the first two years of residence is in any case considered unreasonable and will, in principle, result in termination of residence. In this scenario, the IND will assess the appropriateness while considering the following circumstances of each case: the reason for the inability to make a living, its temporary or permanent nature, ties with the country of origin, family situation, medical situation, age, other applications for (social) services, the extent of previously paid social security contributions, the level of integration and the expectation for future social assistance needs.

A year after *Brey*, the CJEU delivered its judgment in the *Dano* case where it took a different approach.[18] In *Dano*, two Romanian nationals, mother and son who lived in Germany were refused access to benefits under the German basic provision rules. 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 never exercised any profession in Germany or Romania. As regards access to social benefits, the Court held that nationals of other Member States are only entitled to be treated equally with nationals of the host Member State if their residence in the territory of the host Member State meets the requirements of Directive 2004/38.

[17] Vc B 10/2.3.
[18] Case C-333/13 *Dano*, EU:C:2014:2358

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. The *Dano* decision 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 automatically means that they have no (longer) sufficient resources and consequently no residence right under Directive 2004/38). Thus, if in *Brey* applying for a benefit was an '**indication'** of lack of sufficient resources, in *Dano* this has become '**certainty'**. The reasoning in *Dano* leads to the paradoxical situation where a Union citizen would only be entitled to social assistance if he has sufficient resources and therefore is not in need of any social assistance.[19] We seem to be in the presence of a real Catch-22 situation.

6. The *Alimanovic* case

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 eldest 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.

According to the Court, Ms Alimanovic and her daughter were not covered by the Directive as former workers anymore because on the basis of Article 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.

This does not mean, however, that Ms Alimanovic and her daughter can be expelled. As long as they are job seekers and continue to have a genuine chance of being engaged expulsion is not possible. But after six months of

[19] H. Verschueren, 'Preventing "benefit tourism" in the EU: A narrow or broad interpretation of the possibilities offered by the ECJ in *Dano*?', (2015) 52 CMLR, 381

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). Interestingly, according to the CJEU 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. 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.

7. The opinion of the Advocate General

The Advocate General confirmed that an EU citizen having worked in national territory for less than one year may, in accordance with EU law, will lose the status of worker after six months of unemployment.[20] Nevertheless, he considers that it runs counter to the principle of equal treatment to exclude automatically an EU citizen from entitlement to social assistance benefits 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.[21] 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.[22] The Court, however, avoids any reflections on the importance of a possible demonstration of the existence of such a 'genuine link' on the access to social benefits.[23]

8. Conclusions

This legal shift in the interpretation of the Citizens' Directive takes place in a context of rising political debates about free movement, which are increasingly focusing on the mobility of poor or economically inactive EU citizens. Although no study seems to find any evidence that social tourism, but also benefit fraud or abuse are happening on a large scale, these debates continue to take place. It is equally clear that the case law concerned with the entitlement of economically inactive EU citizens to social rights in their host States is undergoing some profound changes.

The shift we 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

[20] Based on Directive 2004/38, art 7(3) (c)
[21] Opinion AG of 26 March 2015, Case C-67/14, *Alimanovic*, para 110
[22] Opinion AG of 26 March 2015, Case C-67/14, *Alimanovic*, para 111
[23] Case C-67/14 *Alimanovic*, EU:C:2015:597

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 and the usual emphasis on 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 since in their national legislation Member States may set the threshold high. Take for instance as example the Romanian pensioners who have an average old-age pension of around € 175. Such pensioners would meet the requirement of sufficient resources only in 8 of the 27 Member States (Bulgaria, Croatia, Czech Republic, Estonia, Latvia, Lithuania, Poland and Slovakia). The area of free movement, in which such Romanian pensioners may exercise their fundamental right to move and reside freely would shrink to less than 1/3 of the EU.[24]

Those who work in precarious jobs and do not manage to make the one year threshold of working in the host Member State which is the 'gold standard' for a (more) durable residence right under Article 7, they must at least work a little every six months to retain their social benefits.

What type of solidarity is being promoted in the EU, if it is available only for those who do not need it and only when they do not need it? Moreover, if the political discussion is to continue along the line of problematizing the working poor, while also bearing in mind the structural changes underwent by national labour markets that increasingly rely on part-time, poorly paid jobs to generate growth, who will still be able to move freely in the EU?

[24] 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,* (DJØF Publishing 2014), 236