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Exploring the limits of social solidarity: welfare tourism and EU citizenship

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ABSTRACT: Political debates concerning the free movement of (poor) EU citizens (mainly from the newer EU Member States) have focused upon the twin issues of abuse of free movement rights and welfare tourism, despite the lack of meaningful evidence that the two are actually taking place on a wide scale in the EU. This article discusses the increasing political contestation of EU mobility as captured by notions such as, welfare tourism and poverty migration. The analysis of the case law of the Court of Justice of the European Union on issues of social rights and EU citizenship shows a noticeable shift towards stricter interpretations of the scope of social solidarity for mobile EU citizens. We argue that the coupling of these two aspects of EU mobility raises questions about the scope of EU citizenship and its nature as a fundamental status.

KEYWORDS: EU citizens - free movement - equality - social tourism - poverty migration.

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1. Introduction

Building on Marshall's account of citizenship, social rights provide a benchmark for understanding whether a person is seen as part of the community of citizens and therefore entitled to enjoy social solidarity.¹ In the EU context, the manner in which Member States deliver social rights and social solidarity is influenced by EU citizenship and the rules adopted to give it effect since they require that EU citizens be treated as nationals. However, before equal treatment in the enjoyment of social rights becomes possible, EU citizens must meet a series of preconditions. The exact geometry of how mobile EU citizens are incorporated into the social security and welfare systems of their host states is prescribed by rules of secondary legislation implementing the Treaty rights on citizenship, workers, self-employment and equality, and the interpretation of these rules by the European Court of Justice (CJEU).

In this contribution, we take 2004 as the starting point of our analysis of EU social rights jurisprudence. 2004 is an important year that marked three developments in the field of free movement of persons: a) enlargement and extension of EU citizenship status to nationals of the EU new 8 countries – the largest enlargement in the history of the EU – followed by the 2007 enlargement (EU new 2 countries), b) adoption of Directive 2004/38, the Citizens' Directive which was meant to bring clarity to the right of EU citizens to move and reside freely in another Member State, and c) recast of Regulation 883/2004, the social security coordination regulation, which was meant to extend, clarify and simplify the already existent system of coordination of social security systems in the EU. Thus, the extension of EU citizenship to millions of persons was doubled by a process of legislative consolidation and expansion of the rules on free movement and social security coordination. By the same token, the rules on social security were consolidated in order to give access to special non-contributory benefits to EU citizens who were not economically active in their host Member States, provided that they were habitually resident there. The political message from the EU institutions, including the representatives of the EU Member States acting in the Council and Parliament, could be interpreted as positive and focused on making the right to free movement a reality for all EU citizens. According to Guild, the enlargement process went hand in hand with a process of strengthening social solidarity by the adoption of the Citizens Directive and of Regulation 883/2004, despite the fact that most of the countries that joined in 2004 (and 2007) had lower GDPs than the 'older' Member States.² Her conclusion is that EU's experience with the last two enlargements shows that enlarging the pool of people who are entitled to social rights does not necessarily imply a lowering of standards or acts as inhibiting factor for social protection.

However, a decade after the 2004 enlargement, 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.³ This debate is not new; it is ongoing

¹ T.H. Marshall, *Citizenship and Social Class and Other Essays*, Cambridge: Cambridge University Press, 1950.

² E. Guild, "Does European Citizenship Blur the Borders of Solidarity?" in *The Reconceptualization of European Union*, Citizenship Guild, Gortazar Rotaecche & Kostakopoulou (eds), 2014, 205.

³ For an overview, see H. Verschueren, "Free Movement or Benefit Tourism: The Unreasonable Burden of Brey", in *European Journal of Migration and Law*, 16, 2014, 147-179.

since the introduction of EU citizenship and its expansive interpretation by the Court in relation to the principle of equality.⁴ Nonetheless, at present it has taken on new dimensions as politicians question the fundamental character of free movement of persons.⁵ Legally, the main issue seems 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.

In this article, we look at changes in the case law of the CJEU in relation to the social rights of mobile EU citizens within the last ten years. The paper is divided as follows: Section 2 starts with general considerations about free movement in the EU, taking a closer look at discrepancies between who can move, who actually moves and (from the perspective of some EU governments) who should ideally move. Section 3 presents the general rules on free movement as contained by Directive 2004/38, whereas Section 4 discusses how CJEU jurisprudence dealing with social rights and social solidarity is changing. The final section reflects on how the political debates and changes identified in case law affect the scope of EU citizenship and asks whether we are witnessing its transformation into an elite status.

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

The above questions capture in a nutshell the current contestation of EU mobility, which is increasingly presented as an abuse of EU rights or as ‘poverty migration’. The last term is a new trope in debates about EU citizenship signalling the increasingly difficult political climate in which intra-EU migration takes place.

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

⁴ C. Barnard, “EU citizenship and the principle of solidarity”, in *Social welfare and EU law*, M. Dougan and E. Spaventa (eds), Oxford: Hart Publishing, 2005, 157-180; M. Dougan and E. Spaventa, “Wish you weren’t here...: new models of social solidarity in the European Union”, in *Social welfare and EU law*, M. Dougan and E. Spaventa (eds), Oxford: Hart Publishing, 2005, 181-218; S. Giubonni, “Free movement of Persons and European solidarity”, *European Law Journal*, 13:3, 2007, 360-379; C. O’Brien, “Real links, abstract rights and false alarms: the relationship between ECJ’s ‘real link’ case law and national solidarity”, in *European Law Review* 33:5, 2008, 643-665; G. Davies, “The humiliation of the state as a constitutional tactic”, in *The Constitutional Integrity of the European Union*, F. Amtenbrink and P.A.J. van den Berg (eds), 2010, Asser Press, 147.

⁵ D. Cameron, “Free movement in Europe needs to be less free”, in *Financial Times*, 26 November 2013; E. Guild, 2013, “Cameron’s proposals to limit EU citizens’ access to the UK: lawful or not, under EU rules?”, CEPS Commentary, <http://www.ceps.eu/system/files/EG%20Commentary%20Cameron%27s%20Proposals.pdf>.

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.⁶ It applies to EU citizens irrespective of their economic participation and to their family members irrespective of nationality.

In the ten years since the adoption of the Citizens' Directive as the overarching piece of legislation applicable to EU citizens who move to another Member State, the position of economically inactive citizens and their claims to equal treatment in the host state have led to a series of cases before the CJEU that have received a lot of attention from politicians and media. Usually, the discussion is posed in terms of 'benefit tourism' and presented as a phenomenon linked to east-west migration within the EU, which is also read as movement of poor EU citizens to richer Member States. So popular is the term, it has its own Wikipedia entry, which defines it as: "*a political term coined in the 1990s and later used for the perceived threat that a huge number of citizens from eight of the ten new nations given membership in the European Union in the 2004 enlargement of the European Union would move to the existing member states to benefit from their social welfare systems rather than to work. This threat was in several countries used as a reason for creating temporary work or benefit restrictions for citizens from the eight new member states.*" In some Member States, notably Germany, the discussion has entered a new plane where fears of benefit tourism are doubled by discussions on 'poverty migration', a term that describes the movement of poor EU citizens mainly from the Eastern Member States, some of whom are Roma EU citizens.⁷ Similar debates are present in the UK and in both Member States they are partly fuelled by the concentration of EU citizens in certain geographic areas that already contain migrant populations, where they are seen as putting extra pressure on local infrastructure.⁸ However, some German reports⁹ suggest that under this new term one can also address the movement of EU citizens who work for a limited number of hours and who rely on social benefits and social assistance to supplement their income. It is unclear how such debates relate to the reality of the labour market in specific member states where part-time jobs and zero-hours contracts are increasingly becoming the norm, nor to the definition of the concept of EU worker, which is an autonomous concept of EU law.¹⁰

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). Coupled with the

⁶ 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, OJ 2004, L 158/77.

⁷ Deutscher Städtetag Position Paper by the German Association of Cities on questions concerning immigration from Romania and Bulgaria, 22 January 2013, http://www.staedtetag.de/imperia/md/content/dst/internet/fachinformationen/2013/positionspapier_dst_zuwanderung_2013-e.pdf.

⁸ C. Bruzelius, E. Chase & M. Seeleib-Kaiser, "Semi-Sovereign Welfare States, Social Rights of EU Migrant Citizens and the Need for Strong State Capabilities", Oxford Institute of Social Policy 2014/3, 2014, www.social-europe.eu; D. Bräuninger, "Debate on free movement – Does the EU need new rules on social security coordination?", Deutsche Bank Research Briefing, 2015, 20 March 2015.

⁹ Bräuninger, p. 10.

¹⁰ Mark Freedland, "The Regulation of Casual Work and the Problematical Idea of the 'Zero Hours Contract'", OxHRH Blog, 25 March 2014, <<http://ohrh.law.ox.ac.uk/?p=5026>> [30-6-2015]; T. Tse & M. Esposito, "Germany, the giant with the feet of clay", blog Euro crisis in the press, 12 March 2015, <http://blogs.lse.ac.uk/eurocrisispress/2015/03/12/germany-the-giant-with-the-feet-of-clay/>.

fact that most migration takes place towards EU15 states, this increase has led to discussions about how migrants impact their host states. The fact that the last three enlargements took place more or less at the same time as the global economic crisis and recession in Europe is seen as having an impact on how migration is perceived by destination countries. Over the same period of time, most EU countries experienced a worsening of their fiscal balances, whereas taxes levied on labour were insufficient to cover increasing social expenditure, leading to the conclusion that “*the typical employee is a net beneficiary of the social security system if taxes on labour alone are taken into account.*”¹¹ This points towards changing economic conditions that affect workers irrespective of their nationality or migration status, although national governments seem less inclined to portray national workers as (net) users of welfare rather than producers thereof.

According to Giulietti, two main questions are asked in relation to immigrants: whether they deliberately move to countries with more generous welfare systems and whether migrants take up excessively or abuse social benefits.¹² 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. 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.*”¹³ Moreover, restricting immigrants’ access to welfare benefits is likely to worsen their socio-economic integration and in the long run may increase welfare claims. 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 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 with fewer children than nationals, while their main objective in moving to one of the 4 states investigated was to find work.¹⁴ The study found that EU migrants have both higher employment and unemployment rates than nationals, a fact attributed to their higher participation in the labour market.¹⁵

The ECAS study is worth mentioning since it looked at the fiscal impact of EU migration in these states as opposed to impact in relation to the host state’s labour market and macroeconomic impact of migration. The study found that “*the fiscal contribution of EU foreigners increased substantially in the past several years*” and that migrants made a positive contribution to government budget in all 4 states “*as the total taxes paid exceeded the total benefits they received.*”¹⁶ The result remained positive in all states except for the Netherlands when pensions were taken out of the calculation. For 2013, the net fiscal impact calculated without pensions was €627 million in Austria, €11 billion in Germany, close to €600 million in the UK and a negative impact of

¹¹ ECAS, *Fiscal Impact of EU migrants in Austria, Germany, the Netherlands and UK*, Brussels, 2014, p. 10.

¹² C. Giulietti, “The welfare magnet hypothesis and the welfare take-up of migrants”, in *IZA World of Labour* 2014:37,2014, DOI: 10.15185/izawol.37.; See also his study with Kahanec that reached similar conclusions: C. Giulietti and M. Kahanec, “Does generous welfare attract immigrants? Towards evidence-based Policy-Making?”, in *Social Benefits and Migration: A Contested Relationship and Policy Challenge in the EU*, E. Guild and S. Carrera (eds), CEPS: Brussels, 2013.

¹³ Giulietti 2014.

¹⁴ ECAS 2014, p. 13.

¹⁵ *Ibid.*

¹⁶ ECAS 2014, p. 79.

€350 million in the Netherlands.¹⁷ It is important to mention that the ECAS study tried to collect information based on nationality in relation to both income taxes and social contributions revenues and expenditures, including benefit fraud. However, when the national authorities were asked to provide such data, it became clear that “*none of the official government institutions collects data on the citizenship of taxpayers or benefit recipients through a process that would allow for the statistical use of such information.*”¹⁸ This suggests that the public calls for curbing free movement on grounds that EU citizens are abusing the welfare systems of their host states are not based on data but rather the result of a politicization of EU mobility that is divorced from the reality of intra-EU movement.

Who should move?

In 2013, the interior ministers of 4 EU Member States wrote a letter to the European 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.¹⁹ 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)²⁰ 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.²¹ A comprehensive study was commissioned by the European Commission which concluded that the share of non-active intra-EU migrants is small, 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.²²

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. In this context, and precisely because data and the reality of migration seems to play no role in the debate, alternative explanations may be relevant. Bruzelius et alii have looked at different social constructions of EU citizenship and social rights

¹⁷ *Ibid.*

¹⁸ ECAS 2014, 19.

¹⁹ Y. Pascouau, *Strong attack against freedom of movement of EU citizens: turning back the clock*, European Policy Centre, 2013.

²⁰ Joint statement from the Foreign Ministers of the Visegrad countries of 04.12.2013, JAI 1115 FREMP 205 MI 1129 POLGEN 255 SOC 1019.

²¹ E. Guild, S. Carrera & K. Eisele, *Social Benefits and Migration: A Contested Relationship and Policy Challenge in the EU*, CEPS:Brussels 2013 and ECAS 2014, for a review of several studies.

²² 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.

as reflected by analysis of print media in 3 EU Member States: UK, Germany and Sweden.²³ Their analysis suggests different national approaches and attitudes towards EU citizenship, EU migrants and their entitlements to social rights. 2004 and secondly 2007 are seen as important dates in framing the discourse on EU citizenship resulting in an increase in media attention concerning topics such as intra-EU migration and the impact of EU citizens/migrants on the national welfare state. UK's trajectory distinguishes itself from the other two states since it has an increasingly predominant negative reporting culture that challenges the concept of freedom of movement and the entitlement of EU citizens to social rights, more generally. Germany and Sweden have a more balanced and neutral approach that focuses more on economically inactive EU citizens and their entitlement to social benefits in the absence of having first contributed to the welfare system.²⁴ Moreover, issues of abuse of social rights are not presented as a generalized phenomenon, whereas in the UK, media portrays groups of Eastern Europeans supposedly moving to claim benefits in the UK and abuse the system. The study suggests that domestic politics play an important role in the contestation of mobility and that domestic specificities inform the process of presenting EU migration as problematic. 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.”*²⁵

In our view, the mechanisms through which such concerns are pushed onto the EU level and translated into concerns that demand EU legal actions (eg, Treaty amendments to free movement rules) as opposed to social or political responses need further inquiry. As we will discuss further, from a purely legal perspective, the mobility of EU citizens and their entitlement to social solidarity in their host state are not a static concerns. The European Court of Justice has played an important role in the process of enlarging the pool of EU citizens who can move and enjoy social benefits in their host state. However, its role is criticised by some authors who view this process as undermining the solutions negotiated by the Member States with the occasion of the adoption of secondary legislation in the field of free movement.²⁶ In the following sections we focus on the legal limits of social solidarity as they appear in EU law and in the Court's case law in order to understand the connections between law, its interpretation by the Court and the increasing politicisation of EU mobility.

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,

²³ C. Bruzelius, E. Chase, C. Hueser & M. Seeleib-Kaiser, “The Social Construction of European Citizenship and Associated Social Rights”, Barnett Working Paper 14/01, Oxford, 2014.

²⁴ Bruzelius et al., p. 21.

²⁵ E-M Poptcheva, “Freedom of movement and residence of EU citizens – Access to social benefits”, European Parliamentary Research Service, 2014, p. 4.

²⁶ S. Giubonni, “Free movement of persons and European solidarity”, in *European Law Journal* 13:3, 2007, 360-379; G. Davies, “The humiliation of the state as a constitutional tactic”, in *The Constitutional Integrity of the European Union*, F. Amtenbrink & P.A.J. van den Berg (eds), Asser Press, 2010, 147-174.

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 (Article 6).

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 longer than 3 months if they

- (a) are workers or self-employed persons in the host Member State;
- (b) have sufficient resources for themselves and their family members do not 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;
- (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).

The 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.

It has never been entirely clear what the Directive means by ‘sufficient resources’, an issue that led to several debates during the negotiation of the Directive.²⁷ The most disputed aspects concerned the contradiction between prohibiting the use of a fixed amount of money to define sufficient resources and using the threshold of the level of social assistance benefit as indication of (lack) sufficient resources. This ambivalence is reflected in the practice of various Member States as well.²⁸ CJEU jurisprudence regarding the notion of sufficient resources highlights two important issues: the level and the origin of the resources. Underpinning these issues is the

²⁷ P. Minderhoud, “Sufficient resources and residence rights under Directive 2004/38”, in *Where do I belong? EU law and adjudication on the link between individuals and Member States*, H. Verschueren (ed), Intersentia: Antwerp, forthcoming.

²⁸ 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, 165.

relation between sufficient resources and reliance on the host state's social assistance system. At the moment, the Court's biggest challenge is to find a balance between the requirement to fulfil the condition of sufficient resources and the possibility to apply for social assistance, as shown by the *Brey* and *Dano* cases.²⁹ Regarding the origin of the resources, it is clear from the case law of the CJEU that to 'have' sufficient resources means that these resources are available to the Union citizen, regardless of their origin. While they can be derived from another person, including a third national family member (*Zhu and Chen*),³⁰ it is still disputed whether the prospect of future earnings is enough to fulfill the condition of sufficient resources (opinion of AG Mengozzi in *Alopek*).³¹

The requirement to have comprehensive sickness insurance has not received a lot of attention in EU scholarship or case law, and overall there is little information concerning the situation in the Member States.³² Issues are known to exist in the UK,³³ where economically inactive EU citizens are required to have private health insurance since UK authorities do not consider NHS entitlement as comprehensive sickness insurance under Directive 2004/38 (NHS entitlement is dependent on legal residence in the UK, whereas the UK authorities do not consider habitual residence in the UK sufficient and instead apply the right to reside test). This situation has led to the Commission opening infringement procedure against the UK in 2012 but there is no decision on whether to proceed further with litigation before the Court of Justice.³⁴

According to Article 24 of the Directive, Union citizens who reside on the basis of the Directive (that is, they fulfil the conditions attached to the type of residence rights as discussed above) enjoy equal treatment with nationals of the host state within the scope of the Treaty. However, Article 24(2) stipulates that

by way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.

The wording of the directive in relation to the social rights of economically inactive mobile citizens and jobseekers has been criticised for lacking clarity.³⁵ On

²⁹ Judgment *Brey*, Case C-140/12, EU:C:2013:565; Judgment *Dano*, Case C-333/13, EU:C:2014:2358.

³⁰ Judgment *Zhu and Chen*, Case C-200/02, EU:C:2004:639.

³¹ Judgment *Alopek*, Case C-86/12, EU:C:2013:645.

³² P. Minderhoud (forthcoming). Concerning case law, the *Baumbast* case is relevant for interpreting the requirements of comprehensive sickness insurance, Judgment *Baumbast*, Case C-413/99, EU:C:2002:493.

³³ S. de Mars, "Economically inactive EU migrants and the United Kingdom's National Health Service: unreasonable burdens without real links", in *European Law Review*, 6, 2014, 770-789.

³⁴ Similar to the benefit tourism discussion, UK media also reports on 'health tourism' and the alleged burden placed by EU migrants on the NHS. For a counter view, the Guardian published data showing that in actual fact UK citizens treated in Europe cost 5 times more than EU migrants treated by the NHS in the UK <http://www.theguardian.com/society/2015/apr/07/treating-uk-tourists-in-europe-costs-five-times-more-than-equivalent-cost-to-nhs>.

³⁵ P. Minderhoud, "Directive 2004/38 and Access to social assistance", in *The Reconceptualization of*

the one hand, the Directive only allows inactive persons to use their free movement rights if they have the necessary resources. On the other hand, it includes all kinds of signals that when inactive persons apply for a social assistance benefit, they should be able to get such a benefit without having to fear automatic expulsion due to lack of sufficient resources. The Directive fails to offer a clear definition as to when an EU citizen becomes an ‘unreasonable burden’ to the social assistance system of his host state. Leeway is given to Member States to examine whether financial difficulties may be temporary, which some states duly used by developing own definitions.³⁶ Some legal experts argue that it is not possible to deny access to social assistance benefits, even if the economically inactive citizen has not yet acquired a right of permanent residence.³⁷ Moreover, it is not entirely clear when a benefit can be categorized as a social assistance benefit. According to the CJEU in the *Vatsouras* case, a benefit of a financial nature intended to facilitate access to the labour market is not a social assistance benefit in the sense of Directive 2004/38.³⁸ This raises questions on the character of social assistance benefits in several countries (France, Germany, UK and the Netherlands) which all have the intention of facilitating labour market access.³⁹ It was precisely some of these Member States that complained to the Commission about abuse of their welfare systems although it is not clear whether the free movement rules encourage abuse or the nature and rules of attribution of the benefits makes it easier for economically inactive citizens to claim those benefits.

In July 2009, the Commission published a Communication 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.⁴⁰ It repeated that in assessing whether an individual whose resources can no longer be regarded as sufficient and who was granted the minimum subsistence benefit is or has become an unreasonable burden, the authorities of the Member States must carry out a proportionality test. To this end, Member States may develop a points-based scheme as an indicator. Recital 16 of Directive 2004/38 provides three sets of criteria for this purpose:

1. Duration: For how long is the benefit being granted? Is it likely that the EU citizen will get out of the safety net soon? How long has the residence lasted in the host Member State?

2. Personal situation: What is the level of connection of the EU citizen and his/her family members with the society of the host Member State? Are there any considerations pertaining to age, state of health, family and economic situation that need to be taken into account?

3. Amount: Total amount of aid granted? Does the EU citizen have a history

European Union Citizenship, Guild, Gortazar Rotaeche and Kostakopoulou (eds), Leiden Boston: Nijhoff, 2014, 209-225; D. Thym, “The elusive limits of solidarity: residence rights of social benefits for economically inactive Union citizens”, in *Common Market Law Review*, 52, 2015, 17-50.

³⁶ P. Minderhoud, 2014.

³⁷ D. Sindbjerg Martinsen, “The Social Policy Clash: EU Cross-Border Welfare, Union Citizenship and National Residence Clauses”, Paper prepared for the EUSA Tenth Biennial International Conference, Montreal, May 17-19, 2007.

³⁸ Judgment *Vatsouras and Koupatantze*, Case C-22/08 and C-23/08, EU:C:2009:344.

³⁹ H. Verschuere, “Do national activation measures stand the test of European law on the free movement of workers and jobseekers”, in *European Journal of Migration and Law*, 12:1, 2010, 81-103.

⁴⁰ COM (2009)313/4 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, Brussels.

of relying heavily on social assistance? Does the EU citizen have a history of contributing to the financing of social assistance in the host Member State?

The Communication emphasizes that 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 States, they cannot be expelled for this reason, an interpretation reflecting Article 14(3) of the Directive. Concerning job-seekers, Article 14(4) states that they “*may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged*” by way of exception from the general rule that EU citizens retain their right to reside for longer than 3 months if they meet the conditions of Article 7. Although these Guide and Communication were meant for clarification, Member States are left leeway to define the concept of unreasonable burden. Several questions remain relevant: when is it a case of temporary difficulties, how long should the duration of residence have been, which personal circumstances should be relevant and how much aid granted is too much?

4. The limits of solidarity for EU citizens

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 paragraph 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.

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*”⁴¹ or “*need to demonstrate a certain degree of integration into the society of the host State.*”⁴² Equally, CJEU recognises the right of the host Member State to stop the right of residence of the person concerned, but this should not be/become “*the automatic consequence of relying on the social assistance system.*”⁴³

The *Brey* case of 19 September 2013 gives the first signals of an altering position of the CJEU regarding the tension between satisfying the condition as to sufficient resources and applying for a social assistance benefit.⁴⁴ 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 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

⁴¹ Judgment *Collins*, Case C-138/02, EU:C:2004:172, paras. 67-69.

⁴² Judgment *Bidar*, Case C-209/03, EU:C:2005:169, para. 57.

⁴³ Judgment *Grzelezyk*, Case C-184/99, EU:C:2001:458, para. 43; Judgment *Trojani*, Case C-456/02, EU:C:2004:488, para. 36.

⁴⁴ Judgment *Brey*, Case C-140/12, EU:C:2013:565.

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 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.

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 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. This automatic refusal prevents the national authorities from carrying out an overall assessment of the specific burden.

A year after *Brey*, the CJEU delivered its judgment in the *Dano* case where it took a different approach.⁴⁵ 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. 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 fact that Union citizens who have used their freedom of movement and of residence are

⁴⁵ Judgment *Dano*, Case C-333/13, EU:C:2014:2358.

being treated differently from the host Member State's own nationals with regard to social benefits is described as an inevitable consequence of Directive 2004/38 (paragraphs 77 and 78). 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 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.

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.⁴⁶ We seem to be in the presence of a real Catch-22 situation.

In his opinion in the *Alimanovic* case, Advocate General Wathelet proposed a balancing act between the requirement to fulfil the condition of sufficient resources and the possibility to apply for social assistance that reflects the variety of situations in which EU citizens may find themselves in a host state.⁴⁷ 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. The *Dano* judgment was taken as the starting point of the discussion: 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. The AG notes the unusual stir caused by the *Dano* judgment in European media, stressing that all the political interpretations that have accompanied it confirm the importance and sensitivity of the subject matter. We are not told how this aspect influences (if at all) the proposed solution but this remark makes it clear that the AGs and the

⁴⁶ H. Verschuere, "Preventing «benefit tourism» in the EU: A narrow or broad interpretation of the possibilities offered by the ECJ in *Dano*?" in *Common Market Law Review*, 52, 2015, p. 381.

⁴⁷ Opinion AG of 26 March 2015, Judgment *Alimanovic*, Case C-67/14, EU:C:2015:210.

Court are aware of the political climate in which the discussion on the mobility of economically inactive citizens takes place.

However, the two mentioned cases are different since in *Alimanovic*, the Union citizens asking for subsistence benefits worked for less than a year in the territory of a host Member State. According to the AG, restrictions of the grant of social assistance to Union citizens who have no or no longer worker status, which are established on the basis of Article 24(2) of Directive 2004/38, must be legitimate.⁴⁸ The AG's solution was to distinguish between 3 situations. 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 *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. 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.

The AG confirms 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.⁴⁹ 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.⁵⁰ 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.⁵¹

In its decision of 15 September 2015, 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.⁵² It first confirms that the contested SGB II benefit is a social assistance benefit and not a benefit facilitating access to the labour market, clearly revoking its earlier position in the *Vatsouras* and *Koupatantze* judgment. 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.

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

⁴⁹ Based on Article 7(3)(c) Directive 2004/38. This happened in the case of Ms Alimanovic and her daughter in December 2011.

⁵⁰ Opinion AG of 26 March 2015, Judgment *Alimanovic*, Case C-67/14, para. 110.

⁵¹ Opinion AG of 26 March 2015, Judgment *Alimanovic*, Case C-67/14, para. 111.

⁵² Judgment *Alimanovic*, Case C-67/14, EU:C:2015:597.

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 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.

5. Conclusions

This article chronicles the changing scope of social solidarity among EU citizens and their host states. 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, benefit fraud or abuse are happening on a large scale, these debates continue to take place. Although the case law does not provide conclusive evidence that the political debate and accompanying discourses are infiltrating the Court's jurisprudence, it is equally clear that the case law concerned with the entitlement of economically inactive EU citizens to social rights in their hosts' 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 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.⁵³

According to Spaventa we are witnessing a reactionary phase in the Court's interpretation of citizenship. She describes this phase as characterized by "*an apparent retreat from the Court's original vision of citizenship in favor of a minimalist interpretation, which reaffirms the centrality of the national link of belonging, positing the responsibility for the most*

⁵³ M. Meduna et al., "Institutional report", in *Union Citizenship: Development, Impact and Challenges, The XXVI FIDE Congress in Copenhagen*, U. Neergaard, C. Jacqueson and N. Holst-Christensen (eds), Copenhagen: DJØF Publishing 2014, 236.

*vulnerable individuals in society firmly with the state of origin.*⁵⁴ In this way, the promise of Union citizenship – as a status which ‘exploded’ the traditional links of belonging, pre-assigned rather than chosen, in favor of a more fluid concept where belonging is determined also having regard to the actual links established by the (individual) citizen with the polity of reference – is much reduced if not altogether nullified. We share her concerns that the current jurisprudence points towards a very limited vision of social solidarity that benefits workers and economically active citizens with the implication that the ‘fundamental status’ of EU citizenship is to be enjoyed only by mobile, healthy and wealthy migrants. 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?

⁵⁴ E. Spaventa, “Earned citizenship – understanding Union citizenship through its scope”, in *EU Citizenship and Federalism: the Role of Rights*, D. Kochenov (ed), Cambridge: Cambridge University Press, forthcoming.