JOB-SEEKERS HAVE A RIGHT OF RESIDENCE BUT NO ACCESS TO SOCIAL ASSISTANCE BENEFITS UNDER DIRECTIVE 2004/38

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

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§1. INTRODUCTION

This judgment of the Court of Justice of the EU (CJEU) clarifies when Member States can limit access to social benefits for EU nationals who are not or who are no longer engaged in employment. The judgment is important because it sets out a course which diverges from some of the Court's earlier case law. It also provides an interpretation of the right to reside which emphasizes the limitations found in Directive 2004/38.[1] Although jobseekers have a right of residence, they are not entitled to social assistance benefits under this Directive. This exclusion, based on Article 24 of Directive 2004/38, can take effect without an individual assessment. Financial responsibility for EU jobseekers appears to be a long-term problem for the person's country of nationality to deal with.

§2. RELEVANT FACTS

Ms Alimanovic and her three children are all Swedish nationals. Ms Alimanovic was born in Bosnia but her children were all born in Germany. The Alimanovic family left Germany in 1999 for Sweden and then returned to Germany in June 2010. Ms Alimanovic and her eldest daughter worked between June 2010 and May 2011 in temporary jobs for less than a year (11 months in total). Ms Alimanovic received benefits under the German Social Code II (SGB II) for herself and her children until the Job Centre withdrew this benefit in May 2012 on the basis that she no longer qualified as a non-German job-seeker

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1 Directive 2004/38 on EU freedom of movement and residence, [2004] OJ L 158/77.

for access to this SGB II benefit.[2] The family appealed and the matter was (eventually) referred to the CJEU.

§3. THE REASONING OF THE COURT

First, the CJEU began by accepting the position of the referring court that the benefits in question are social assistance (and not social security) benefits. Overruling its finding in 2009 in the *Vatsouras and Koupatantze* case,[3] the CJEU now found that the same German SGB II benefit, which is a 'special non-contributory cash benefit' within the meaning of Article 70(2) of Regulation 883/2004,[4] is not primarily intended to facilitate access to the labour market. Social assistance benefits that facilitate access to the labour market do not fall under the equal treatment exception of Article 24(2) of Directive 2004/38, which excludes jobseekers from entitlement to social assistance benefits in general. The Court notes that the SGB II benefits at issue, even if they form part of a scheme which also provides for benefits to facilitate the search for employment, are intended to cover subsistence costs for persons who cannot cover those costs themselves and are not financed through contributions, but through tax revenue.

The CJEU then holds the opinion that only EU nationals who have a right of residence under Article 7 of the Directive are entitled to equal treatment with nationals of the host Member State.[5] According to the Court, to find otherwise would 'run counter to an objective of the directive':[6] to prevent Union citizens from becoming an unreasonable burden on the social assistance scheme of another Member State. Hence, the CJEU had to determine whether Ms Alimanovic was 'lawfully resident' in Germany under Article 7 Directive 2004/38. According to the Court, she was not because she and her daughter were no longer covered by the Directive as they were 'former workers'. 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.[7]

This, however, does not mean that the Alimanovic family had to leave Germany.[8] As long as they were job seekers and they continued to have a genuine chance of being

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2 §7(1), second sentence of the German Social Code II (*Sozialgesetzbuch* II) excludes from this benefit foreign nationals whose right of residence arises solely out of the search for employment along with their family members.

3 Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze*, EU:C:2009:344.

4 Regulation (EC) No 883/2004 on the coordination of social security systems, [2004] OJ L 166/1.

5 Case C-67/14 *Alimanovic*, EU:C:2015:597, para. 49.

6 Ibid., para 50.

7 Ibid., para. 53.

8 Ibid., para. 54.

engaged in employment they could not be expelled. However after 6 months of looking for work they lost the status of 'worker' and went back to being ordinary job seekers who are not entitled to social assistance.[9] Interestingly, according to the CJEU, Ms Alimanovic and her daughter could rely on a right of residence directly on the basis of Article 14(4)(b) of Directive 2004/38.[10]

Lastly, the Court points out that a Member State must take account of the individual situation of the person concerned before it adopts an expulsion measure or finds that the residence of that person is an unreasonable burden on its social assistance system.[11] But then it observes that no such individual assessment is necessary in circumstances such as those at issue in the main proceedings, since the gradual system as regards the retention of the status of 'worker' provided for in Directive 2004/38, which seeks to safeguard the right of residence and access to social assistance, itself takes into consideration various factors characterizing the individual situation of the applicant for social assistance.[12] A period of six months after the cessation of employment during which the right to social assistance is retained is consequently such as to guarantee a significant level of legal certainty and transparency in the context of the award of social assistance by way of provision, while complying with the principle of proportionality.[13]

The Court concludes in its operative part therefore that Article 24 of Directive 2004/38 and Article 4 of Regulation 883/2004 must be interpreted as not precluding legislation of a Member State under which nationals of other Member States who are in a situation such as that referred to in Article 14(4)(b) of that Directive are excluded from entitlement to certain 'special non-contributory cash benefits' within the meaning of Article 70(2) of Regulation No 883/2004, which also constitute 'social assistance' within the meaning of Article 24(2) of Directive 2004/38, although those benefits are granted to nationals of the Member State concerned who are in the same situation.

§4. COMMENTS

The *Alimanovic* case cannot be discussed without referring to the *Dano* case.[14] In *Dano*, two Romanian nationals, a mother and son who lived in Germany, were refused access to exactly the same SGB II benefits. Ms Dano had not entered Germany to seek employment and although she applied for benefits reserved for job-seekers, the case file showed that she had not been looking for a job. She had no professional qualifications

9 Ibid., para. 58.

10 Ibid., para. 52 and 57. Article 14(4)(b) of Directive 2004/38 provides that Union citizens who have entered a host Member State looking for work may not be expelled as long as they can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.

11 Ibid., para. 59, referring to Case C-140/12 *Brey*, EU:C:2013:565, para. 64, 69 and 78.

12 Ibid., para. 60.

13 Ibid., para. 61.

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

and had never had a job 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, Ms Dano and her son lacked sufficient resources and, pursuant to Directive 2004/38, were therefore not entitled to a right of residence in Germany, nor were they entitled to benefits under the German SGB II legislation.

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 no (longer) have sufficient resources and consequently no right to reside under Directive 2004/38. 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.[15] This seems to be 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.[16] The Advocate General's solution was to distinguish between three 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 an 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. However, thirdly, for a national of one Member State who stays in the territory of another Member State for more than three months and has worked there (like Ms Alimanovic), the Advocate General considers that they may not automatically be refused the benefits in question.

The Advocate General confirms that an EU citizen who has worked in a Member State for less than one year may in accordance with EU law lose the status of worker after six months of unemployment. Nevertheless, he considers that it runs counter to the principle of equal treatment to automatically exclude 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'.[17] In that regard, in addition to matters evident from the family circumstances (such as the children's education), the fact

15 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.

16 Opinion of Advocate General Wathelet in Case C-67/14 *Alimanovic*, EU:C:2015:210.

17 Ibid., para. 110.

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.[18]

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 and ignores its previous case law in this respect completely.[19] Although Ms Alimanovic had a work history of 11 months she was regarded as a first time jobseeker by the Court in her present situation. Given the wording of Article 24(2) of Directive 2004/38 and the urging of the Court in Paragraph 61 for a significant level of legal certainty and transparency, this could be understood in a way. But what is not comprehensible is why the Court does not stop here and adds an extra paragraph in which the Court states:

> Moreover, as regards the individual assessment for the purposes of making an overall appraisal of the burden which the grant of a specific benefit would place on the national system of social assistance at issue in the main proceedings as a whole, it must be observed that the assistance awarded to a single applicant can scarcely be described as an 'unreasonable burden' for a Member State, within the meaning of Article 14(1) of Directive 2004/38. However, while an individual claim might not place the Member State concerned under an unreasonable burden, the accumulation of all the individual claims which would be submitted to it would be bound to do so.[20]

I cannot interpret this paragraph in any other way than that the Court holds the view that the mere fact that EU citizens could be an unreasonable burden on the social assistance system as a group is enough to regard the individual claimant as an unreasonable burden. This is in glaring contrast with the approach in the *Brey* case where the Court followed the suggestion of the Commission and decided that in order to ascertain more precisely the extent of the burden which the relevant grant in this case would place on the national social assistance system, it may be relevant to determine the proportion of the beneficiaries of that benefit who are Union citizens in receipt of (in this case) a retirement pension in another Member State.[21]

In my case note on *Brey* (in Dutch), I suggested that the turning point for the determination of this unreasonable burden could be reached as soon as the percentage of those receiving a social assistance benefit would be higher than the percentage of the total number of EU citizens of other Member States compared to the total population of the host Member State. This is based on the assumption that most EU citizens contribute to taxes and premiums in the host Member State.[22] The approach chosen by the Court in *Alimanovic* also does not do any justice to the fact that there is no empirical evidence at

18 Ibid., para. 111.

19 See Case C-138/02 *Collins*, EU:C:2004:172, para. 67–69; Case C-209/03 *Bidar,* EU:C:2005:169, para. 57; Case C-184/99 *Grzelczyk*, EU:C:2001:458, para. 43; Case C-456/02 *Trojani,* EU:C:2004:488, para. 36.

20 Case C-67/14 *Alimanovic*, para. 62.

21 Case C-104/12 *Brey*, para. 78.

22 P. Minderhoud, 'Case Note under CJEU 19 september 2013, C-140/12, *(Brey)*', 84 *Rechtspraak Vreemdelingenrecht* (2013), p. 511–513.

all that EU citizens make excessive use of the social assistance system of the host Member State and the fact that the whole discussion on 'welfare tourism' is built on quicksand.[23]

Another intriguing point is that, going beyond the referred questions in this case, the Advocate General emphasized that if it could be 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 Germany under Article 10 of Regulation 492/2011.[24] The children of a national of one Member State who works or has worked in the host Member State and the parent who is their primary caregiver can claim such a right of residence in the latter Member 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 CJEU, the Advocate General recalls that that right of residence is not dependent on the conditions laid down in Directive 2004/38 and therefore there are no requirements to have sufficient resources and a comprehensive sickness insurance.[25] In those circumstances, according to the Advocate General, 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'. Although this suggestion of the Advocate General deserved further investigation, it should be noted that Ms Alimanovic derives her right of residence in this situation from Regulation 492/2011 and not from Directive 2004/38. Therefore, this right could end when all her children reach the age of majority. The Court did not reflect on this alternative possibility in any way.

Part of the problems dealt with in the *Dano* and the *Alimanovic* cases is caused by the fact that the German social assistance system is complicated. It consists of two basic social benefits. The SGB II, which was the contested benefit in both *Dano* and *Alimanovic*, provides a basic social benefit for job-seekers who have no rights to the usual unemployment benefit scheme (*Grundsicherung für Arbeitsuchende*). Additionally, the SGB XII (Social Code Book 12) provides a basic social benefit for jobless people who are not capable of work (*Sozialhilfe*). Section 21 of SGB XII however states that nobody should be entitled to this *Sozialhilfe* if they are in principle entitled to the *Grundsicherung für Arbeitsuchende*. Based on Articles 1 and 20 of the German Basic Law (*Grundgesetz*), there is however a right to a minimum level of dignified existence for everyone legally residing in Germany.[26]

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23 For more details on this, see S.A. Mantuand and P.E. Minderhoud, 'Solidarity (still) in the making or a bridge too far?', *Nijmegen Migration Law Working Papers Series*no 2015/01(2015), http://repository.ubn.ru.nl/handle/2066/143178.

24 Regulation (EU) No 492/2011 on freedom of movement for workers, [2011] OJ L 141/1.

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

26 See *Bundesverfassungsgericht* (Federal Constitutional Court) 18 July 2012, DE:BVerfG:2012:ls20120718.1bvl001010.

Partly as a follow up to the *Alimanovic* judgment, the German Federal Social Court (*Bundessozialgericht*) made rulings in three cases on 3 December 2015 on the entitlement of EU citizens to social assistance benefits.[27] This highest German Social Court ruled that EU citizens who reside legally for longer than six months in Germany have a right to a minimum level of dignified existence and are therefore entitled to *Sozialhilfe*. It was only in the case of residence shorter than six months that the implementation agency (*Sozialamt*) was left with discretion to provide such *Sozialhilfe* or not. In the case of Ms Alimanovic, the *Bundessozialgericht* confirms the position of the CJEU that she has no right to a SGB II benefit but it had to be checked whether Ms Alimanovic did not have another basis for her residence right in Germany, which was related to the education and integration of the children.[28] In that case she will be entitled to a SGB XII benefit as well. It seems that the German Federal Social Court in this regard pays more attention to the Opinion of the Advocate General than the Court did.

§5. CONCLUSION

A practical consequence of the *Alimanovic* judgment is that Union citizens need to work at least for a while every six months in order to remain entitled to the same social assistance benefits which are available to nationals of the host Member State. Only by working every six months do they retain a right of residence under the Directive as a worker which entitles them to equal treatment. This will affect those who work in unstable jobs and cannot meet 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 of Directive 2004/38.

The Court's approach in both the *Dano* and *Alimanovic* case will undoubtedly have an impact upon how fundamental EU citizenship is as a status and whom it actually applies to. An interpretation where economically non-active EU citizens must always have sufficient resources so that they do not 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. Especially worrying is the emphasis of the Court that an objective of the Directive is 'preventing Union citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system'.[29] This is difficult to reconcile with the objective of the Directive to facilitate and strengthen the right of free movement and residence of all Union citizens as the Court emphasized in the *Metock* case.[30]According to Spaventa, we are witnessing

27 *Bundessozialgericht* (Federal Social Court) 3 December 2015, no. B 4 AS 59/13 R, B 4 AS 44/15 R and B 4 AS 43/15 R.

28 *Bundessozialgericht* 3 December 2015, no. B 4 AS 43/15 R.

29 Case C-67/14 *Alimanovic*, para. 50; see also Case C-333/13 *Dano*, para. 74.

30 Case C-127/08 *Metock*, EU:C:2008:449, para. 59.

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 favour of a minimalist interpretation, which reaffirms the centrality of the national link of belonging, positing the responsibility for the most vulnerable individuals in society firmly with the state of origin.'[31]

In my view, the current case law 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 stigmatizing the working poor, while also bearing in mind the structural changes in 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?

31 E. Spaventa, 'Earned citizenship – understanding Union citizenship through its scope', in D. Kochenov (ed.), *EU Citizenship and Federalism: the Role of Rights, Cambridge* (CUP, forthcoming).