Timeo *Danones* et dona petentes

European Court of Justice (Grand Chamber), Judgment of 11 November 2014, Case C-333/13, *Elisabeta and Florin Dano* v *Jobcenter Leipzig*

Dominik Düsterhaus*

Introduction

Amidst growing fears both for and of the free movement of persons in the EU,[1] the judgment in *Dano* inaugurates the third decade of the Court of Justice's acquaintance with EU citizenship.[2] It casts the right to reside as a privilege of the self-subsistent and accepts that those who are not can be excluded from social benefits granted to needy nationals and the economically active.

The case specifically concerned, once again,[3] a provision under German law which denies foreign jobseekers access to the so-called 'basic provision' benefits for persons capable of earning a living but nevertheless in need of social assistance.[4] The judgment has, however, wider implications. Not only will some of the other member states have received it with relief, hoping that their current and prospective limitations on the access to benefits may now be shielded from further

*Legal secretary, Court of Justice of the European Union. All views are personal to the author who has not been involved in any of the cases addressed. Thanks go to the anonymous reviewers of *EuConst*.

[1] On the interrelationship of both see notably Editorial Comments, 'The free movement of persons in the European Union: Salvaging the dream while explaining the nightmare', 51 *CMLRev* (2014) p. 729-740.

[2] The Court was first asked to interpret what is now Art. 21 TFEU in Case C-193/94, *Skanavi* [1996] ECR I-943.

[3] This provision had already been incidentally considered by the Court in ECJ 4 June 2009, Joined Cases C-22/08 and C-23/08, *Vatsouras and Koupatantze*, in the course of examining the validity of Art. 24(2) of Directive 2004/38. See on this judgment Elaine Fahey, 'Interpretive legitimacy and the distinction between "social assistance" and "work seekers allowance"', 34 *ELRev* (2009) p. 933.

[4] § 7(1)(2) Nr. 2 of Book II of the German Code of Social Law (SGB II).

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scrutiny,[5] but it should also draw a line under political and legal debates on how to bar what is depicted as 'welfare tourism' by dint of free movement. In what follows, I propose a threefold assessment of this judgment. Firstly: as regards the legal soundness of curtailing the equal treatment rules of Directive 2004/38[6] and Regulation 883/2004[7] in order to exclude certain groups of Union citizens from their scope. Secondly: with a view to the practical consequences for the member state concerned. And, thirdly: as to the constitutional legitimacy of operating this exclusion in the current political context.

The legal and political background and the facts of the case

In order to fully grasp the importance of the issues at stake in *Dano*, we should briefly go back in time to the heyday of Union citizenship, some fifteen years ago.

The heyday of Union citizenship

As this author has observed elsewhere,[8] Union citizenship has doubtlessly been fertilized by the Court of Justice which, during the first decade of its citizenship case-law, managed to promote free movement and residence rights beyond the scope of market integration, scrapping formal requirements laid down in secondary law,[9] facilitating access to student loans[10] and unemployment[11] and social assistance benefit[12] abroad, extending the possibilities of exporting such entitlements to other member states[13] and, generally, outlawing exclusionary

[5] With regard to the 'right to reside test' applied by the UK, Case C-308/14 *Commission* v *UK* is currently pending before the Court. This test requires economically active persons from other member states to have acquired permanent residence in order to claim benefits falling within the scope of Regulation 883/2004 and social advantages under Regulation 492/2011. *See* in detail P. Minderhoud, 'Directive 2004/38 on Access to Social Assistance Benefits' in E. Guild et al. (eds), *The reconceptualization of European Union citizenship* (Brill Nijhoff 2014) p. 209 at p. 219 ff.

[6] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ L 158, p. 77, with corrigendum OJ L 229, p. 35).

[7] Regulation No 883/2004 of 29 April 2004 on the coordination of social security systems OJ L 166, p. 1.

[8] See D. Düsterhaus, 'Union Citizenship after Ruiz Zambrano or How Many Rights are there in a Status', in J. Diez-Hochleitner Rodríguez et al. (eds.), *Últimas tendencias en la jurisprudencia del Tribunal de Justicia de la Unión Europea* (Kluwer La ley 2012) p. 461 at p. 462.

[9] ECJ 20 September 2001, Case C-184/99, *Grzelczyk*.

[10] ECJ 15 March 2005, Case C-209/03, *Bidar*.

[11] ECJ 23 March 2004, Case C-138/02, *Collins*.

[12] ECJ 7 September 2004, Case C-456/02, *Trojani*.

[13] ECJ 26 October 2006, Case C-192/05, *Tas-Hagen and Tas*; ECJ 23 October 2007, Joined Cases C-11/06 and C-12/06, *Morgan and Bucher*.

effects of member state nationality.[14] All this was based on a constructive interpretation of the principle of non-discrimination in the light of the Treaty's citizenship provisions and the latter in the light of the former. The *leitmotif* of this case law had been that, in order to preserve and promote EU citizens' right of free movement, there may be no categorical exemption from benefits and no automatic expulsion. All conditions and limitations must be subject to an individual assessment in the light of the Treaty's citizenship provisions and with a special focus on the proportionality of the measures.[15] Completing its 'civic turn'[16] ten years ago in *Trojani*,[17] the Court of Justice confirmed, to the great dismay of the member states, that needy EU citizens are entitled to non-discriminatory treatment in respect of social assistance benefits granted by their host member state even if they do not reside there under EU law, but solely hold a national residence permit. While the Court later clarified that this judgment did not contain a general definition of what constitutes legal residence for the purposes of Directive 2004/38,[18] the finding in *Trojani* that non-discriminatory access to social benefits may still have to be granted certainly epitomized the migration-friendly approach of the first decade.[19]

The right to claim benefits is not, however, absolute. In earlier cases, the Court had indeed already made non-discriminatory access to social assistance conditional upon the needy EU citizen not becoming an unreasonable burden on the host member state's public finances[20] and on having a genuine link with that state's employment market[21]or demonstrating a certain degree of integration into its society.[22] Moreover, these judgments also stressed a member state's right to expel the citizen who unreasonably burdens its assistance system, as long as this is not the automatic consequence of his relying on the system at all.[23] These safeguards and conditions notwithstanding, the fundamental status of non-discrimination appeared to be the *Trojan horse* of EU citizenship, allowing 'welfare tourists' to prey on national assistance schemes.[24] Such fears did not, however, prevent the

[14] ECJ 5 June 2008, Case C-164/07, *Wood*.

[15] ECJ 17 September 2002, Case C-413/99, *Baumbast and R*.

[16] Düsterhaus, supra n. 8 p. 462.

[17] ECJ 7 September 2004, Case C-456/02, *Trojani* [2004] ECR I-7573.

[18] ECJ 21 July 2011, Joined Cases C-325/09 Dias and C-424/10, *Ziolkowski and Szeja*.

[19] *See*, in detail, on the different stages of the case-law M. Dougan, 'The Bubble that Burst: Exploring the Legitimacy of the Case Law on the Free Movement of Union Citizens' in M. Adams et al., *Judging Europe's Judges* (Hart Publishing 2013) p. 127 at p. 133, as well as D. Düsterhaus, supra n. 8, p. 469-473.

[20] ECJ 20 September 2001, Case C-184/99, *Grzelczyk*, para. 44

[21] ECJ 23 March 2004, Case C-138/02 *Collins*, para. 69

[22] ECJ 15 March 2005, Case C-209/03, *Bidar*, para. 57.

[23] ECJ 20 September 2001, Case C-184/99, *Grzelczyk*, para. 43.

[24] Political and media discourse on 'welfare tourism' started even before the 2004 enlargement, see N. Nic Shuibhne and J. Shaw, 'General Report' in U. Neergaard et al., XXVI FIDE 2014 Congress Publications Vol. 2, *Union Citizenship*, (DJØF Publishing 2014) p. 65 at p. 211.

EU legislature from reflecting the bulk of the Court's case law in its overhaul of the free movement and social security legislation in 2004.

Legislation on access to social benefits

The Citizenship Directive (2004/38)[25] and Regulation No 883/2004 on the coordination of the social security systems[26] were both enacted on the same day. Whilst they are independent and seemingly oblivious of each other, it is worth recalling that the uncertain articulation of their respective equal treatment rules, which has now given rise to *Dano*, had spurred an unsuccessful suggestion by Austria that the principle of equal treatment established by Directive 2004/38 should not apply to social security benefits covered by Article 4 of Regulation No 883/2004.[27] The latter provides that persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any member state as the nationals thereof. Unlike what had previously been the case under the old Regulation No 1408/71, these 'persons' are not only the employed or self-employed, but 'nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States'. Economic activity has thus ceased to be a precondition for the application of the coordination rules in order to ensure that migrants do not lose social security benefits when moving. The general rule of Regulation No 883/2004 which neither harmonizes national social laws nor imposes minimum conditions is the exportability of such benefits to other member states. There is nevertheless an important – and decisive – exception: 'special non-contributory cash benefits' (SNCBs) as a third category of social benefits constituting both social security and social assistance[28] shall be provided, pursuant to Article 70(4) thereof, exclusively in the member state in which the persons concerned reside,[29] where they have been notified as such under that Regulation.[30]

The Citizenship Directive's 'right of residence' approach and the coordination regime of Regulation No 883/2004 thus concur in two regards. Both apply to economically active and non-active EU citizens alike and both explicitly recognize

[25] *Supra* n. 6.

[26] *Supra* n. 7.

[27] M. Meduna, 'Institutional report', in: U. Neergaard et al., *supra* n. 24 p. 268.

[28] *See*, in detail, F. van Overmeiren et al., 'Social Security Coverage of Non-Active Persons Moving to Another Member State' in E. Guild et al., *supra* n. 4, p. 227.

[29] Pursuant to Article 1(j) of Regulation 883/2004, this is the place where a person habitually resides. It may be defined as 'the centre of interests of the person concerned, based on an overall assessment of all available information relating to relevant facts' (Article 11 of Regulation No 987/2009).

[30] Annex X to Regulation currently comprises roughly 70 benefits notified by the member states, most of them relating to old-age and disability/invalidity.

a right to equal treatment. However, the Regulation appears to confer a right to claim certain benefits which, under Article 24 of Directive 2004/38, may be made conditional or even excluded. Article 24(1) of the Directive certainly provides that, subject to specific EU law provisions, all Union citizens residing on the basis of this Directive in the territory of the host member state shall enjoy equal treatment with the nationals of that member state within the scope of the Treaty. Conversely, pursuant to Article 24(2), the host member state shall not be obliged to confer entitlement to social assistance either during the first three months of residence or, beyond that period, to unsuccessful jobseekers who nevertheless still have a genuine chance of being engaged. No specific rule is laid down for the rights of Union citizens not meeting these conditions.

This legal imbroglio has been the object of repeated and intense discussion between the Commission and certain member states, the latter fearing that the unqualified equal treatment rule of Regulation No 883/2004 would spur welfare migration.[31] Thus, at the 3099th meeting of the EPSCO Council on 17 June 2011, 13 member states made a joint statement calling on all member states and the European Commission to look into the issue of interaction between Regulation 883/2004 and, notably, Directive 2004/38 as a matter of priority.[32] Finally, in April 2013, four of them, i.e. Austria, Germany, the Netherlands and the UK, sent a letter to the Irish Council Presidency and the Commission, calling for 'practical measures to address the pressures placed on [the] social welfare systems', notably at municipal level.[33]

However, on the basis of external studies finding that the entitlement to SNCBs in the host member states has a limited impact on the motivation for, and the extent of, cross-border migration,[34] the Commission did not deem urgent action to be required. Notably, only five member states (Estonia, Finland, Germany, Ireland and the UK) currently provide SNCBs to jobseekers[35] and the number of claimants among migrants appears to be negligible. In 2012, EU

[31] This fear appears not to be shared by the 'majority of Member States [who] remain fairly unconcerned and deaf to suggestions of change', E. Guild, 'Does European Citizenship Blur the Borders of Solidarity?' in: E. Guild et al., *supra* n. 4, p. 189.

[32] Council document 11834/11 ADD 1.

[33] Available at <docs.dpaq.de/3604-130415_letter_to_presidency_final_1_2.pdf>, visited 12 January 2015.

[34] The ICF GHK and Milieu study commissioned by DG Employment, of 14 October 2013, available at: <ec.europa.eu/employment_social/empl_portal/facebook/20131014%20GHK%20study%20web_EU%20migration.pdf>, last visited 11 January 2015, concluded that 'the share of non-active intra-EU migrants is very small, they account for a similarly limited share of SNCB recipients and the budgetary impact of such claims on national welfare budgets is very low. Employment remains the key driver for intra-EU migration and activity rates among such migrants have indeed increased over the last 7 years.'

[35] ICF GHK and Milieu study, p. 63.

migrants accounted for 4.2 per cent of all 'basic provision' beneficiaries in Germany and for 2.6 per cent of all JSA claimants in the UK. These numbers not only roughly correspond to the share of EU migrants in the total population (between 3 and 4 per cent)[36] but also comprise genuinely employed persons receiving benefits. Needy Union citizens not qualifying as workers thus seem to constitute a much smaller group.

Legally limiting access to benefits: The Court's views before Dano

The relevant secondary law provisions on social beneits are not novel to the Court either. Whether German jobseeker benefits are caught by Article 24 of Directive 2004/38 has already been examined in *Vatsouras and Koupatantze.*[37] Both the benefits at issue in those cases and the ones giving rise to *Dano* fall under Book II of the German Code of Social Law (SGB II). It governs benefits granted to ordinary residents capable of earning a living but nevertheless in need of social assistance. The crucial provision in all cases is Paragraph 7(1)(2) SGB II, which excludes from these benefits foreign nationals whose right of residence arises solely from the search for employment. The Court found in this regard that benefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market cannot be regarded as constituting 'social assistance' within the meaning of Article 24(2) of Directive 2004/38. Employment seekers who have established real links with the labour market of the host member state can rely on Article 45 TFEU in order to receive such a benefit.[38] Ever since the Court's judgment in *Vatsouras and Koupatantze,* the issue of whether and to what extent other needy EU citizens residing in Germany can nevertheless claim these benefits has long divided German courts[39] and scholars[40] before the Sozialgericht Leipzig finally decided to make a reference

[36] ICFGHK and Milieu study, p. 14.

[37] ECJ 4 June 2009, Joined Cases C-22/08 and C-23/08, *Vatsouras and Koupatantze* [2009] ECR I-4585.

[38] ECJ 4 June 2009, Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze*, para. 38.

[39] It should be stressed that most courts concluded that § 7(1) SGB II does not validly exclude entitlement to 'basic provision', at least insofar as people not actively looking for, or prevented from, work are concerned. *See*, inter alia, LSG NRW 5 May 2014, L 19 AS 430/13 and 10 October 2013, L 19 AS 129/13 – juris, finding that § 7(1)(2) SGB II does not apply to persons not seeking a job; LSG Berlin-Brandenburg 6 March 2014, L 31 AS 1348/13 – juris, and 3 April 2012, L 5 AS 257/11 B ER – juris; Hess. LSG 14 July 2011, L 7 AS 107/11 B ER – juris; BSG, *NVwZ-RR* 2012, 726 (727) requiring that the intention to seek work must be established.

[40] Considering the German 'basic provision' to constitute social assistance outside the remit of Regulation No 883/2004: U. Kötter, 'Ansprüche von BürgerInnen der Europäischen Union auf Leistungen der sozialen Grundsicherung nach dem SGB II zwischen Gleichbehandlungsanspruch und Demokratieprinzip', *info also* (2013) p. 243 at p. 251. Taking the opposite view: T. Kingreen,

for a preliminary ruling in the case of Elisabeta and Florin Dano. It has later been joined by three other German courts.[41] The questions referred by the latter notably invite the ECJ to consider once more whether some or all of the benefits covered by the German SGB II constitute 'social assistance' when claimed by jobseekers. Conversely, the specificity of *Dano* lies in the manifest absence of any connection with the labour market.

Before focusing on this case it should finally be recalled that the question of how member states can legally limit access to benefits has recently been touched upon in *Brey* with regard to the more horizontal issue of old-age benefits, which constitute SNCBs in 20 member states. In its judgment, the Court clarified that the provisions of Regulation No 883/2004 do not preclude member states from making access to benefits conditional upon a legal right of residence in the host member state, as long as the relevant requirements are themselves consistent with EU law.[42] With regard specifically to the condition of having sufficient resources not to apply for a benefit destined to make these resources sufficient, the Court has found that there may be no automatic refusal. Instead, an overall assessment of the specific burden which granting that benefit would place on the social assistance system as a whole by reference to the personal circumstances characterizing the individual situation of the person concerned must be carried out.[43]

The Court notably refused to follow the Commission's assertion that benefits covered by Regulation No 883/2004 are not subject to the limitations and conditions established by Directive 2004/38.[44] Were that to be true, the case would have been solved, without further ado, in the sense of unconditional and unlimited access to the benefits at issue.[45] This would nevertheless have thwarted the measured approach of Directive 2004/38 to the crucial issue of social benefits.

The scene having thus been set, we can now turn to *Dano*.

The facts of the case

The facts of the case are certainly extreme. Ms Dano is a Romanian citizen in her twenties. She has been living, on and off, for several years in Germany, her last

'Staatsangehörigkeit als Differenzierungskriterium im Sozialleistungsrecht. Zur Vereinbarkeit von § 7 Abs. 1 Satz 2 Nr. 2 SGB II mit europäischem Unions- und deutschem Verfassungsrecht', *SGb* (2013) p. 132.

[41] The Bundessozialgericht in ECJ Case C-67/14, *Alimanovic*, the Sozialgericht Dortmund in ECJ Case C-19/14 (dismissed by reasoned order of 3 July 2014) and, recently, the Landessozialgericht NRW in ECJ Case C-299/14, *Garcia-Nieto*.

[42] ECJ 19 September 2013, Case C-140/12, *Brey*, paras. 44 and 45.

[43] ECJ *Brey*, para. 77.

[44] ECJ *Brey*, para. 58.

[45] *See* D. Thym, 'Sozialleistungen für und Aufenthalt von nichterwerbstätigen Unionsbürgern', *NZS* (2014) p. 81.

entry dating back to 2010. Together with her son, born in Germany in 2009, Ms Dano currently stays at her sister's apartment in Leipzig. She has been issued with a national freedom of movement certificate for EU citizens but has not yet acquired a right of permanent residence in Germany. Ms Dano has never had a paid job and is not actively looking for, nor likely to find one. Having attended school for three years in Romania, she left it without any qualifications. She has not learned or been trained in a profession. While she understands German, she can only express herself simply in that language which, moreover, she cannot write. She receives German child benefit and an advance on maintenance payments for her son. The award of benefits to cover subsistence costs in accordance with the SGB II was however denied on the basis of paragraph 7(1) of that law. Seized of the matter, the Sozialgericht Leipzig opined that, EU law notwithstanding, this provision also applies, beyond its wording, to nationals of other member states who do not seek employment but only welfare.[46] As regards EU law, the Sozialgericht took the view that the benefits at issue do not fall under the *Vatsouras and Koupatantze* rule and that, in any case, Ms Dano has not established any links with the German employment market. Considering that Directive 2004/38 did not therefore require granting access to these benefits, the Sozialgericht asked the Court to ascertain whether Article 4 of Regulation No 883/2004 and Articles 18 and 20 TFEU nevertheless precluded their refusal.

While scholars expected the Court to transpose its findings in *Brey* to the issue of subsistence benefits,[47] they were wondering whether this would result in a systemic or, rather, an individualized approach to the question of unreasonableness, that is, whether the Court would confirm that account should be taken not only of the individual circumstances but also of the proportion of beneficiaries coming from other member states.[48] The European Commission advocated the latter.[49] With these expectations in mind, the categorical Opinion of Advocate General Wathelet was received with outspoken discontent by social law scholars.[50]

[46] This interpretation is not obvious, given that it bluntly transposes a derogation clause expressing the scheme and objectives of the SGB XII to the SGB II.

[47] Thym, *supra* n. 45.

[48] As it had done in *Brey*, para. 77. Decidedly opposing this approach: M. Fuchs, 'Freizügiger Sozialtourismus?', *ZESAR* (2014) p. 103.

[49] According to its written observations, which are still accessible at <mediendienst-integration.de/fileadmin/Dateien/Empfehlung_Europ_Kommission_Sozialleistungen_GER.pdf>, para. 100, last visited 12 January 2015. The background of this case would indeed not be sufficiently described without mentioning the public debate surrounding these observations. They had been obtained and published by German social rights lobby groups. The message distilled and transmitted by the media was that the Commission had stipulated an unconditional right for unemployed nationals of other Member States to claim social benefits in Germany. This spurred the Commission to react with a press release clarifying its position.

[50] *See* A. Farahat, 'Kollisionsrechtliche und aufenthaltsrechtliche Perspektiven beim Leistungsausschluss von Unionsbürgern nach § 7 Abs. 1 S. 2 Nr. 2 SGB II', *NZS* (2014) p. 490.

Opinion of the Advocate General

The Advocate General indeed approved of a categorical exclusion of non-economically active EU citizens from national subsistence benefits on the basis of a general criterion, such as the aim pursued by their coming to that member state, capable of demonstrating the absence of a genuine link with the latter.[51]

Given that the SNCBs at issue also constitute social assistance within the meaning of Directive 2004/38 they may, in some circumstances, be exempt from equal treatment. In the Advocate General's view, precisely because the nationals of other member states who wish to remain for more than three months must have sufficient resources in order not to become a burden on the social assistance system of the host member state, it must be possible to exclude them from subsistence benefits which would provide them with sufficient resources. Otherwise, this condition would be 'artificially' met. For the Advocate General, the criterion proposed by the referring court (i.e. that the sole reason for entering German territory is to seek employment or obtain social assistance) is indeed capable of demonstrating the absence of a genuine link with the host member state and to be also proportionate.[52] Requiring, instead, an individual assessment of a Union citizen's economic capability, would notably amount to treating benefit seekers more favourably than job seekers who are automatically denied social assistance.[53]

Judgment of the Court

The Court's judgment is straightforward. It holds that Articles 24(1) of Directive 2004/38/EC and Article 4 of Regulation No 883/2004 do not preclude legislation of a member state under which nationals of other member states who do not have a right of residence under Directive 2004/38 are excluded from entitlement to certain 'special non-contributory cash benefits' within the meaning of Article 70 (2) of Regulation No 883/2004, although those benefits are granted to nationals of the host member state who are in the same situation.[54] The Court derives this from a number of intertwined considerations.

It first does away with the doubts of the referring court as to the scope of the equal treatment provision in Article 4 of Regulation No 883/2004, holding that it covers SNCBs as referred to in Articles 3(3) and 70 of the regulation,[55] which the benefits at issue constituted.

[51] Para. 152.
[52] Paras 135-137 of the Opinion.
[53] Paras 112-116 of the Opinion.
[54] Para. 84 of the Judgment.
[55] Para. 55.

The Court then jointly addresses the second and third questions relating to Articles 18 and 20(2) TFEU, Article 24(2) of Directive 2004/38, and Article 4 of Regulation No 883/2004, introducing their examination by recalling the fundamental status which Union citizenship is destined to be, enabling citizens to enjoy the same treatment in law irrespective of their nationality.[56] In accordance with Article 18(1) and 20(2) TFEU, the principle of non-discrimination is given more specific expression in Article 24 of Directive 2004/38 and Article 4 of Regulation No 883/2004, meaning that the Court should interpret these provisions.[57]

Building upon its reasoning in *Brey* regarding Article 7(1)(b) of Directive 2004/38, the Court clarifies that SNCBs fall under the broad concept of 'social assistance' within the meaning of Article 24(2) of Directive 2004/38.[58] However, given that Ms Dano has been residing in Germany for more than three months, that she is not seeking employment and that she did not enter Germany in order to work, the Court does not find the latter provision to apply *ratione personae*.[59]

It thus turns to Article 24(1) and recalls in that regard that for periods of residence longer than three months, the right of residence is subject to the conditions set out in Article 7(1) of Directive 2004/38 and, under Article 14(2), that right is retained only if the Union citizen and his family members satisfy those conditions, notably the requirement that the economically inactive Union citizen must have sufficient resources for himself and his family members.[60]

From the Directive's objective of preventing unreasonable burdens on the social assistance systems and its *summa divisio* between economically active and inactive persons the Court derives its main finding that Article 7(1)(b) of Directive 2004/38 seeks to prevent economically inactive Union citizens from using the host member state's welfare system to fund their means of subsistence.[61] For the Court,

> any unequal treatment between Union citizens who have made use of their freedom of movement and residence and nationals of the host Member State with regard to the grant of social benefits is an inevitable consequence of Directive 2004/38. Such potential unequal treatment is founded on the link established by the Union legislature in Article 7 of the directive between the requirement to have sufficient resources as a condition for residence and the concern not to create a burden on the social assistance systems of the Member States.[62]

[56] Para. 58.
[57] Paras 61-62.
[58] Para. 63.
[59] Para. 67.
[60] Para. 71 and 73.
[61] Para. 76.
[62] Para. 77.

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A member state must therefore have the possibility of refusing to grant social benefits to economically inactive Union citizens who exercise their right to freedom of movement solely in order to obtain another member state's social assistance although they do not have sufficient resources to claim a right of residence. In order to prevent these persons from automatically having sufficient resources through the grant of an SNCB, the financial situation of each person concerned should be examined specifically, without taking account of the social benefits claimed.[63] Given that Ms Dano and her son do not have sufficient resources, they cannot claim a right of residence in Germany under Directive 2004/38 and cannot therefore invoke the principle of non-discrimination in Article 24(1) of the directive.[64]

In one paragraph, the Court then transposes this reasoning to the interpretation of Article 4 of Regulation No 883/2004:

> The same conclusion must be reached in respect of the interpretation of Article 4 of Regulation No 883/2004. The benefits at issue in the main proceedings, which constitute 'special non-contributory cash benefits' within the meaning of Article 70(2) of the regulation, are, under Article 70(4), to be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation. It follows that there is nothing to prevent the grant of such benefits to Union citizens who are not economically active from being made subject to the requirement that those citizens fulfil the conditions for obtaining a right of residence under Directive 2004/38 in the host Member State (see, to this effect, judgment in Brey, EU: C:2013:965, paragraph 44).

In reply to the Sozialgericht's final question whether the Charter requires the member states to grant Union citizens SNCBs, the Court reiterates that when the member states lay down the conditions for the grant of such benefits and their extent, they are not implementing EU law, thus excluding the Court's jurisdiction.

Comment

What appears to be a reasonable, rather than revolutionary,[65] solution relieving free movement law from the innuendo of fostering welfare tourism[66] is, I submit, a bold and principled judgment whose ramifications transcend the marginal situation which gave rise to it.

[63] Paras 78-80.
[64] Para. 81.
[65] D. Simon, 'L'arrêt Dano ou comment se créent les mythes', *Europe* (2014) no 12, repère 11.
[66] H. Küchler, 'Kein Sozialtourismus unter dem Deckmantel der Freizügigkeit', <jean-monnet-saar.eu/?p=659>, visited 11 January 2015.

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Instead of pondering over possible justifications of the German rule as construed by the referring court, the Grand Chamber chose to formally exclude persons who, like Ms Dano, are neither economically active, nor self-sufficient, from the scope of the applicable equal treatment provisions, thereby neutralizing their benefit claims irrespective of how the relevant national legislation is framed. This the Court achieves by subjecting the hitherto unqualified equal treatment rule of Regulation No 883/2004 to a condition of legal residence it derives from a teleological reading of Directive 2004/38: economically inactive migrants without sufficient resources cannot invoke equal treatment under Article 24 in order to claim subsistence benefits.

With regard solely to Directive 2004/38, it is by all means plausible to jointly construe its Articles 7(1), 14(1) and 24(1), as well as recital 10, as allowing the member states to refuse access to national subsistence benefits which would enable benefit seekers to meet the crucial condition of having sufficient resources throughout their stay. In the alternative, this condition for legal residence would indeed prove to be an empty shell. Whilst one may wish to argue that such a derogation to the equal treatment rule had been dismissed by the legislature[67] or that recital 10, which the Court draws upon, does not, on the face of it, relate to periods of residence between three months and five years, at stake in *Dano*, there is indeed nothing in the text of the Directive which openly contradicts the Court's solution. I would thus contend that, whether or not it defers to the political and budgetary concerns of certain member states in these times of crisis,[68] the Court's interpretation finds a sufficiently solid basis in the provisions and objectives of the Citizenship directive.

But would not an individualized approach through the lens of proportionality, based on a 'genuine link' requirement, have done the trick without petrifying the categorical divide based on a person's occupation better than a categorical exclusion? Whilst it is difficult to object to the outcome of this particular case, one would indeed hesitate to give the same answer where benefits are denied to a person having resided for, say, four years in the host member state. Alas, that situation would also seem to be caught by the Court's solution. It may thus have

[67] Limiting the categorical exclusion from benefits to the initial period seems to have been a deliberate choice in order to find a compromise between the Council and EP/COM, notably under the impression of the Court's case-law. The Commission had initially proposed to exclude economically inactive citizens from social assistance before the acquisition of permanent residence before siding with the EP. The Council had suggested that the condition of sufficient resources was to be considered as met as long as economically inactive citizens did not become an unreasonable burden, M. Meduna, *supra* n. 27, p. 263.

[68] O. Tambou, 'Des mots, des maux, démons autour de la citoyenneté sociale européenne' *Dalloz actualité* (2 December 2014) <dalloz-actualite.fr/chronique/des-mots-des-maux-demons-autour-de-citoyennete-sociale-europeenne>, visited 12 January 2015.

seemed preferable to inscribe a 'genuine link' test into Article 24(1), which Ms Dano would have failed, but those who seek to integrate in the host society could still pass. It had indeed been assumed that the Directive's piecemeal indications should be construed as favouring a gradual integration, with 'real' or 'genuine' links to the host member state compensating a lack of economic activity.[69] The better a Union citizen is integrated into the host society, the more legitimate his benefit claims become.[70]

Such a 'genuine link' test could even have been a path towards coherence between the Directive and Regulation No 883/2004. The latter's concept of 'habitual residence' as a precondition for receiving benefits may indeed be construed as an equivalent to the 'genuine link' test used hitherto in citizenship cases.[71] Subjecting both to the same standard is not illusionary. Alternatively, coherence among the texts could also be achieved, along the lines of *Brey,* on the basis of an unreasonable burden test. Even though the latter has not found the blessing of social law scholars,[72] it would have seemed a reasonable price to pay for legal harmony. The Court, however, chose a third approach by transposing the scope exclusion under Article 24 of the Directive to Article 4 of Regulation No 883/2004. Innocuously framed as an option for the member states, this is nevertheless a game-changing intervention into the logic of the Regulation. Considering that non-discriminatory access to SNCBs had been expressly agreed upon by the member states in order to avoid their exportability,[73] it would now seem that migrant Union citizens who, for whatever reason, cannot be considered as economically active, run the risk of being caught between two stools: they cannot export home member state SNCBs, whereas their host member state is not obliged to grant such benefits.[74]

It is somewhat ironic that, after having established the category of SNCBs in order to bring certain types of social assistance within the remit of the Regulation,

[69] This is underlined by the Commission's 'Guidance for better transposition', COM(2009) 313/4. *See also* K. Lenaerts and T. Heremans, 'Contours of a European Social Union in the Case-Law of the European Court of Justice', 2 *EuConst* (2006) p. 101 at p. 107, who refer to a 'balancing act' and P. Minderhoud, *supra* n. 4, p. 224. For a recent overview on the relevant case-law *see* E. Guild et al., *The EU Citizenship Directive* (2014) p. 234-240.

[70] L. Azoulai, 'La citoyenneté européenne, un statut d'intégration sociale', in J.-C. Piris et al. (eds.) *Mélanges Jean Paul Jacqué. Chemins d'Europe* (Dalloz 2010) p. 1 at p. 18.

[71] van Overmeiren et al., 'Social Security Coverage of Non-Active Persons Moving to Another Member State', in E. Guild et al., *supra* n. 4, p. 227 at p. 257.

[72] H. Verschueren, 'Free Movement or Benefit Tourism: The Unreasonable Burden of Brey', 14 *European Journal of Migration and Law* (2014) p. 147; M. Fuchs, 'Freizügiger Sozialtourismus?', *ZESAR* (2014) p. 103.

[73] van Overmeiren et al., 'Social Security Coverage of Non-Active Persons Moving to Another Member State', in E. Guild et al., *supra* n. 4, p. 227 at p. 253; Verschueren, *supra* n. 72, p. 179.

[74] *See also* Verschueren, *supra* n. 72, p. 164, claiming that this may result in a reconsideration of the export ban.

having expanded its personal scope to economically inactive persons, and having subsumed these benefits again under the notion of social assistance for the purpose of equal treatment pursuant to the Citizenship Directive, the only category of persons concerned by every single step of this complex exercise and requiring assistance (i.e. economically inactive migrants not having sufficient resources) should be categorically excluded from these benefits.[75]

Now that the Directive and the Regulation are in harmony, the juxtaposition of *Brey* and *Dano* still makes for a good riddle. The Court's finding in *Dano* that subsistence benefits may be denied to those who seek them in order to enjoy a right of residence seems to echo the rule it has recently outlawed in *Brey*, i.e. that the requirement to have sufficient resources does not apply for a benefit making these resources sufficient. One may seek to reconcile both rulings by arguing, amongst other things, that the small supplement at stake in *Brey* differs, in degree and kind, from the German 'basic provision' which, as such, constitutes a modest income. Nevertheless, such a line of argument would seem to justify the diverging results only if an individual assessment as stipulated in *Brey* were to apply to both situations: topping up the resources of a pensioner capable of covering his basic needs even without the benefit sought would appear to be much less of a burden for the system than having to ensure in full the subsistence of economically inactive benefit seekers.[76] But precisely because, under the *Dano* rule which, based on its wording, is of general application, such an assessment is not required in order to deny the benefit sought, the question of when and where the balancing approach opted for in *Brey* can still apply remains. In case of doubt, the *Dano* rule will take precedence. 'Basic provision' and other non-contributory assistance may be refused to benefit seekers from other member states no matter how long they need how much of it. Even if their financial situation must be examined 'specifically', social benefits are not part of the equation.

The Court will soon have an opportunity to further clarify the relationship of both judgments when determining, in *Alimanovic*,[77] whether Union citizens who, unlike Ms Dano, are actively looking for work, may also be categorically excluded from German 'basic provision' and equivalent benefits or deserve a *Brey*-style assessment.

Precarious residence as a consequence?

An appraisal of the Court's solution in *Dano* should also take into account its practical consequences. Regard should notably be had to the job or benefit seeker's

[75] *See* already Verschueren *supra* n. 72 p. 163, who points out that the SNCB coordination regime concerns these persons in the first place.

[76] Building upon a similar analysis of the circumstances at issue in *Bidar* and *Grzelczyk* by Lenaerts and Heremans, *supra* n. 69, p. 107.

[77] ECJ, pending Case C-67/14, *Alimanovic*.

possibly continuing residence in the host member state. Article 14(2) of the Directive certainly provides that economically inactive Union citizens have a right of residence only as long as they meet the relevant conditions. Where there is a reasonable doubt, member states may specifically, but not systematically, verify this.

It is not unlikely that job or benefit seekers can rely on alternative sources for their subsistence, such as family, friends or occasional gainful activity below the threshold of Article 45 TFEU. In any case, pursuant to Article 8(4) of the Directive, member states may not lay down a fixed amount which they regard as 'sufficient resources', but they must take into account the personal situation of the person concerned. Moreover, family and child care benefits like those effectively paid to Ms Dano may still complement the available resources as long as it suffices to reside in Germany in order to claim these benefits. In this regard, it should be recalled that, pursuant to Article 14(3), member states may not take an expulsion measure as the automatic consequence of a Union citizen's recourse to the social assistance system of the host member state.

It would thus appear that refusing the non-contributory benefits at issue does not automatically lead to the benefit seekers leaving the host member state, given that they may prefer to continue trying their luck in a wealthier country than their own. What is more, as regards Germany specifically, the recent abolishment of the obligatory 'freedom of movement certificate' makes further contact with the national authorities superfluous. It cannot therefore be ruled out that a substantial number of illegally residing migrants stay, under precarious circumstances, in Germany.[78] While this is indeed an issue for the national legislature to address,[79] the latter may also decide of its own motion to grant the benefits which EU law does not require. With Germany having denounced the applicability of the European Convention on Social and Medical Assistance[80] to the 'basic provision' under SGB II and the Court of Justice declining jurisdiction as regards the Charter,[81] a genuine entitlement of economically inactive Union citizens to this type of benefits in Germany now seems to depend on whether the Federal

[78] K. Hailbronner, 'EU-Freizügigkeit für nicht erwerbstätige Unionsbürger?', *Juristenzeitung* (2014) p. 869, notes that, in the last few years, roughly only 30 to 40 per cent of the decisions ordering EU citizens to leave Germany have actually led to a departure and that both the number of re-entries and, generally, that of EU citizens not meeting the requirements of legal residence is unknown.

[79] Thym, *supra* n. 45.

[80] This Council of Europe Convention of 11 December 1953 entitles the nationals of the Contracting Parties to receive social assistance. The German government's decision followed a judgment of the Federal social court finding the Convention to require granting 'basic provision'.

[81] On this specific issue see D. Düsterhaus, 'EU Citizenship and Fundamental Rights: Contradictory, Converging or Complementary?' in D. Kochenov (ed.) *EU Citizenship and Federalism: The Role of Rights* (Cambridge CUP, forthcoming).

Constitutional Court will find this to be a matter of equal treatment.[82] But let us turn back to EU law.

Testing the untested: On the Court's legitimacy to curtail equal treatment

The newly curtailed equal treatment rules do not exist in a legal void, but are framed by the Treaty, notably Articles 18 and 21 TFEU. If unequal treatment really is an 'inevitable consequence' of Directive 2004/38, as stated by the Court, can the Directive still be compatible with the Treaty? Even though the answer to that question would seem to be a 'yes', not least since the Court itself has come up with this interpretation, the latter could have benefited from an explicit anchoring in primary law.

From a conceptual point of view, an isolated or 'detached' interpretation of Directive 2004/38[83] as operated in *Dano* is not necessarily problematic. And indeed, the Court's retreat from its allegedly over-ambitious 'constitutional' review[84] of secondary legislation under the citizenship provisions has been lauded as a willingness to entertain a genuine dialogue with the legislature and to respect its policy choices.[85] I nevertheless submit that, when faced with sketchy and contradictory legislation obscuring the legislature's intentions, such an approach stands on shaky foundations. Indeed, for judicial restraint not to tip over into judicial activism, this dialogic interpretation has its limits. Arguably, only choices which are reflected in the law as it stands or has been adopted (as was the case in *Förster*[86]) *can* inform the interpretation of the law and they *may* do so only to the

[82] This has been suggested by different German State social courts, notably LSG Bayern 22 December 2010, L 16 AS 767/10 B ER – juris and finds support in the literature: T. Kingreen, *supra* n. 40, p. 139. Regarding benefits for asylum seekers BVerfG 18 July 2012, 1 BvL 10/10, 1 BvL 2/11, at marginal no. 121 held that 'migration-policy considerations of keeping benefits paid […] low to avoid incentives for migration, if benefits were high compared to international standards, may generally not justify any reduction of benefits below the physical and socio-cultural existential minimum. […] Human dignity may not be relativised by migration-policy considerations.'

[83] *See*, on instances of an isolated application of rigid secondary law clauses in circumstances previously found to require an individualized proportionality assessment: S. O'Leary, 'Equal treatment and EU citizens: A new chapter on cross-border educational mobility and access to student financial assistance, 34 *ELRev* (2009) p. 612 at p. 623; Dougan, *supra* n. 17, p. 140; P. J. Neuvonen, 'In search of (even) more substance for the "real link" test: comment on Prinz and Seeberger', 39 *ELRev* (2009) p. 125 at p. 132.

[84] M. Dougan, 'The Constitutional Dimension to the Case Law on Union Citizenship', 31 *ELRev* (2006) p. 613.

[85] K. Lenaerts, 'The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice', in Adams et al., *supra* n. 19, p. 13.

[86] ECJ 18 November 2008, Case C-158/07, *Förster*. The Court accepted a Dutch exclusionary rule for study aid on the basis that Directive 2004/38, which did not yet apply to the circumstances at issue in the main proceedings, allows such a rule.

extent that they are compatible with higher ranking norms. In other words, just as the text of the directive should remain the boundary of any functional interpretation of the Treaty provisions, an interpretation of the directive must *a fortiori* respect the Treaty as the hierarchically superior norm. Both preconditions, i.e. an indication of the legislature's will to let the Directive justify unequal treatment and the compatibility of such justification with primary law, deserve some thought.

As concerns the first condition, one may wonder whether there really was an indication of the legislature's intentions to curtail the equal treatment clauses, given that no overhaul of the Directive or the Regulation was planned. It could be argued, however, that the Court merely resuscitated an exclusionary rule for periods of residence of more than three months, which its own case-law during the first citizenship decade had prompted the legislature not to establish. The Court could thus still legitimately fill the legislative void with its own appreciation, thereby clarifying the stances taken before the Directive was enacted.[87] And the Court's clarification was indeed essential, since the interested member states would not have been in a position to obtain a legislative amendment against the Commission's will and deviating from the Court's earlier interpretation of Articles 18 and 21 TFEU in *Grzelczyk* and *Trojani*.[88]

With regard to the second condition, i.e. the compatibility with primary law, we should make a distinction. If the unequal treatment of economically inactive migrants with insufficient resources were a national rule not backed by the Directive, it would seem to be at variance with Articles 18 and 21 TFEU, not least because the member state concerned would not be able to establish either the existence of 'welfare tourism' in general, or an 'unreasonable burden' as a consequence of conferring the particular benefit at issue.[89] As an exclusion from the scope of equal treatment operated at the level of secondary law, the *Dano* rule may, however, be subsumed under the authorization in Article 21 TFEU to lay down the conditions and limitations of the right to move and reside and benefits from the legislature's wide discretion. Unlike every member state individually, it

[87] This argument has been made by D. Thym, 'EU Free Movement as a Legal Construction – not as Social Imagination', <eutopialaw.com/2014/11/13/>, visited 11 January 2015.

[88] B. De Witte has recently pointed out that the difficulty of an EU legislative overruling of the Court's interpretation is aggravated where it relates to primary law: 'Democratic Adjudication in Europe – How Can the Court of Justice Be Responsive to the Citizens?', in M. Dougan et al. (eds.), *Empowerment and Disempowerment of the European Citizen* (Hart Publishing 2012) p. 129.

[89] On top of the findings recalled *supra* n. 35-37 that there is no indication of structurally significant 'welfare tourism', it is worth noting that less than 4 per cent of the EU migrants above 15 years and constituting 0.015 per cent of the total population above 15 are in the situation of Ms Dano, i.e. that of a single, unemployed parent. Assuming that even less are equally poorly educated, the burden on the German social security budget appears insignificant.

may notably consider that an exclusion of unemployed and penniless migrants from national subsistence benefits is an appropriate response to the danger that the rampant 'welfare tourism' discourse ends up spoiling more fundamental aspects of the free movement of persons. I submit that, in filling the legislative void which its own case-law had arguably provoked, the Court was entitled to act on the assumption that this is indeed the legislature's will. So justified, the scope exemption operated in *Dano* appears to be broadly compatible with the EU rules on free movement of persons.

Sectorial solutions, false debates and the hollowness of the fundamental status

Despite its legal soundness and constitutional legitimacy, the judgment still leaves me with a feeling of unease. It does not relate to the presumed outcome of the main proceedings, which indeed concern a nightmarish situation for all proponents of transnational social integration. I rather wonder whether, upon the categorical exclusion of economically inactive benefit seekers from legal residence and equal treatment, Union citizenship can still be dubbed the 'fundamental status' of member state nationals entailing the right not to be discriminated when moving.[90] In the present case, the explicit reference to what citizenship is destined to confer (i.e. equal treatment) coupled with the demonstration that it still fails to do so (because unequal treatment is allowed), indeed suggests that the divide between economically active and inactive free movers has been petrified. Under these circumstances, the assumption that Union citizenship requires the member states to show 'a certain degree of solidarity', is crumbling and the hope that they can no longer limit their solidarity to their nationals but should include all persons who demonstrate a 'sufficient degree of integration'[91] seems to be fading. How can a needy migrant with no right to reside possibly achieve such a degree of integration?

As it is now construed, the citizenship Directive has largely neutralized Articles 18 and 21 TFEU as building blocks of the fundamental status. Fears that, like a Trojan horse, the status would carry an army of 'welfare tourists' inside the carefully protected social assistance systems are unfounded. Figuratively speaking, the 'fundamental status' turns out to be just a large wooden horse carrying no-one inside. After *Dano*, the status of an EU migrant seems to be once again that of a worker, a self-employed person, a pensioner, or a well-off student or playboy. Just as it was under the sectorial regime[92] in place before 2004, these categories of persons may move and reside abroad while the poor must stay – or return – home.

[90] As the Court has maintained since ECJ 20 September 2001, Case C-184/99, *Grzelczyk*, para. 31.

[91] Lenaerts and Heremans, *supra* n. 69, p. 127.

[92] I am referring to the three residence Directives 90/364/EEC, 90/365/EEC and 93/96/EEC.

As argued above, the judgment in *Dano* may dam the perilous discourse on 'welfare tourism'. But even if it succeeds, the question remains whether that discourse properly reflected reality in the first place. This seems to be refuted by statistical evidence. Not only is the immigration of job seekers overall beneficial for the host state, but also, particularly for Romanian migrants in Germany, the inclination or obligation to rely on social assistance is low.[93] It has thus been argued that the legal battle against welfare driven migration concerns a flat populist suspicion of abuse, rather than the actual migration practice.[94] The very idea of massive 'welfare tourism' appears to stem from demagogic campaigns initiated, amongst others, by members of national governments and alleging abuse of free movement rights.[95] Considering this, one can only deplore that the almost uncountable doctrinal writings vaunting EU citizenship and free movement had so little impact on the political decision makers who counter hopeful claims of *'civis europaeus sum'* with a disenchanted *'timeo Danones et dona petentes'* – *'I fear the Danos asking for the dole'*. One may also wonder why the Commission, who strictly opposed a categorical exclusion of economically inactive Union citizens in its written observations in *Dano,* did not react in due time with infringement procedures against member states presumably not complying with the rules of Directive 2004/38.[96] Arguably, the 'fundamental status' could have been made more robust before the crisis diverted the established migration paths[97] and the virtues of social integration were obscured by the fear of 'welfare tourism'.

[93] Brücker et al., 'Arbeitsmigration oder Armutsmigration?', <doku.iab.de/kurzber/2013/kb1613.pdf>, visited 12 January 2015, p. 5. *See also* the findings of the Milieu study, *supra* n. 35-37. Whilst it cannot be denied either that some municipalities are particularly affected by the influx of needy migrants, the ensuing costs could easily be offset against the overall fiscal benefit which EU migration provides for the member state concerned.

[94] Farahat, *supra* n. 50, p. 495.

[95] Meduna, *supra* n. 27, p. 313.

[96] In the same vein it is difficult to understand why, out of the 120 genuine citizenship cases decided by the Court of Justice in the last 20 years, only 6 have been brought by the Commission under the infringement procedure. *See*, however, Case C-308/14 *Commission* v *UK*, which is currently pending before the Court, *supra* n. 5.

[97] Brücker et al, *supra* n. 93, p. 2 found that the economic deterioration in Italy and Spain has led many Romanian and Bulgarian jobseekers to leave these countries for Germany.

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