



Dano and Alimanovic: the recent evolution of CJEU case-law on EU citizenship and cross-border access to social benefits

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ABSTRACT: Since its inception, the concept of EU citizenship, as well as the rights and duties deriving therefrom, has evolved considerably, particularly in the area of social rights. ECJ case law has played a central role in defining the right of EU citizens to access social benefits in the host Member States, which meant a decrease in their degree of discretion to restrict the access to national social securities systems. However, the recent Dano and Alimanovic judgments represent a significant change from previous case-law, setting limits on the right of EU citizens to social benefits in the host Member States. The right of residence in another Member State appears to be dependent on the status of a worker citizen in accordance with the new methodology in order to avoid being an excessive burden on the social system of the host Member State. However, the new approach still leaves several unanswered questions. Were these decisions an attempt to address the “social security tourism” debate? Is the CJEU falling behind with regard to the protection of social rights? What will remain of previous jurisprudence?

KEYWORDS: Union citizenship – social benefits – social security – EU law – CJEU case-law.

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I. Foreword

1. 1st January 2016 marked the 30th anniversary of Portugal's accession to the European Economic Community (EEC), now the European Union (EU), together with Spain, following the signing of the Treaty of Accession, which took place on 12th June 1985. It is a moment of celebration and of reflection on the past but, more importantly, on the future of the EU. Looking onwards to the future of the Union necessarily means discussing EU citizenship. EU citizenship, which is additional to national citizenship of a Member State and affords a set of rights, is at a crossroads, especially in terms of its implementation by the Member States and its relation to fundamental rights, namely social rights, and the principle of non-discrimination. There has been a recent change in the Court of Justice of the European Union's (CJEU) case-law in this subject that could have profound consequences.

II. Introduction: the construction of the EU citizenship by the CJEU

2. The concept of citizenship of the EU, which was a novel experiment¹ established by the Maastricht Treaty 1992, and recognized in the Treaty of the EU (TEU) and the Treaty on the Functioning of the EU (TFEU), as well as the rights and duties it entails, has evolved greatly, in response to the case-law of the CJEU.

2014, 2015 and 2016 have been no exception to the central role played by the CJEU in the development of the legal status of EU citizenship. To name just a few cases, one can mention the *Delvigne* case,² on Member States' legislation providing for the deprivation of the right to vote in the case of a criminal conviction in certain cases. There was also a string of cases concerning the right of residence in the EU for divorced spouses, namely when they are the care-taker of minors who have EU citizenship. This was the issue in the *Singh* case,³ as it concerned the proposed retention of the right of residence of a third-country national married to an EU citizen after the spouse's departure from the host Member State, followed by divorce. In the *NA* case,⁴ on the same question, with the difference in this case being that the third country national had custody of children who were EU citizens, and the *Rendón Marín* case,⁵ which dealt with the right of a third-country national with a criminal record to reside in a Member State of a third-country national with a criminal record who is the parent having sole care of two minor children, who are Union citizens.

3. The evolution of the notion of Union citizenship in CJEU case-law was especially notable in the area of the free movement and residence of EU citizens and their access to social benefits. The Court's case-law has been central for the guarantee of an effective right to freedom of movement of citizens within the territory of the Member States, recognized in the TEU, as one of the fundamental freedoms on which the Union is based, and to which the principle of prohibition of discrimination

¹ E. Gild, C. Gortázar Rotaeché and D. Kostakopoulou, *The reconceptualization of European Union citizenship* (Leiden: M. Nijhoff, 2014) 1.

² Judgment *Delvigne*, of 6 October 2015, Case C-650/13.

³ Judgment *Singh*, of 16 July 2015, Case C-218/14.

⁴ Judgment *NA*, of 30 June 2016, Case C-115/15.

⁵ Judgment *Rendón Marín*, of 13 September 2016, Case C-165/14.

on grounds of nationality (Article 18 TFEU)⁶ applies. According to Article 3(2) TEU; “*The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured*”. The right of every citizen of the Union “*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*” is also recognized (Article 21 TFEU).⁷ The relation between freedom of movement, freedom of residence, and the prohibition of discrimination is implemented by the Citizens’ Directive.^{8/9}

In the *Grzelczyk* case, the Court established one of the cornerstones of the EU citizenship case-law: that; “*Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for*”.¹⁰

The CJEU recognized the direct effect of the right of residence of Union citizens¹¹ and has consistently extended the prohibition of discrimination and the principle of equality, while interpreting Articles 18, 20 and 21 TFEU, namely to EU citizens who reside lawfully in the Member State but are economically inactive.¹² The Court was especially important in the building of a notion of EU citizenship which was not connected with the need to have an economic link to a certain Member State and which granted access to a wider range of rights. The EU citizenship should make a difference and involves a break from merely economic categories, such as “*worker*”, which were predominant in the EEC.¹³

⁶ On the expansive interpretation by the Court of the EU citizenship in relation to the principle of equality, v. *n.g.*, C. Barnard, “EU citizenship and the principle of solidarity”, in *Social welfare and EU law*, ed. M. Dougan and E. Spaventa (Oxford: Hart Publishing, 2005) 157-180; G. Davies, “The humiliation of the state as a constitutional tactic”, in *The Constitutional Integrity of the European Union*, ed. F. Amtenbrink and P.A.J. van den Berg (The Hague: Asser Press, 2010) 147; 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*, ed. M. Dougan and E. Spaventa (Oxford: Hart Publishing, 2005) 181-218; S. Giubonni, “Free movement of Persons and European solidarity”, *European Law Journal*, vol. 13, No. 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”, *European Law Review*, vol. 33, No. 5 (2008) 643-665.

⁷ J. Cunha Rodrigues, “Liberdade de Circulação e Permanência”, in *Carta dos Direitos Fundamentais da União Europeia Comentada*, ed. Alessandra Silveira and Mariana Canotilho (Coimbra: Almedina, 2013) 522-523.

⁸ 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

⁹ For a comprehensible analysis, v. E. Guild, S. Peers and J. Tomkin, *The EU citizenship directive: a commentary* (Oxford: Oxford University Press, 2014).

¹⁰ Judgment *Grzelczyk*, of 20 September 2001, Case C-184/99, recital 31.

¹¹ V. *n.g.*, Judgments *Baumbast*, of 17 September 2002, Case C-413/99, recital 84, and *Trojani*, of 7 September 2004, Case C-456/02, recital 32.

¹² V. *n.g.*, Judgment *Martinez Sala*, of 12 May 1998, Case C-85/96, recitals 61-62.

¹³ V. *n.g.*, E. Spaventa, “From Gebhard to Carpenter: Towards a (non-)economic European constitution”, *Common Market Law Review*, vol. 41, No. 3 (2004) 743-773; N. Nic Shuibhne, “The Resilience of EU Market Citizenship”, *Common Market Law Review*, vol. 47, No. 6 (2010) 1597-1628, 1605-1609; S. Kadelbach, “Union citizenship”, in *Principles of European Constitutional Law*, ed. von Bogdandy and Bast, 2nd ed., (Oxford: Hart, 2009) 443-478, 445-448; C. O’Brien, “I trade, therefore I am: legal personhood in the European Union”, *Common Market Law Review*, vol. 50 (2013) 1643-1684.

III. EU citizenship and the access to social assistance granted to non-national EU citizens

4. The freedom of movement has close links with the non-national EU citizens' access to social rights, and specifically to social benefits, in the host State and it was up to the CJEU to largely develop the legal framework and the principles applicable. The Court developed an approach which was centred on the individual at issue and its subjective case and established that the right of residence and of establishment and the equal treatment principle should not be precluded by lack of resources. For instance, the principle of equality is applicable to the rights of students, who are exercising their right of residence, to maintenance aid, despite the exception established in Article 24 (2) of the Citizens' Directive.¹⁴

The prohibition of discrimination on ground of nationality and the establishment of EU citizenship were seen by the CJEU as precluding the entitlement to a non-contributory social benefit from being made conditional to non-national legally residing EU citizens being considered as workers when no such conditions would apply to nationals of the Member State. In Judgments such as *Martínez Sala*, *Grzelezyk*, *Trojani*, or *Bidar*, for instance, the CJEU developed case-law which incrementally broadened non-national EU citizens' rights to claim social benefits while narrowing Member States' scope to regulate or restrict their access to national welfare systems, notably in the case of non-contributory benefits. The Court recognized and accepted that this involved the need for a certain degree of financial solidarity between Member States.¹⁵

However, the Court accepted that in certain cases, it was legitimate for a Member State to grant such a benefit only after it has been possible to establish a “*real link*” between the job-seeker and the labour market of that State,¹⁶ or a “*certain degree of integration into the society of the host State*” was demonstrated.¹⁷ Finally, in any case, the Court recognized that the applicant should not become “*an unreasonable burden*” on the public finances of the Member State.¹⁸

5. The rights of freedom of movement and of residence of EU citizens, as developed by the CJEU, are closely connected with the development of EU integration. However, case-law was sometimes criticised, namely by some of the Member States, for being too broad in recognizing the access to benefits while interpreting the Citizens' Directive too extensively.¹⁹ There is a direct relation with the current debates on

¹⁴ V, *ng.*, Judgments *D'Hoop*, of 11 July 2002, Case C-224/98, recitals 30-32; *Bidar*, of 15 March 2005, Case C-209/03, recital 31.

¹⁵ Judgment *Grzelezyk*, of 20 September 2001, Case C-184/99, recital 44; *Bidar*, of 15 March 2005, Case C-209/03, recital 56.

¹⁶ V, *ng.*, Judgments *Vatsouras*, of 4 June 2009, Cases C-22/08 and C-23/08, recitals 38-39, and, *Collins*, of 23 March 2004, Case C-138/02, recitals 67-69.

¹⁷ V, *ng.*, Judgments *Bidar*, of 15 March 2005, Case C-209/03, recital 57; *Ioannidis*, of 15 September 2005, Case C-258/04, recital 30 et seq.; *Förster*, of 18 November 2008, Case C-158/07, recital 54; *Gottwald*, of 1 October 2009, Case C-103/08, recital 32 et seq.

¹⁸ V, *ng.*, Judgments *Grzelezyk*, of 20 September 2001, Case C-184/99, recital 44; and *Commission v Austria [reduced fares on public transport granted to students]*, of 4 October 2012, Case C-75/11, recital 60.

¹⁹ V, *ng.*, N. Caicedo Camacho, “La Directiva 2004/38/CE y la jurisprudencia del TJCE sobre el disfrute de las prestaciones sociales: ¿freno al avance en materia social o adecuación a los intereses de los estados?”, *Revista d'estudis autonòmics i federals*, No. 19 (2014) 96-143; G. Davies, “The humiliation of the state as a constitutional tactic”, in *The Constitutional Integrity of the European Union*, ed. F. Amtenbrink and P.A.J. van den Berg (The Hague: Asser Press, 2010) 147-174; S. Giubonni,

access by non-nationals to social security in host States, characterized sometimes as ‘welfare migration’²⁰ or ‘social tourism’,²¹ where (at least some of) the Member States reject intrusions in their autonomy. The European Commission defends the freedom of movement of persons.²² The broad interpretation could interfere with the Member States’ political choices or the national solidarity basis of their welfare systems.²³ The debate has grown in intensity because of the perceived need to implement budget-cuts on national benefits during the global economic crisis.²⁴

IV. The recent evolution in CJEU case-law on access to social assistance granted to non-national EU citizens

6. Against this background, a number of recent CJEU judgments present a striking shift in relation to the previous case-law, clarifying the limits of the right to access to social assistance granted to non-national Union citizens in host Member States under EU Law.

In the *Brey* judgment,²⁵ of September 2013, the CJEU stated that the Citizen’s Directive “allows the host Member State to impose legitimate restrictions in connection with the grant of [social security] benefits to Union citizens who do not or no longer have worker status, so that

“Free movement of persons and European solidarity”, *European Law Journal*, vol. 13, No. 3 (2007) 360-379; *Idem*, “A Certain Degree of Solidarity? Free Movement of Persons and Access to Social Protection in the Case Law of the European Court of Justice”, in *Promoting Solidarity in the European Union*, ed. M. Ross and Y. Borgmann-Prebil (Oxford: Oxford University Press, 2010) 191-193; I. Lirola Delgado, “Derecho de residencia de los ciudadanos de la Unión y prestaciones sociales en tiempos de crisis”, *Revista de Derecho Comunitario Europeo*, vol. 18, No. 49 (2014) 761-762; F. Wollenschläger “A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration”, *European Law Journal*, 17 (2011) 1-34.

²⁰ P. Larkin, “The Limits to European Social Citizenship in the United Kingdom”, *Modern Law Review*, 68 (2005) 435-447, 440-442; S. Mantu and P. Minderhoud, “Exploring the limits of social solidarity: welfare tourism and EU citizenship”, *UNIO - EU Law Journal*, vol. 2, No. 2 (2016) 4-19.

²¹ Term used by Advocate General Geelhoed, and described as “moving to a Member State with a more congenial social security environment” (v. Opinion of Advocate General Geelhoed delivered on 19 February 2004, *Trojani*, C-456/02, 18).

²² For an overview, v. M. Morsa, “Les migrations internes à l’Union européenne sont-elles motivées par un accès à des prestations sociales? Citoyenneté européenne, liberté de circulation et de séjour des inactifs et droits sociaux. La relation entre la coordination européenne et la directive 2004/38”, *Journal des tribunaux du travail*, No. 1190 (2014) 245-246; H. Verschueren, “Free Movement or Benefit Tourism: The Unreasonable Burden of *Brey*”, in *European Journal of Migration and Law*, 16 (2014) 147-179.

²³ M. Dougan, “The constitutional dimension to the case law on Union citizenship”, *European Law Review*, 31 (2006) 613-641, 623; A.J. Menéndez, “European Citizenship after Martinez Sala and Baumbast: Has European Law Become More Human but Less Social?”, in *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, ed. M. Poiares Maduro and L. Azoulai (Oxford: Hart, 2010) 391-392.

²⁴ V. Editorial Comments, “The free movement of persons in the European Union: Salvaging the dream while explaining the nightmare”, *Common Market Law Review*, vol. 51 (2014) 729-740; J. Shaw, “Between law and political truth? Member States preferences, EU free movement rules and national immigration law”, *Conference paper, UACES 44th Annual Conference*, Cork, 1-3 September 2014 (available in <http://www.uaces.org>); I. Lirola Delgado, “Derecho de residencia de los ciudadanos de la Unión y prestaciones sociales en tiempos de crisis”, 734-742.

²⁵ Judgment *Brey*, of 19 September 2013, Case C-140/12. Mr Brey and his wife were both German nationals with no other income or assets other than a low sum of pension and benefit payments received in Germany. After moving to Austria in 2011, Mr Brey applied for a compensatory supplement. However, the Austrian authorities refused this because the aforementioned low amounts of pension payments from Germany supposedly did not constitute sufficient resources to establish his lawful residence in Austria.

those citizens do not become an unreasonable burden on the social assistance system of that Member State”.^{26/27} This objective to avoid that situation where a citizen becomes an “unreasonable burden” was already stated in Recital 10 in the preamble to the Directive.²⁸

However, the Court interpreted the Directive in light of the Treaty and of general principles of EU law. The result was that “since the right to freedom of movement is – as a fundamental principle of EU law – the general rule, the conditions laid down in Article 7(1)(b) of Directive 2004/38 must be construed narrowly (see, by analogy, *Kamberaj*, paragraph 86, and *Chakroun*, paragraph 43) and in compliance with the limits imposed by EU law and the principle of proportionality (see *Baumbast and R*, paragraph 91; *Zhu and Chen*, paragraph 32; and *Commission v Belgium*, paragraph 39)”. This meant that EU law precluded the automatic exclusion of an economically inactive citizen of another Member State from receiving a particular social benefit because that exclusion does not enable the competent authorities of the host Member State to “carry out – in accordance with the requirements under, inter alia, Articles 7(1)(b) and 8(4) of that directive and the principle of proportionality – 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 characterising the individual situation of the person concerned would be”.²⁹

The *Brey* test is construed in such a way that the Member State’s authorities can only claim that a citizen is an unreasonable burden to their social security system after considering their own individual personal situation.

7. Only a year later, in November 2014, the *Dano* case³⁰ represents the beginning of a different methodology of analysis of the relationship between the right to reside and the right of access to social benefits.³¹ In the *Dano* decision, the CJEU made it clear that Member States may reject claims to social assistance by EU citizens who have no intention to work and cannot support themselves. It was followed by the *Alimanovic* case, which confirmed the new trend and gave the Court the opportunity to clarify the application of this principle.

²⁶ Judgment *Brey*, of 19 September 2013, Case C-140/12, recital 57.

²⁷ For an analysis of the *Brey* case, v, n.g., B. Spiegel, “Anspruch auf Leistungen der sozialen Sicherheit von nicht aktiven Personen – wer fürchtet sich vor ‘Sozialtourismus’? Neue EuGH Fälle: C-140/12, *Brey*, und C-333/13, *Dano*”, *ERA Forum*, 15, 2014, pp. 339–340; D. Thym, “Sozialleistungen für und Aufenthalt von nichterwerbstätigen Unionbürgern”, *Neue Zeitschrift für Sozialrecht*, 23 (2014). 81–120; H. Verschueren, “Free Movement or Benefit Tourism: The Unreasonable Burden of *Brey*”, *European Journal of Migration and Law*, 16 (2014) 147-179; A.P. van der Mei, “Overview of Recent Cases before the Court of Justice of the European Union (October-December 2014)”, *European Journal of Social Security*, vol. 17, No. 1 (2014) 102–122.

²⁸ Judgment *Brey*, of 19 September 2013, Case C-140/12, recital 54. It was already stated in the Judgment *Ziolkowski and Szeja*, of 21 December 2011, Cases C-424/10 and C-425/10, recital 40.

²⁹ Judgment *Brey*, of 19 September 2013, Case C-140/12, recital 77.

³⁰ Judgment *Dano*, of 11 November 2014, Case C 333/13.

³¹ For an analysis of the *Dano* case, v, n.g., D. Guimarães, “The Right of Free Movement and the Access To Social Protection in the EU: The Economical Dimension. Notes on the Case *Elisabeta Dano v Jobcenter Leipzig*, C-333/13”, *UNIO - EU Law Journal*, vol. 1, No. 1 (2015) 110-120; D. Thym, “The Elusive limits of solidarity: Residence rights of and social benefits for economically inactive Union citizens”, *Common Market Law Review*, 52 (2015) 17-20; A.P. van der Mei, “Overview of Recent Cases before the Court of Justice of the European Union (January-June 2015)”, *European Journal of Social Security*, vol. 17, No. 4 (2015) 481–496; H. Verschueren, “Preventing ‘Benefit Tourism’ in the EU: A Narrow or Broad Interpretation of the Possibilities offered by the ECJ in *Dano*?”, *Common Market Law Review*, 52 (2015) 363-364; and, very critically of the CJEU’s new approach: N. Nic Shuibne, “Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship”, *Common Market Law Review*, 52 (2015) 889-937.

At the beginning of the reasoning of the *Dano* decision, the Court repeats the *Grzelczyk* statement that; “*the status of citizen of the Union is destined to be the fundamental status of nationals of the Member States*”.³² However, the CJEU subsequently answered the questions by reference to the Citizens’ Directive and Regulation No 883/2004,³³ as “*more specific expressions*” of the prohibition of discrimination on grounds of nationality under Article 18 TFEU, and says that; “*so far as concerns access to social benefits, such as those at issue in the main proceedings, a Union citizen can claim equal treatment with nationals of the host Member State only if his residence in the territory of the host Member State complies with the conditions of Directive 2004/38*”.^{34/35} In doing so, the Court does a literal interpretation of the text of the Directive without reference to the Treaties – especially to the provisions on EU citizenship and the freedom of movement and of residence.

Adopting this methodology allows the CJEU to state that “*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*”³⁶ without having to equate this statement with the general principles of EU law and with the Treaties’ rules.

According to the Citizens’ Directive, the right of residence for periods longer than three months is subject to the conditions set out in Article 7(1) which distinguishes between; (i) persons who are working and (ii) those who are not. The first group of citizens have the right of residence in the host Member State without having to fulfil any other condition (Article 7(1)(a) of Directive). Persons who are economically inactive are required by Article 7(1)(b) of the Directive to meet the condition that they have sufficient resources of their own. From these provisions the Court concludes that each; “*Member State must therefore have the possibility, pursuant to Article 7 of Directive 2004/38, 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*”.³⁷

No reference to the individual situation of Ms Dano was made other than that “*in the main proceedings, according to the findings of the referring court the applicants do not have sufficient resources and thus cannot claim a right of residence in the host Member State*”.³⁸ This, in itself, signified a departure from the *Brey* test described *supra*.

One of the questions was on the application of the Charter of Fundamental Rights to the case. The CJEU, however, stated that it did not have jurisdiction. Its reasoning was that since the conditions creating the right to the benefits did not result, neither from Regulation No 883/2004 nor from Directive 2004/38 or other secondary EU legislation It was thus, for the legislature of each Member State to lay down those conditions. According to the Court, while doing so, the Member States are

³² Judgment *Dano*, of 11 November 2014, Case C 333/13, recital 58.

³³ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

³⁴ Judgment *Dano*, of 11 November 2014, Case C 333/13, recital 69.

³⁵ The Advocate General Wathelet also concluded that EU law did not preclude the national legislature from choosing to exclude nationals of other Member States from entitlement to a special non-contributory cash benefit on the basis of a general criterion, such as the reason for entering the territory of the host Member State, but used the capability of demonstrating the absence of a genuine link with that State, in order to prevent an unreasonable burden on its social assistance system (v. Advocate General Wathelet Opinion, delivered on 20 May 2014, *Dano*, C-333/13, 139).

³⁶ Judgment *Dano*, of 11 November 2014, Case C 333/13, recital 77.

³⁷ Judgment *Dano*, of 11 November 2014, Case C 333/13, recital 78.

³⁸ Judgment *Dano*, of 11 November 2014, Case C 333/13, recital 81.

not implementing EU law for the effect of triggering the application of the Charter under its Article 51 (1).³⁹

8. In the *Alimanovic* case⁴⁰ one year later, the Court used the *Dano* line of reasoning, confirming that a new paradigm of access of non-national EU citizens to host State social benefits had emerged.^{41/42}

The question before the CJEU was if Member States could exclude nationals of other Member States who are job-seekers in the host Member State 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 the Citizens’ Directive, although those benefits were granted to nationals of the Member State concerned who are in the same situation.⁴³ The Court reiterated the *Dano* assessment that “*a Union citizen can claim equal treatment with nationals of the host Member State under Article 24(1) of Directive 2004/38 only if his residence in the*

³⁹ Judgment *Dano*, of 11 November 2014, Case C-333/13, recitals 87-92.

⁴⁰ Judgment *Alimanovic*, of 15 September 2015, Case C-67/14. The case concerns the access of Nazifa Alimanovic and her three German born children, all possessing the Swedish nationality, to German social welfare benefits. These welfare benefits include *Arbeitslosengeld II*, Germany’s subsistence allowance for the long-termed unemployed, and social allowances for beneficiaries unfit to work. In contrast with the *Dano* case, in which the EU citizen in question had never worked and was not seeking work, mother Alimanovic and her oldest daughter did have temporary jobs between June 2010 and May 2011 in Germany. As a result, they received social benefits from 1 December 2011 to 31 May 2012, after which the ‘*Job Center*’, the responsible German authority, withdrew their grant.

⁴¹ This meant not following the Advocate General’s opinion. Advocate General Wathelet considered that it was “*contrary to EU law, and more precisely, to the principle of equal treatment affirmed in Article 18 TFEU and clarified in Article 4 of Regulation No 883/2004 and Article 24 of Directive 2004/38, for the legislation of a Member State, such as that at issue in the main proceedings, automatically to exclude a citizen of the Union from entitlement to a special non-contributory cash benefit within the meaning of Regulation No 883/2004 (a benefit which, moreover, constitutes social assistance within the meaning of Directive 2004/38) beyond a period of involuntary unemployment of six months after working for less than a year, without allowing that citizen to demonstrate the existence of a genuine link with the host Member State*” (v. Advocate General Wathelet Opinion, delivered on 26 March 2015, *Alimanovic*, C-67/14, 110). The Advocate General also stated that in circumstances such as those of the main proceedings, the children of a national of a Member State who works or has worked in the host Member State and the parent who is their primary carer may claim a right of residence there on the sole basis of Article 10 of Regulation (EU) No 492/2011 on freedom of movement for workers within the Union, without such a right being conditional on their having sufficient resources and comprehensive sickness insurance cover in that State (v. Advocate General Wathelet Opinion, *Alimanovic*, C-67/14, 117-122).

⁴² For an analysis of the *Alimanovic* case, v. *vg.*, A. Iliopoulou-Penot, “*Deconstructing the former edifice of Union citizenship? The Alimanovic judgment*”, Common Market Law Review (2016) 1007-1035; A.P. van der Mei, “*Overview of Recent Cases before the Court of Justice of the European Union (July-December 2015)*”, European Journal of Social Security, vol. 18, No. 1 (2015) 74-84.

⁴³ In this case, as in the *Dano* case, the benefits at issue were characterised as ‘*special non-contributory cash benefits*’ within the meaning of Article 70(2) of Regulation No 883/2004, *i.e.* benefits which were intended to cover subsistence costs for persons who cannot cover them themselves and that they are not financed through contributions, but through tax revenue. The Court considered that, from its case law, those benefits were also covered by the concept of ‘social assistance’ within the meaning of Article 24(2) of Directive 2004/38, which refers to all assistance schemes established by the public authorities to which recourse may be had by an individual who does not have resources sufficient to meet his own basic needs and those of his family and who by reason of that fact may, during his period of residence, become a burden on the public finances of the host Member State which could have consequences for the overall level of assistance which may be granted by that State. Cf. Judgments *Dano*, of 11 November 2014, Case C 333/13, recital 63, and *Alimanovic*, of 15 September 2015, Case C-67/14, recitals 43-44.

territory of the host Member State complies with the conditions of Directive 2004/38”.⁴⁴ Only Article 7(3)(c) and Article 14(4)(b) of the Citizens’ Directive were considered as able to confer a right of residence on job-seekers in the situation of Ms Alimanovic and her daughter. The first provision [Article 7(3)(c)]⁴⁵ only conferred worker status during 6 months after their last employment had ended, a period which had already expired when they were refused entitlement to the benefits at issue. Article 14(4)(b) can be relied upon to establish a right of residence even after the expiry of the period referred to in Article 7(3)(c) of the Citizens’ Directive, entitling Ms. Alimanovic and her daughter to equal treatment with the nationals of the host Member State so far as access to social assistance is concerned.⁴⁶ However, in that case, the host Member State may rely on the derogation in Article 24(2) of that Directive in order not to grant that citizen the social assistance sought.

The Court went on to address the *Brey* case, stating that: “*although the Court has held that Directive 2004/38 requires a Member State to 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 placing an unreasonable burden on its social assistance system (judgment in Brey, C 140/12, EU:C:2013:565, paragraphs 64, 69 and 78), no such individual assessment is necessary in main proceedings (highlighted) in circumstances such as those at issue in the main proceedings*”.⁴⁷ The reasoning for this conclusion begins with stating that the Citizens’ Directive “*itself takes into consideration various factors characterising the individual situation of each applicant for social assistance and, in particular, the duration of the exercise of any economic activity*”. Besides, the Directive does “*guarantee a significant level of legal certainty and transparency in the context of the award of social assistance by way of basic provision, while complying with the principle of proportionality*”. Finally, “*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*”.⁴⁸

9. Any prospect that these cases did not represent the adoption of a broad new approach of the CJEU to the question of access to social benefits by non-national EU citizens was proven to be unfounded by the subsequent case that adopted the same methodology.

In the *García-Nieto case*,⁴⁹ the Court once again judged on access to ‘special non-

⁴⁴ Judgments *Dano*, of 15 September 2015, Case C 333/13, recital 69, and *Alimanovic*, of 15 September 2015, Case C-67/14, recital 49.

⁴⁵ This provision provides that if the worker is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first 12 months and has registered as a jobseeker with the relevant employment office, he retains the status of worker for no less than six months. During that period, the Union citizen concerned retains his right of residence in the host Member State under Article 7 of the Citizens’ Directive. Article 7(3)(b) provides in principle for the unlimited retention of the worker status after employment for more than a year, but in that case the worker would have to have completed an employment contract longer than a year.

⁴⁶ Article 14(4)(b) stipulates that Union citizens who have entered the territory of the host Member State in order to seek employment 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.

⁴⁷ Judgment *Alimanovic*, of 15 September 2015, Case C-67/14, recital 59.

⁴⁸ Judgment *Alimanovic*, of 15 September 2015, Case C-67/14, recitals 60-62.

⁴⁹ Judgment *García-Nieto*, of 25 February 2016, Case C-299/14. The unmarried Spanish couple García-Nieto and Peña Cuevas, had lived together in Spain for several years and had a common child. The father also had a son from an earlier relationship. Mother García-Nieto and their common child moved to Germany in April 2012, where she moved in with her mother, registered

contributory cash benefits’ within the meaning of Article 70(2) of Regulation No 883/2004, which also constitutes ‘social assistance’ within the meaning of Article 24(2) of the Citizens’ Directive by quoting the *Dano* and *Alimanovic* cases – “a Union citizen can claim equal treatment with nationals of the host Member State (...) only if his residence in the territory of the host Member State complies with the conditions” of the Citizens’ Directive.⁵⁰ The Court followed the same kind of reasoning, limiting itself to interpreting the provisions of the Citizens’ Directive. While Article 6(1) of the Citizens’ Directive provides that EU citizens have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport, in such a case, the host Member State may rely on the derogation in Article 24(2) in order to refuse to grant that citizen the social assistance sought.⁵¹ Hence, the host Member States can exclude economically inactive non-national EU citizens from access to ‘social assistance’ who are residing for a period shorter than three months. No reference to the special status of EU citizen or to the Treaties is made. No consideration is given to family status of those involved.

The individual’s personal situation test put forward in *Brey* was replaced by the objective test used in the *Alimanovic* case. In *Alimanovic*, the Court stated that Citizens’ Directive, “establishing a gradual system as regards the retention of the status of ‘worker’ which seeks to safeguard the right of residence and access to social assistance, itself takes into consideration various factors characterising the individual situation of each applicant for social assistance and, in particular, the duration of the exercise of any economic activity”.⁵² This reasoning is taken a step further by the Court in the *García-Nieto* case, stating that “if such an assessment is not necessary in the case of a citizen seeking employment who no longer has the status of ‘worker’, the same applies a fortiori to persons who are in a situation such as that (...) in the main proceedings”.⁵³

This delivers the *coup de grace* on the *Brey* doctrine – no individual personal situation test is needed; the Court merely applies the Citizens’ Directive to the case. However, the Court does so without the admission of abandoning that doctrine, and without a specific reasoning on that subject: it is as if the Court is presenting a mere exception.

V. Critical analysis

10. In these decisions, the CJEU seems to have abandoned its earlier jurisprudence.

In the pre-*Dano* case-law, the reasoning of cases on Union citizenship had their starting point in the Treaty, bearing in mind the proportionality principle and imposed an individual assessment of the person at issue. The Citizens’ Directive and other

as a job seeker and started working in June 2012. The father and his other son joined the family in Germany in June 2012. Until November 2012, the family’s living expenses were met from the mother *García-Nieto*’s income. From that moment onwards, the father also started to work in short-term jobs. The case concerned the request for social assistance benefits that the father made for himself and his son in July 2012. The German authorities denied them these benefits for August and September as they resided shorter than three months in Germany and, during that period, were neither working nor self-employed.

⁵⁰ Judgment *García-Nieto*, of 25 February 2016, Case C-299/14, recital 38, quoting Judgments *Dano*, of 11 November 2014, Case C-333/13, recital 69, and *Alimanovic*, of 15 September 2015, Case C-67/14, recital 49.

⁵¹ Judgment *García-Nieto*, of 25 February 2016, Case C-299/14, recitals 42-43, quoting Judgment *Dano*, of 11 November 2014, Case C-333/13, recital 70.

⁵² Judgment *García-Nieto*, of 25 February 2016, Case C-299/14, recital 47, quoting Judgment *Alimanovic*, of 15 September 2015, Case C-67/14, recital 60.

⁵³ Judgment *García-Nieto*, of 25 February 2016, Case C-299/14, recital 48.

secondary legislation was interpreted in that light. However, in the post-*Dano* case-law, the CJEU appears not to engage in the interpretation of the Treaty – only the letter of the Citizens’ Directive matter and its interpretation is done *ad pedem litterae*. The *Dano-Alimanovic* methodology is that; “a Union citizen may claim equal treatment with nationals of the host Member State under Article 24(1) of Directive 2004/38 only if his residence in the territory of that State complies with the conditions of that directive”.^{54/55} Only the Directive’s provisions matter.

There is also an abandonment of the *Brey* decision: no proportionality test or individual assessment of personal circumstances was made. This is especially notable in the *Alimanovic* case, where the Court did not use the *Grzelezyk* characterization of the European citizenship as “the fundamental status of nationals”. It did not engage with the doctrine of EU citizenship, and it made no reference to Article 20 TEU and one can find a bold contradiction of the *Brey* test. The Court appears to have established that the Citizens’ Directive already creates a system of individual assessment taking into consideration various factors characterising the individual situation. The Court also makes no mention that Ms. Alimanovic is the primary caretaker of minor children, in contradiction with previous case-law.⁵⁶

This approach has emerged in cases dealing with ‘special non-contributory cash benefits’,⁵⁷ which were the benefits at issue in the *Dano*, *Alimanovic* and *García-Nieto* cases. However, it appears to be emerging as a general trend.⁵⁸ In the *UK child benefit or child tax credit case*,⁵⁹ despite the fact that the question is the implementation of Regulation (EC) No 883/2004, and not the Citizens’ Directive, the Court quotes the *Brey* and the *Dano* cases to conclude that: “it is clear from the Court’s case-law that there is nothing to prevent, in principle, the grant of social benefits to Union citizens who are not economically active being made subject to the requirement that those citizens fulfil the conditions for possessing a right to reside lawfully in the host Member State”.⁶⁰

11. There are positive aspects to this new line of reasoning by the Court. The *Dano/Alimanovic* case-law represents a noteworthy shift of emphasis, accentuating the protection of Member States’ interests and a new-found respect to national legislatures.⁶¹ Member States should be free to determine the material conditions and levels of benefit

⁵⁴ Judgment *Alimanovic*, of 15 September 2015, Case C-67/14, recital 49.

⁵⁵ D. Thym, “The elusive limits of solidarity: Residence rights of and social benefits for economically inactive Union citizens”, *Common Market Law Review*, 52 (2015) 17-50, 25.

⁵⁶ V. Judgments *Ibrahim*, of 23 February 2010, Case C-310/08, and *Teixeira*, of 23 February 2010, Case C-480/08.

⁵⁷ On this subject, v. T. Guerrero Padrón, “The scope and instrumentation of the principle of equal treatment regarding social assistance benefits”, e-Revista Internacional de la Protección Social, Vol. I, No. 1, (2016) 87, 89-90.

⁵⁸ E.g., Judgment *Commission v the Netherlands*, of 2 June 2016, Case C-233/14, recital 82. This case is about the restricting of access to fares at preferential rates on public transport for students who pursue their studies in the Netherlands to Netherlands students who are registered with a private or public educational establishment in the Netherlands and to students from other Member States who, in the Netherlands, are economically active or have obtained the right of permanent residence.

⁵⁹ Judgment *Commission v United Kingdom [UK child benefit or child tax credit case]*, of 14 June 2016, Case C-308/14.

⁶⁰ Judgment *UK child benefit or child tax credit case*, of 14 June 2016, Case C-308/14, recital 61, 68. However, the *Brey* and the *Dano* cases address special non-contributory benefits, whereas the social benefits at issue in this case (child benefit or child tax credit) are ‘social security benefits’, as referred to in Article 3(1)(j) of Regulation No 883/2004, read in conjunction with Article 1(z) thereof.

⁶¹ D. Thym, “The Elusive limits of solidarity”... 25.

of their social security systems as part of the non-harmonisation principle.⁶²

The Court also refuses to read the Citizens' Directive extensively or creatively, respecting the will of the EU legislature. This is extremely important: it represents the idea that it should be the democratically legitimised EU legislator rather than the CJEU to take the main responsibility in balancing the individual rights of EU citizens against the financial-political interests of the Member States to maintain social assistance systems.⁶³

The new line of reasoning also establishes clear criteria to access to benefits, providing legal certainty, because the Member States and the EU citizens can now trust that the Court will follow a literal interpretation of the Directive instead of performing an individual assessment test of the case, whose result was considered unpredictable and uncertain.⁶⁴

12. Despite these positive aspects, formal and substantive criticisms can be made of this new trend in the CJEU case-law.

As for the formal criticism, one can challenge the method used by the Court in overruling its previous judgments. Usually, this is done by means of evolutive interpretation. Arguably, in this case we have an instance of interpretation of evolution which lowers rather than heightens human rights protection. Although this is not unprecedented in the Court's history, one can argue that the Court needs serious reasons to depart from its own case-law not only in cases of 'progressive' evolution but especially in opposite cases. On more than one occasion, the Court itself has pointed out that evolutive interpretation should be justified by particularly strong reasons. However, the Court changed its methodology without admitting the reversal of the earlier doctrine, and, once again, without a specific reasoning justifying the change.

13. Besides, the new case law states that, in terms of access to social assistance, EU citizens can only claim equal treatment if its residence in the territory of the host State complies with the conditions to lawfully reside there, established in the Citizens' Directive.

This focus on the provisions of the Citizens' Directive means that the claim of equal treatment, which is established in the Treaties, is dependent on conditions set in secondary law. Restrictions to the right to reside established in Article 21 TFEU can also result from secondary legislation. In this case, fundamental freedoms, recognized in the Treaties, are restricted by secondary legislation and the Court does not review the conformity of these restrictions with the Treaties – which are the parameters of the EU's rule of law. The CJEU is voluntarily abdicating of its role of "*Constitutional Court*" of the EU.

14. The positive aspect of the shift of emphasis of the Court with the *Dano* / *Alimanovic* case-law, accentuating Member State interests, could represent, also, the abandonment of countervailing constitutional arguments that could have justified a

⁶² F. Pennings, "EU citizenship: access to social benefits in other EU member states", *International Journal of Comparative Labour Law and Industrial Relations* 28 (2012), 307-334.

⁶³ A.P. van der Mei, "Overview of Recent Cases before the Court of Justice of the European Union (July-December 2015)"... 77.

⁶⁴ S. O'leary, "Developing an Ever Closer Union Between the Peoples of Europe? A reappraisal of the case-law of the Court of Justice on the free movement of persons and EU citizenship", *Yearbook of European Law* (2008) 182.

different outcome.⁶⁵ The idea of solidarity between Member States and an emphatic defence of the right to move and to reside, could be examples of arguments sacrificed.

Nobody denies that the Treaties and the Citizens' Directive trust the CJEU to define and control the limits of free movement. But the Court should be careful not to ignore the implications for social cohesion in the internal market and the constitutional and sociological foundations of social policy and the importance of the freedom of movement of citizens (independently of being economically active or not) to the notion of EU citizenship. The Court's approach runs the risk of downplaying the risks of this reduction, in effect, of the scope of the freedom of movement to encompass merely economically active citizens.

The assessment of individual cases, burdensome as it was, served the wider objective "*to ensure that the grant of assistance (...) does not become an unreasonable burden which could have consequences for the overall level of assistance*".⁶⁶

15. The radical change in the CJEU case-law can be especially criticised because it appears to have not been needed. The Court could have used criteria established in earlier judgments to exclude access to benefits in these cases.⁶⁷

For example, in the *Dano* case, Advocate General Wathelet submitted that the questions raised should be answered "*in the light of the principle of proportionality*" and of the case law of the CJEU on the existence of a "*genuine link*" between Union citizens and the host Member State.⁶⁸ The Advocate General refers, more specifically, to the case-law on the grant of assistance to students and social benefits for jobseekers, from which he infers that the entitlement of economically inactive Union citizens to social assistance benefits "*is, in general, dependent on a certain degree of integration into the host Member State*".⁶⁹

Also in the *Dano* case, the Court could have resorted to "*the excessive burden to the social security system of the host State*" criteria but, instead, chose as the reason to refuse access to benefits the non-fulfilment of residence requisites established in the Citizens' Directive.⁷⁰

So, the CJEU could have made an evaluation of the national legislation in light of the established jurisprudence, while arriving at the same conclusion (that the national legislation was compatible with the Treaties), but following a path which was coherent with its previous case-law and with less erosion of the rights to move and to reside.

16. Additionally, the recent case-law can also be criticised because of the absence of analysis of the cases in light of the EU Charter of Fundamental Rights.

As was referred *supra*, the EU Charter of Fundamental Rights was deemed non-

⁶⁵ D. Thym, "The Elusive limits of solidarity"...

⁶⁶ D. Thym, "The Elusive limits of solidarity"..., p. 32.

⁶⁷ H. Verschueren, "Preventing "benefit tourism" in the EU: A narrow or broad interpretation of the possibilities offered by the ECJ in *Dano*?", Common Market Law Review, vol. 52, No. 2 (2015) 363-390, 374.

⁶⁸ Advocate General Wathelet Opinion, delivered on 20 May 2014, *Dano*, C-333/13, recital 126.

⁶⁹ Advocate General Wathelet Opinion, delivered on 20 May 2014, *Dano*, C-333/13, recitals 127–129. The Advocate General refers to this effect to the judgments *Bidar*, of 15 March 2005, Case C-209/03, recitals 56 and 57; *Förster*, of 18 November 2008, Case C-158/07, recitals 48 and 49; *Collins*, of 23 March 2004, Case C-138/02, recital 67; *Vatsouras*, of 4 June 2009, Case C-22/08 and C-23/08, recital 38; *Prinz and Seeberger*, of 18 July 2013, Cases C-523/11 and C-585/11, recital 36; and *Thiele Meneses*, of 24 October 2013, Case C-220/12, recital 35.

⁷⁰ P. Jimenez Blanco, "Derecho de residencia en la Unión Europea y turismo social", *La Ley Unión Europea*, No. 22 (2015) 11.

applicable in the *Dano* case. In fact, despite the clear statement, in the *Åkerberg Fransson* case, that the Charter was applicable in all situations governed by European Union law,⁷¹ in the social rights arena, this clarity of purpose has eluded the Court.^{72/73}

Also, the connection between fundamental rights and EU citizenship, established in decisions such as the *Rottmann*⁷⁴ or the *Ruiz Zambrano*⁷⁵ cases, has been read in a much more restrictive manner in the *Cholakova*⁷⁶ or *Ymeraga*⁷⁷ cases.⁷⁸ The convergence of these tendencies with the *Dano* case-law results in a deficit of protection of non-economically active Union citizens who seek access to social benefits.

17. The CJEU's judgements in *Dano* and *Alimanovic* introduced a level of ambiguity on the EU citizens' right to free movement and freedom to reside in the territory of any EU Member State.

The right of a EU citizen to reside in a Member State other than its national State is made dependent on he/she's ability to support themselves and their family in order to avoid becoming an unreasonable burden on the social security system of the host State. There is an implied duty to have sufficient resources and the economically inactive citizens can apparently see their right of movement restricted. In fact, the only relevant circumstance after *Alimanovic* is the duration of economic activity – not the existence of genuine link to the Member State or the family status. EU citizenship is, therefore, once again related with worker status and the content of the EU citizenship as a fundamental and political status with no link with market economy, is being dismantled.

The *Dano* and *Alimanovic* cases can be seen as confirming as the Court now takes a back seat when it comes to protecting the legal status of economically inactive EU citizens.⁷⁹ The Court's analysis of the meaning of the Citizens' Directive could be interpreted to the effect that Member States are allowed to refuse to pay any social benefits, including social security benefits, to economically inactive Union citizens who do not have the right to reside under that Directive, namely because they do not possess sufficient resources of their own.⁸⁰ It is up to the EU legislator, through the Citizens' Directive, to define the legal status of EU citizens. The CJEU no longer refers to EU citizenship as the '*fundamental status*' of citizens and seems no longer willing to use the TFEU's provisions on EU citizenship and the rights attached to it to interpret the Directive.

⁷¹ Judgment *Åkerberg Fransson*, of 26 February 2013, Case C-617/10, recital 19.

⁷² V., *v.g.*, Judgments *Torralbo Marcos*, of 27 March 2014, Case C-265/13, recitals 29-30 and 43; *Julian Hernández*, of 10 July 2014, Case C-198/13, recitals 32-34, 37, and 48; *Ariza Toledano*, of 5 February 2015, Case C-117/14, recitals 28-29, and 42. In all these cases the Charter was considered not applicable.

⁷³ For an analysis of the more recent decisions, v. F. Fontanelli, "*The implementation of European Union law by Member States under Article 51(1) of the Charter of Fundamental Rights*", *The Columbia Journal of European Law*, vol. 20, No. 3 (2014) 193-247; J. Genberg, "*The scope of application of the Charter of Fundamental Rights of the European Union: quo vadimus?*", *Helsinki Law Review*, vol. 8, No. 1 (2014) 31-60.

⁷⁴ Judgment *Rottman*, of 2 March 2010, Case C-135/08.

⁷⁵ Judgment *Ruiz Zambrano*, of 8 March 2011, Case C-34/09.

⁷⁶ Order of the Court of 6 June 2013, *Cholakova*, C-14/13, recitals 28-29, 31.

⁷⁷ Judgment *Ymeraga*, of 8 May 2013, Case C-87/12, recitals 40 and 43.

⁷⁸ S. Iglesias Sánchez, "*Fundamental Rights and Citizenship of the Union at a Crossroads. A Promising Alliance or a Dangerous Liaison*", *European Law Journal*, vol. 20, No. 4 (2014) 466-467.

⁷⁹ A.P. van der Mei, "*Overview of Recent Cases before the Court of Justice of the European Union (July-December 2015)*"..., p. 77.

⁸⁰ H. Verschueren, "*Preventing 'Benefit Tourism' in the EU: A Narrow or Broad Interpretation of the Possibilities offered by the ECJ in Dano?*"... 378-379.

One may agree with the need to respect the will of the democratically legitimised legislator (national and European). However, if the EU is governed by the rule of law, it should be up to its highest Court to control the decisions of the legislatures, especially in times of socio-economic crises. The Citizens' Directive cannot be seen as giving the Member States *carte blanche* to discriminate between EU citizens.

18. Several questions remain.

What motivated this change? Is the CJEU being influenced by the political debates in the Member States on “*social tourism*”? Or is the *Dano/Alimanovic* case law driven by the view that the previous EU citizenship case law is now seen as having been too judicially activist?⁸¹ How far will the Court go? What is, then, left of the previous jurisprudence on this matter?

If, in terms of access to social assistance, EU citizens can only claim equal treatment if its residence in the territory of the host State complies with the conditions to lawfully reside there, established in the Citizens' Directive, what happens to those EU citizens whose right to reside in the host Member State are based on other EU instruments, such as Article 45 TFEU as in the *Saint-Prix* case,⁸² or on national law which is more favourable than the Directive (as in the *Martinez Sala* and *Trojani* cases)?

As Advocate General Wathelet pointed out, it is likely that the residence of the non-national EU citizens will be jeopardised in the event of being excluded from entitlement to subsistence benefits.⁸³ Without sufficient means of subsistence, the Union citizens could be considered “*illegal*”, which means that a consequence of the *Dano* jurisprudence is to allow for EU citizens to be classified as “*illegal migrants*”⁸⁴. Can they be expelled?

Is a right of Member States to discriminate economically inactive citizens being recognized? A kind of licence to discriminate unwritten in the Treaties, but established in a Directive? Can be used to such an end?

One can accept that there are financial reasons shared and approved by all Member States, which justify restrictions to the principle of equal treatment in regard to the granting of social assistance benefits to non-nationals residing in the territory of the host State. However, one cannot forget that, from the point of view of adversely affected citizens, this means that the free movement of citizens and workers in the European Union is still incomplete.

⁸¹ A.P. van der Mei, “Overview of Recent Cases before the Court of Justice of the European Union (July-December 2015)”... 77.

⁸² Judgment *Saint Prix*, of 19 June 2014, Case C-507/12.

⁸³ Advocate General Wathelet Opinion, delivered on 20 May 2014, *Dano*, C-333/13, recital 125.

⁸⁴ D. Thym, “The Elusive limits of solidarity”... 45.