Ferdinand Wollenschläger[*]

Consolidating Union Citizenship: Residence and Solidarity Rights for Jobseekers and the Economically Inactive in the post-Dano era

Paper to be presented at the
EUSA Fifteenth Biennial Conference, May 4–6, 2017, Miami
Panel 2A: "A Deconstruction of EU Citizenship?"

I. Consolidating Union Citizenship

The question of transnational free movement rights of economically inactive persons and the latter's access to social assistance constitutes a controversial and politically sensitive issue. For it raises the question, to which extent economically inactive Union citizens are entitled to social solidarity in the host Member State. The current political climate seems rather reserved, which has also had an impact on the Court's recent jurisprudence. Turning to the legal framework, the EU free movement regime contains a tension in this regard, making matters complicated and provoking debate: While, in order to prevent an unreasonable burden on the welfare systems of notably the wealthier Member States, self-sufficiency is demanded as a residence criterion, not possessing sufficient resources does not necessarily mean losing one's right to residence and to equal treatment. This tension goes back to the initial jurisprudence of the ECJ on Union citizenship and its subsequent codification in the Residence Directive 2004/38/EC (II.). It poses a challenge for determining free movement rights of non-market actors under the current EU rules – as the Court's jurisprudence demonstrates. The main part of this article explores this issue further and argues that we are witnessing a consolidation phase: Other than often assumed, the Dano judgment, at least from a legal point of view, does not constitute a paradigm shift. Moreover, the recent jurisprudence – generally speaking and this has to be stressed in view of the

[*] Prof. Dr. iur. The author holds a chair for Public Law, European Law and Public Economic Law at the Faculty of Law, University of Augsburg, Germany. A first draft of this paper was presented at the conference 'The Judicial Deconstruction of Union Citizenship. The Limits of Free Movement & Solidarity in the EU' at the University of Konstanz in April 2016.

widespread criticism it draws[1] – takes account of the current legal framework as concretised in the Residence Directive rather than questions it, notwithstanding problematic aspects of notably the Dano judgment (III.). Methodologically, these findings are based on a legal-doctrinal analysis of the EU free movement rules and their interpretation in the ECJ's jurisprudence.[2]

II. The introduction of Union citizenship: a turning point for free movement of economically inactive persons

1st A Free movement right for economically inactive persons: a 'paper declaration'?

With market freedoms already foreseeing a right of residence for market actors;[3] the ECJ awarding the same right from the mid-1980s onwards to students and recipients of services and the Free Movement Directives 90/364/EEC, 90/365/EEC and 93/96/EEC – having entered into force at the beginning of the 1990s after more than a decade of legislative procedure – closing the remaining gaps as far as economically inactive persons were concerned, the progress achieved by introducing a general right of free movement with the treaty of Maastricht in 1993 (currently Art 21 TFEU) seemed negligible. True, the existing guarantees were not absolute: the public-policy proviso allowing for expulsion of non-nationals on grounds of public order, security and health, as well as the stipulation of economic conditions to be fulfilled by economically inactive persons under the Free Movement Directives both give evidence of this. However, a general right of free movement 'subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect', simply seemed to carry over these restrictions. In view of this it is understandable that Art 21 TFEU was considered a 'paper

---

1 For an overall critical view on the recent jurisprudence A Farahat, 'Solidarität und Inklusion. Umstrittene Dimensionen der Unionsbürgerschaft' (2016) *Die Öffentliche Verwaltung* 45; C O'Brien, 'Civis capitalist sum: Class as the new guiding principle of EU free movement rights' (2016) 53 *CML Rev* 937, 943 ff, 961 ff, 973 ff – rightly stressing possible negative consequences in terms of permitting further restrictions on the free movement regime in general, which might be seen in the current debate on the free movement of workers; A Iliopoulou-Penot, 'Deconstructing the former edifice of Union citizenship? The Alimanovic judgment' (2016) 53 *CML Rev* 1007, 1015 ff; N Nic Shuibne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' (2015) 52 *CML Rev* 889. Positive: D Thym, 'When Union Citizens turn into illegal migrants: the Dano case' (2015) 40 *EL Rev* 249, 260 ff. Ambivalent: A Wallrabenstein, 'Die Gleichheit der Freiheit' (2016) *Zeitschrift für europäisches Sozial- und Arbeitsrecht* 349, 357.

2 See on "doctrinal constructivism" A von Bogdandy, 'The past and promise of doctrinal constructivism: A strategy for responding to the challenges facing constitutional scholarship in Europe' (2009) 7 *International Journal of Constitutional Law* 364, 371 ff; further idem, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch' (2010) 16 *European Law Journal* 95, 98 ff; A Somek, 'The Indelible Science of Law' (2009) 7 *International Journal of Constitutional Law* 424.

3 This section follows F Wollenschläger, 'A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration' (2011) 17 *European Law Journal* 1, 15 ff.

declaration'[4] and that any progress its introduction promised for European integration was considered small: 'Union Citizenship may have "constitutionalised" the Community law rights of free movement, but it has not added much that is substantially new to existing community law.'[5] These initial assessments, however, turned out to be unfounded.

First and foremost (and unlike what some commentators have proposed[6]) the reservation contained in Art 21 TFEU does not allow for any watering-down of this guarantee (and hence for denying its direct effect).[7] This norm confers on every Union citizen in a clear and precise manner a right of residence and in consequence it is directly applicable.[8] After initial reluctance,[9] the ECJ confirmed this interpretation in the Baumbast case and subsequent decisions.[10]

However, the fact that the right of residence is subject to restrictions laid down in primary and secondary EU law illustrates that, according to the Member States' will, the former are still applicable and that Art 21 TFEU does not confer an absolute right.[11] It is equally true, however, that the right of residence's significance cannot be interpreted without considering its re-posi-

---

4 D Pollard, 'Rights of Free Movement' in NA Neuwahl and A Rosas (eds), *The European Union and human rights* (The Hague, Martinus Nijhoff Publishers, 1995) 105, 116.

5 T Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: between past and future* (Manchester, Manchester University Press, 2001) 66. Equally restrictive: N Bernard, *Multilevel Governance in the European Union*, (The Hague, Kluwer Law International, 2002) 186 f; P Magnette, *La citoyenneté européene* (Bruxelles, Editions de l'Université de Bruxelles, 1999) 162: '"la valeur ajoutée" de la citoyenneté de l'Union apparaît nulle jusqu'à present'; D O'Keeffe, 'Union Citizenship' in D O'Keeffe (ed), *Legal Issues of the Maastricht Treaty* (Chichester, Chancery Law Publishing, 1994) 87, 93 f; S O'Leary, 'The relationship between community citizenship and the protection of fundamental rights in community law' (1995) 32 *CML Rev* 519, 519 f; idem, *European Union Citizenship: The Options for Reform* (London, Institute for Public Policy Research, 1996) 92; J Shaw, 'Citizenship of the Union: Towards Post-National Membership?' in Academy of European Law (ed), *Collected Courses – 1995 European Community Law* (The Hague, Kluwer Law International/Martinus Nijhoff Publishers, 1998) 247; idem, 'European Union Citizenship' (1997) 3 *European Public Law* 413, 416 f; JHH Weiler, 'Les droits des citoyens européens' (1996) *Revue Du Marché Unique Européen* 35, 39.

6 *cf* only W Kaufmann-Bühler in CO Lenz and K-D Borchardt (eds), *EGV*, 2nd edn (Köln, Bundesanzeiger Verlag, 1999), Art 18 EC, para 1 – repealed, however, in the 3rd edn (2003), Art 18 EC, para 1.

7 *cf* for an account of this debate F Wollenschläger, *Grundfreiheit ohne Markt. Die Herausbildung der Unionsbürgerschaft im unionsrechtlichen Freizügigkeitsregime* (Tübingen, Mohr Siebeck, 2007/reprint 2017) 126 f.

8 *cf* only Wollenschläger (n 7) 126 f.

9 Left open in ECJ, Case C-85/96 *Martínez Sala* [1998] ECR I-2691, para 60; Case C-378/97 *Wijsenbeek* [1999] ECR I-6207, paras 41 f; Case C-357/98 *Yiadom* [2000] ECR I-9265, para 23; Case C-192/99 *Kaur* [2001] ECR I-1237, paras 15, 28.

10 ECJ, Case C-413/99 *Baumbast* [2002] ECR I-7091, paras 80 f. Confirmed in Case C-456/02 *Trojani* [2004] ECR I-7573, para 31; Case C-408/03 *EC v Belgium* [2006] ECR I-2647, para 34; Case C-50/06 *EC v Netherlands* [2007] ECR I-4383, para 32; Case C-398/06 *EC v Netherlands* [2008] ECR I-56, para 27.

11 *cf* ECJ, Case C-456/02 *Trojani* [2004] ECR I-7573, para 32; Case C-50/06 *EC v Netherlands* [2007] ECR I-4383, para 33; Case C-398/06 *EC v Netherlands* [2008] ECR I-56, para 28; Case C-33/07 *Jipa* [2008] ECR I-5157, para 21; Case C-524/06 *Huber* [2008] ECR I-9705, para 54; AP van der Mei, *Free Movement of Persons within the European Community* (Oxford, Hart Publishing, 2003) 46 f; O'Leary (n 5) 136. The invalidity of the restrictions is advocated by V Constantinesco, 'La citoyenneté de l'Union' in J Schwarze (ed), *Vom Binnenmarkt zur Europäischen Union* (Baden-Baden, Nomos, 1993) 25, 29 f, as well as by the Portugese government (quoted in opinion of AG Alber, in ECJ, Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para 52).

tioning in a completely new normative context: The right of residence heads the TFEU's provisions on Union citizenship, a status shared by all Europeans and held independent of one's nationality and one's involvement in an economic activity. Moreover, the right of free movement has been re-evaluated: for economically active persons, it is now protected *per se* and not as an aspect of one's being engaged in a transnational economic activity; and for economically inactive persons, it has changed from being a guarantee enshrined in secondary law to one granted by primary law. This paradigm shift must be considered when interpreting Art 21 TFEU;[12] and indeed, it has been so considered, as the more restrictive application of the public policy proviso[13] and the economic conditions of residence demonstrate. This will be considered in the following section.

2nd Re-interpretation by the Court

In order not to provide incentives for a primarily economically-motivated migration and to protect the social systems of especially the wealthier Member States, the Free Movement Directives 90/364/EEC, 90/365/EEC and 93/96/EEC, in force at the time of the introduction of former Art 18 EC (= Art 21 TFEU), made the right of residence of economically inactive persons dependent on the economic conditions of sufficient means of existence and a comprehensive health insurance. Even more than was the case with the public policy proviso, these limitations were questioned in light of the new status of a Union citizenship shared by all Europeans, whether economically active or not. Consequently, these limitations were either rejected completely[14] or at least reduced to prohibiting the abuse of rights[15]:[16] 'When taken seriously, Union citizenship ought to be developed in such a way that both the "rich" and the "poor" can enjoy the rights that come with it.'[17] Or: 'Non è compatibile con la ratio ultima del nuovo statuto di cittadino europeo, che è quella dell'integrazione fra i popoli degli Stati membri, la quale non può trovare "mortificazione" in logiche di bilancio'.[18]

---

12 *cf* further M Dougan, 'The Constitutional Dimension to the Case Law on Union Citizenship' (2006) 31 *EL Rev* 613, 615; ECJ, Case C-378/97 *Wijsenbeek* [1999] ECR I-6201, opinion of AG Cosmas, para 80.

13 *cf* in this regard Wollenschläger (n 3) 17 f.

14 *cf* only E Pérez Vera, 'Citoyenneté de l'Union Européenne, Nationalité et Condition des Étrangers' (1996 [1998]) 261 *Recueil des Cours* 243, 350 f.

15 J Kokott, 'Die Freizügigkeit der Unionsbürger als neue Grundfreiheit' in PM Dupuy et al (eds), *Common Values in International Law: Essays in Honour of Tomuschat* (Kehl, N.P. Engel Verlag, 2006) 207, 221 f; DH Scheuing, 'Freizügigkeit als Unionsbürgerrecht' (2003) *Europarecht* 744, 769 f.

16 *cf* for an extensive account of the critique of the economic conditions of residence Wollenschläger (n 7) 166 f.

17 van der Mei (n 11) 220.

18 M Condinanzi and A Lang and B Nascimbene, *Cittadinanza dell'Unione e libera circolazione delle persone* (Milano, Giuffrè, 2003) 34.

However, the proviso contained in Art 18 EC (currently Art 21 TFEU) does not allow the economic conditions of residence set up by the (former) Free Movement Directives to be disregarded. Yet it is equally true, as a consequence of the introduction of Art 18 EC (= Art 21 TFEU), that these conditions henceforth constitute restrictions on a superordinate guarantee, ie one enshrined in primary law, meaning that the former must not restrict the latter in a disproportionate manner.[19] Hence, in accordance with the ECJ's jurisprudence, the right of free movement may be restricted with regard to the legitimate aim of protecting the financial interests of Member States, as provided for by the economic conditions set up by the (former) Free Movement Directives. However, these conditions must be applied in accordance with the principle of proportionality: Consequently, the fact that a student temporarily requires social assistance or that the health insurance does not cover all risks does not entitle the host Member State to expel a Union citizen.[20]

Already in the Grzelczyk-case[21] the ECJ relativised the economic conditions of residence and allowed a student temporarily not fulfilling them to invoke Art 18 EC (= Art 21 TFEU). This decision, however, was based on a different methodological approach. The ECJ interpreted the economic conditions of residence strictly in line with the criterion of financial solidarity among Member States demanded by the Directive, but did not apply the principle of proportionality.[22]

3rd Consolidation by the Union legislator

Despite all the criticism coming from the Member States of the ECJ's jurisprudence, the community legislator has written this partial relativisation of the economic conditions of residence into the new Free Movement Directive 2004/38/EC, whose Art 6 now grants an unconditional right of residence for a period of up to three months. However, if a Union citizen becomes an unreasonable burden on the host Member State's system of social assistance, she/he may be expelled (Art 14(1)).[23] The right of residence of persons who are economically inactive for more than three months continues to depend on the economic conditions of having sufficient means

---

19 *cf* Wollenschläger (n 7) 176 f; further E Spaventa, 'Seeing the Wood despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects' (2008) 45 *CML Rev* 13, 26 f.

20 ECJ, Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paras 90 f; Case C-456/02 *Trojani* [2004] ECR I-7573, paras 30 f; Case C-200/02 *Chen/Zhu* [2004] ECR I-9925, para 33; Case C-408/03 *EC v Belgium* [2006] ECR I-2647, paras 38 f; Case C-398/06 *EC v Netherlands* [2008] ECR I-56, para 29.

21 ECJ, Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paras 37 f.

22 *cf* for an extensive account of the development of the ECJ's jurisprudence: Wollenschläger (n 7) 170 f.

23 During this three-month period a Union citizen does not enjoy the right of national treatment in respect of social assistance (*cf* Art 24(2) of the Dir 2004/38/EC).

of existence and a comprehensive health insurance (Art 7(1)(b) and (c)).[24] However, codifying the Court's jurisprudence in the Grzelczyk-case,[25] according to Art 14(3) an 'expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State'.[26] Hence, the latter is obliged to weigh the conflicting interests before deciding on an expulsion. Recital 16 of the directive lists criteria to be taken into account: 'The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion.'[27]

Finally, a substantial innovation of the new Residence Directive has been the introduction of a permanent right of residence for a Union citizen if she/he has resided legally for a continuous period of five years in the host Member State (Arts 16 and 17).[28] Once acquired, this right does not depend on the fulfilment of economic conditions, applying to economically active and inactive persons alike. This means that it is not possible to expel a Union citizen for economic reasons, even if she/he requires social assistance for the rest of his life. Recital 17 of Directive 2004/38/EC declares in this respect: 'Enjoyment of permanent residence by Union citizens who have chosen to settle long term in the host Member State would strengthen the feeling of Union

---

24 The economic 'conditions' of residence – like the public policy proviso (*cf* in this respect ECJ, Case C-48/75 *Royer* [1976] ECR 497, paras 28 f; Case C-118/75 *Watson and Belman* [1976] ECR 1185, para 20; Case C-157/79 *Regina/Pieck* [1980] ECR 2171, para 9) – should not be considered conditions in the sense that their non-fulfilment automatically terminates the right of residence; rather their non-fulfilment only allows for an expulsion of the Union citizen in question. *Cf* Wollenschläger (n 7) 180 f, 187 f. Similarly C Schönberger, 'Die Unionsbürgerschaft als Sozialbürgerschaft' (2006) *Zeitschrift für Ausländerrecht und Ausländerpolitik* 226, 228. Disagreeing D Thym, 'Sozialleistungen für und Aufenthalt von nichterwerbstätigen Unionsbürgern' (2014) *Neue Zeitschrift für Sozialrecht* 81, 86 f; idem (n 1) 259; idem, 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens' (2015) 52 *CML Rev* 17, 39 ff; see further with regard to the right of permanent residence ECJ, Joined Cases C-424/10 and C-425/10 *Ziolkowski et al* [2011] ECR I-14035, paras 36 ff.

25 Art 14(3) has been introduced only in the Common Position of the Council of 5 December 2003, *cf* Common Position (EC) No 6/2004 of 5 December 2003 [2004] OJ C54/12 (Arts 14 and 15). *Cf* also the Communication from the Commission to the European Parliament, SEK (2003) 1293 final, sub 3.3.2 (Arts 14 and 15).

26 A relativisation may already be seen in the (English version of the) provision of Art 7(1)(b) Dir 2004/38/EC since it requires the Union citizen to 'have sufficient resources for themselves and their family members *not to become a burden on the social assistance system* of the host Member State during their period of residence' (emphasis by the author). The German version is worded stricter by defining the threshold not with regard to a burden on the social assistance system, but with regard to having to rely on social assistance ('für sich und seine Familienangehörigen über ausreichende Existenzmittel verfügt, so dass sie während ihres Aufenthalts keine Sozialhilfeleistungen des Aufnahmemitgliedstaats in Anspruch nehmen müssen'). See on this divergence also Nic Shuibne (n 1) 896 f.

27 The indeterminacy of these criteria is criticised by K Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42 *CML Rev* 1245, 1260 f.

28 *cf* in view of the five-year-criterion ECJ, Case C-162/09 *Lassal* [2010] ECR I-9217, opinion of AG Trstenjak, para 40.

citizenship and is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union.'

III. Residence and solidarity rights for jobseekers and the economically inactive under the current legal framework

The ECJ's jurisprudence on the right to residence of economically inactive persons and its subsequent codification in the Residence Directive 2004/38/EC, which have been outlined in the previous section, imply a tension.[29] On the one hand, in order to protect the social assistance systems of the Member States (*cf* recital 10 Directive 2004/38/EC), economic conditions of residence apply. On the other hand, in view of the fundamental right of residence, these conditions are not to be understood too strictly, notably not fulfilling them does not necessarily mean losing one's right of residence.[30] Not surprisingly, this tension, touching upon the sensitive issue of access of economically inactive persons to social assistance, has led to controversial debates not only in academia, but also in the political sphere. Moreover, the ECJ had to face the challenge of how to cope with it.

Against this background, the following section will examine the acquisition and loss of residence rights by jobseekers and the economically inactive under the Residence Directive 2004/38/EC. It will focus on the situation of persons staying for longer than three months in the host Member State, but not having yet acquired the right to permanent residence. For, no economic criteria apply to the right of residence of all other Union citizens. Moreover, persons not falling within this category are also either not entitled (duration of stay < 3 months)[31] or entitled (right to permanent residence) to social assistance irrespective of the circumstances in the individual case.

---

29 See also Thym (n 24) 26.

30 See on the relativisation contained in the (English) wording of Art 7(1)(b) Dir 2004/38/EC already above, n 24.

31 Confirmed in ECJ, Case C-299/14 *García-Nieto* ECLI:EU:C:2016:114, paras 45 ff, and rightly so as proportionate: 'Since the Member States cannot require Union citizens to have sufficient means of subsistence and personal medical cover for a period of residence of a maximum of three months in their respective territories, it is legitimate not to require those Member States to be responsible for those citizens during that period. In that context, it must also be stated that, although Directive 2004/38 requires the host 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 …, no such individual assessment is necessary in circumstances such as those at issue in the main proceedings. In the judgment in *Alimanovic* …, the Court stated that Directive 2004/38, 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. Therefore, 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 of Mr Peña Cuevas in the main proceedings.'

After showing why residence matters (1.) the relevance of the economic residence criteria, notably as interpreted in the recent jurisprudence of the ECJ, will be explored (2.). Particular attention is drawn to the issue of proportionality (3.). Moreover, the relevance of the fundamental right to social assistance guaranteed by Art 34 of the EU Charter of fundamental rights (CFR) is discussed (4.). A final section focuses on the situation of former workers and of jobseekers finding themselves in between the spheres of market and non-market actors in view of their janus-faced status and thus posing a specific challenge (5.).

1st Why residence matters

Residence matters. For, enjoying a right to residence does not only mean protection from expulsion. Rather, the claim to non-discrimination and the acquisition of the right to permanent residence depend upon it. First, Art 24(1) Directive 2004/38/EC grants a claim to equal treatment with the nationals of the host Member State to 'all Union citizens residing on the basis of this Directive in the territory of the host Member State'. This nexus has recently been stressed in García-Nieto: 'As regards access to such benefits, 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 territory of the host Member State complies with the conditions of Directive 2004/38'.[32] Second, according to Art 16(1) sentence 1 Directive 2004/38/EC, the right of permanent residence is granted to 'Union citizens who have resided legally for a continuous period of five years in the host Member State'. This nexus has been confirmed in Ziolkowski et al: 'It follows that the concept of legal residence implied by the terms "have resided legally" in Article 16(1) of Directive 2004/38 should be construed as meaning a period of residence which complies with the conditions laid down in the directive, in particular those set out in Article 7(1). Consequently, a period of residence which complies with the law of a Member State but does not satisfy the conditions laid down in Article 7(1) of Directive 2004/38 cannot be regarded as a "legal" period of residence within the meaning of Article 16(1).'[33]

2nd Relativity of the economic residence criteria

The initial jurisprudence of the ECJ on Union citizenship and its subsequent codification in the Residence Directive 2004/38/EC have introduced a certain flexibility regarding the application of the economic residence criteria. The Brey case constitutes a recent example of this approach

---

32 ECJ, Case C-299/14 *García-Nieto* ECLI:EU:C:2016:114, para 38. Similarly, Case C-67/14 *Alimanovic*, ECLI:EU:C:2015:597, paras 51 f; Case C-333/13 *Dano* ECLI:EU:C:2014:2358, paras 68 f.

33 ECJ, Joined Cases C-424/10 and C-425/10 *Ziolkowski et al* [2011] ECR I-14035, paras 46. *Cf* on the issue of permanent residence which is not discussed any further here Nic Shuibne (n 1) 916 ff.

(a). The Dano case, although sometimes read in the opposite sense (b), has not altered this, although it has emphasised the rule-exception-ratio underlying the Residence Directive (c).

a) Brey: the orthodox approach

The Court's proportionality approach was most recently reflected in the Brey case handed down on 19 September 2013. It concerned German pensioners living in Austria who applied for a compensatory supplement intended to augment their retirement pension. The allowance was refused by the Austrian authorities since the claimants did not possess sufficient resources and thus did not have a right to residence as economically inactive persons under Directive 2004/38/EC.

The Court conceded, on the one hand, that 'the fact that a national of another Member State who is not economically active may be eligible, in light of his low pension, to receive that benefit could be an indication that that national does not have sufficient resources to avoid becoming an unreasonable burden on the social assistance system of the host Member State for the purposes of Article 7(1)(b) of Directive 2004/38'.[34] On the other hand, however, the Court continued by stressing that 'the competent national authorities cannot draw such conclusions without first carrying out an overall assessment of the specific burden which granting that benefit would place on the national social assistance system as a whole, by reference to the personal circumstances characterising the individual situation of the person concerned.'[35]

b) Dano: a paradigm shift?

A deviation from the orthodox approach, even a full restoration of the economic residence criteria is seen by some in the Dano case handed down only a little more than one year later on 11 November 2014. True, the ECJ's ruling reflects a strict reading of the economic residence criteria, since it does not discuss any relativisation in view of proportionality requirements, and moreover emphasises the directive's goal to protect the social system of the host Member State as well as its manifestation in the limitations on the right of residence of eceonomically inactive persons:

> In order to determine whether economically inactive Union citizens … whose period of residence in the host Member State has been longer than three months but shorter than five years, can claim equal treatment with nationals of that Member State so far as concerns entitlement to social benefits, it must therefore be examined whether the residence of those citizens complies with the conditions in Article 7(1)(b) of Directive 2004/38. Those conditions include the requirement that the economically inactive Union citizen must have sufficient resources for himself and his family members.

---

34 ECJ, Case C-140/12 *Brey* ECLI:EU:C:2013:565, para 63.

35 ECJ, Case C-140/12 *Brey* ECLI:EU:C:2013:565, para 64.

To accept that persons who do not have a right of residence under Directive 2004/38 may claim entitlement to social benefits under the same conditions as those applicable to nationals of the host Member State would run counter to an objective of the directive, set out in recital 10 in its preamble, namely preventing Union citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system of the host Member State.

It should be added that, as regards the condition requiring possession of sufficient resources, Directive 2004/38 distinguishes between (i) persons who are working and (ii) those who are not. Under Article 7(1)(a) of Directive 2004/38, the first group of Union citizens in the host Member State have the right of residence without having to fulfil any other condition. On the other hand, 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.

Therefore, 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 …

As the Advocate General has observed in points 93 and 96 of his Opinion, 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.

A 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.[36]

The question remains, however, which general conclusions may be drawn from the judgment. This leads over to the next section.

c) Residence and solidarity rights for jobseekers and the economically inactive in the post-Dano era

With regard to Dano,[37] it has to be stressed that the outcome of the case (denial of a claim to social assistance) seems totally justifiable in view of the reported facts (migration solely to gain access to social benefits).[38] Moreover, in view of the controversial debate on free movement of economically inactive persons, it might have been wise of the Court not to add fuel to the flames by relativising the clear result by proportionality considerations not relevant for the outcome.[39]

---

36 ECJ, Case C-333/13 *Dano* ECLI:EU:C:2014:2358, paras 73 ff.

37 *cf* for this (restrictive) evaluation (in terms of consequences of the Dano judgment) already F Wollenschläger, 'Keine Sozialleistungen für nichterwerbstätige Unionsbürger? Zur begrenzten Tragweite des Urteils des EuGH in der Rechtssache Dano vom 11.11.2014' (2014) *Neue Zeitschrift für Verwaltungsrecht* 1628, 1629 f; further E Eichenhofer, 'Ausschluss von ausländischen Unionsbürgern aus deutscher Grundsicherung?' (2015) *Europarecht* 73, 77 f; D Kramer, 'Earning Social Citizenship in the European Union: Free Movement and Access to Social Assistance Benefits Reconstructed' (2016) *18 Cambridge Yearbook of European Legal Studies* 270, 293 ff; Thym (n 24) 25 f. A wider interpretation (in terms of inapplicability of the proportionality test) is assumed by Nic Shuibne (n 1) 913 f; S Peers, 'Benefits for EU citizens: a u-turn by the Court of Justice?' (2015) 74 *CLJ* 195, 196 f. *Cf* for a contrast of a restrictive and broad interpretation H Verschueren, 'Preventing "Benefit Tourism" in the EU: A narrow or broad interpretation of the Possibilities Offered by the ECJ in Dano?' (2015) 52 *CML Rev* 363, 370 ff, and in favour of the former ibid, 388 f.

38 *cf* also Verschueren (n 37) 373. Considering the motivation for migration immaterial Thym (n 1) 258 f.

39 See also Thym (n 1) 253, 260 f; further Nic Shuibne (n 1) 902 f.

Finally, the Court has stressed that the fulfilment of the economic criteria is the rule (for enjoying a right of residence as economically inactive person) and a deviation from this is only permissible in exceptional cases.[40]

However, the Court's ruling has to be criticised from a methodological perspective.[41] There is no reference to its former case-law and the corresponding provisions in the Residence Directive mitigating the dividing line between market and non-market actors. Apart from this, it has to be stressed that not applying the proportionality test is not only contrary to the court's understanding of Art 21 TFEU, but also contrary to the Residence Directive and thus not in line with EU law. While it is true that Art 7(1)(b) Directive 2004/38/EC stipulates economic residence criteria (sufficient resources and comprehensive sickness insurance), it is equally true that not fulfilling them does not necessarily terminate the right to residence. In contrast, Art 14(3) Directive 2004/38/EC explicitly states that '[a]n expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State.' Moreover, the economic criterion itself is worded in an open way since Art 7(1)(b) Directive 2004/38/EC does not require possessing 'sufficient resources', but 'sufficient resources *not to become a burden on the social assistance system of the host Member State during their period of residence*' (emphasis added, see already n 24).

In line with this, the Court has in the subsequent Alimanovic-judgment, handed down on 15 September 2015, equated enjoying a right of residence with the prohibition of an automatic expulsion: 'Only two provisions of Directive 2004/38 may confer on job-seekers in the situation of Ms Alimanovic and her daughter Sonita a right of residence in the host Member State under that directive, namely Article 7(3)(c) and Article 14(4)(b) thereof.'[42] The same must apply to other economically inactive persons with regard to Art 14(3) Directive 2004/38/EC.

This has been confirmed by the Court in the García-Nieto-judgment handed down on 25 February 2016: 'In that context, it must also be stated that, although Directive 2004/38 requires the host 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 [Brey], no such individual assessment is necessary in

---

40 *cf* for an emphasis on a transition in the understanding of the key aim of the directive from facilitating free movement to preventing burdens on the national welfare systems Kramer (n 37) 290; Nic Shuibne (n 1) 903; Thym (n 24) 25; idem (n 1) 254 f.

41 See also Nic Shuibne (n 1) 916; Thym (n 1) 252 ff.

42 ECJ, Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597, para 52.

circumstances such as those at issue in the main proceedings.'[43] The circumstances of the García-Nieto case were characterised by the fact that a period of residence not exceeding three months was at stake for which Art 24(2) Directive 2004/38/EC explicitly (and in line with primary EU law) excludes an entitlement to social assistance.[44]

Hence, the proportionality test continues to apply for economically inactive Union citizens residing between three months and five years in the host Member State. Not only may Dano – in view of the Court's established case-law from the pre-Dano era and its subsequent confirmation in Alimanovic and García-Nieto – be understood to the contrary;[45] such an understanding would also require an amendment of Arts 7(3)(b) and 14(3) of Directive 2004/38/EC.[46] It has to be added, though, that the scope of application of the proportionality test is rather limited in view of the specific provisions of the Directive regarding certain economically inactive persons, notably students (Art 24(2) Directive 2004/38/EC), first-time jobseekers (Art 24(2) Directive 2004/38/EC; *cf* below III.5.a) and former workers (Art 7(3) Directive 2004/38/EC; *cf* below III.5.b); moreover, it has to be recalled that the threshold for being qualified as worker is relatively low,[47] so that, for instance, an employed person having to rely on in-work benefits supplementing her/his salary to the minimum level of subsistence would count as worker, but not as an economically inactive person.[48]

3rd Assessment of proportionality

Undoubtedly, making the right of residence dependent on an assessment of proportionality in each individual case entails legal uncertainty. This problem is mitigated by the fact that the ECJ has refrained from questioning clear rules in the Directive[49] by requiring or applying a proportionality test, notably in the case of students,[50] economically inactive persons residing for less

---

43 ECJ, Case C-299/14 *García-Nieto* ECLI:EU:C:2016:114, para 46.

44 See supra, n 31.

45 *cf* also Kramer (n 37) 294 f.

46 *cf* also Verschueren (n 37) 379, 383 ff, 388.

47 See only ECJ, Case C-27/91 *URSSAF* [1991] I-5531, para 8; Case C-3/90 *Bernini* [1992] I-1071, paras 15 f; Case C-213/05 *Geven* [2007] I-6347 (6362), para 7; Case C-53/81 *Levin* [1982] 1035, paras 11 ff; Case C-139/85 *Kempf* [1986] 1741, paras 13 ff; Case C-14/09 *Genc* [2010] ECR I-931, paras 19 ff; for an overview Wollenschläger (n 7) 60 ff. Despite the theoretically wide concept, O'Brien (n 1) 937 ff, 953 ff, identifies a tendency towards a restrictive understanding in the Member States' legislation and practice which is considered particular problematic in view of changing patterns in the labour market and the proliferation of low-paid and insecure employment (like zero hours contracts).

48 See also Peers (n 37) 198.

49 See from a general perspective in terms of separation of powers Iliopoulou-Penot (n 1) 1030 ff.

50 *cf* ECJ, Case C-158/07 *Förster* [2008] ECR I-8507 – even before the directive entered into force.

than three months[51] and former workers (seeking a job)[52].[53] However, in cases in which the Directive contains ambiguous provisions – like in the case of the right to residence for economically inactive persons before having acquired a right to permanent residence with regard to expulsion not being the automatic consequence of a person having recourse to the social assistance system – the issue of legal uncertainty remains; it may only be mitigated by a gradual consolidation of the case-law.[54] Against the background of this distinction between settled and open issues with regard to Directive 2004/38/EC it seems wrong to parallelise Dano (regarding the latter) on the one hand and Alimanovic and García-Nieto (regarding the former).[55]

With regard to the proportionality test, one open issue is whether the claimant's becoming an unreasonable burden on the Member State's social assistance system has to be assessed with regard to the individual claimant or the impact on the social system as such.[56] The latter reading might be supported by the Brey-judgment asking for an 'overall assessment of the specific burden which granting that benefit would place on the national social assistance system as a whole'.[57] However, such a test can hardly be met as the ECJ rightly stressed in Alimanovic:

> Moreover, as regards the individual assessment for the purposes of making an overall appraisal of the burden which the grant of a specific benefit would place on the national system of social assistance at issue in the main proceedings as a whole, it must be observed that the assistance awarded to a single applicant can scarcely be described as an 'unreasonable burden' for a Member State, within the meaning of Article 14(1) of Directive 2004/38. However, while an individual claim might not place the Member State concerned under an unreasonable burden, the accumulation of all the individual claims which would be submitted to it would be bound to do so.[58]

Hence, it seems preferable to relate unreasonableness to the situation of the individual claimant.[59]

4th Relevance of the fundamental right to social assistance (Art 34 CFR)

Art 34 of the Charter of Fundamental Rights of the European Union contains a (social) right to social security and social assistance:

---

51 ECJ, Case C-299/14 *García-Nieto* ECLI:EU:C:2016:114.

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

53 See for a critical view in terms of the one-sided outcome Iliopoulou-Penot (n 1) 1023 ff. See also Kramer (n 37) 294 f, 299.

54 On the issue of legal certainty Iliopoulou-Penot (n 1) 1025 ff.

55 See, eg Farahat (n 1) 49 ff; O'Brien (n 1) 948 ff; Iliopoulou-Penot (n 1) 1015 ff, 1028 – relativised, however, at ibid, 1023 ff.

56 In more detail Thym (n 24) 27 ff.

57 ECJ, Case C-140/12 *Brey* ECLI:EU:C:2013:565, para 63.

58 ECJ, Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597, para 62. *Cf* for a critical view Iliopoulou-Penot (n 1) 1027 ff. *Cf* also Case C-333/13 *Dano* ECLI:EU:C:2014:2358, para 74; Case C-299/14 *García-Nieto* ECLI:EU:C:2016:114, para 50.

59 *cf* also – understanding 'the individual standard as a proxy for the systemic argument' – Thym (n 24) 30 ff. See for a critical view O'Brien (n 1) 950.

(1) The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices.

(2) Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices.

(3) In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices.

While it is true that deriving social entitlements directly from fundamental rights must be the exception, notably in view of the primacy of the democratically-legitimised legislator, which is also reflected by the numerous references to EU and national law and practices in the aforementioned Charta provision,[60] and moreover the difficult question of how to distribute the social responsibility between the home and the host Member State has to be answered, the relevance of this Charter right in view of entitlement of economically inactive persons has to be nonetheless determined (this issue is discussed in more detail in the contribution of *Niamh Nic Shuibhne* in this volume).

In Dano, the Court avoided addressing this fundamental rights issue by a limine denying the applicability of the Charter. For, Member States would not be implementing EU law as required by Art 51(1) CFR which has to be interpreted strictly:

> In paragraph 41 of the judgment in Brey (EU:C:2013:565), the Court confirmed that Article 70 of Regulation No 883/2004, which defines the term 'special non-contributory cash benefits', is not intended to lay down the conditions creating the right to those benefits. It is thus for the legislature of each Member State to lay down those conditions.
>
> Accordingly, since those conditions result neither from Regulation No 883/2004 nor from Directive 2004/38 or other secondary EU legislation, and the Member States thus have competence to determine the conditions for the grant of such benefits, they also have competence, as the Advocate General has observed in point 146 of his Opinion, to define the extent of the social cover provided by that type of benefit.
>
> Consequently, when the Member States lay down the conditions for the grant of special non-contributory cash benefits and the extent of such benefits, they are not implementing EU law.[61]

Denying an implementation of EU law within the meaning of Art 51(1) CFR despite extensive deliberations in the judgment on the interpretation of EU law regarding access of economically inactive persons to social assistance, may be considered surprising.[62] Moreover, this approach

---

[60] *cf* only F Wollenschläger, 'Grundrechtsschutz und Unionsbürgerschaft' in A Hatje and P-C Müller-Graff (eds), *Enzyklopädie Europarecht*, vol 2 (Baden-Baden, Nomos, 2014) § 8 para 48.

[61] ECJ, Case C-333/13 *Dano* ECLI:EU:C:2014:2358, paras 89 ff.

[62] See for a critical view Nic Shuibne (n 1) 914 f; Thym (n 24) 48; Verschueren (n 37) 386 f; A Wallrabenstein, 'Wie Florin zwischen die Stühle rutschte – Die Unionsbürgerschaft und das menschenwürdige Existenzminimum' (2016) *JuristenZeitung* 109, 116 f; R Zahn, '"Common Sense" or a Threat to EU Integration? The Court, Economically Inactive EU Citizens and Social Benefits' (2015) 44 *Industrial Law Journal* 573, 583 f.

contrasts with the ECJ's Kamberaj judgment of 24 April 2012 in which the Court reverted to Article 34 CFR to interpret EU secondary law:

> Article 11(4) of Directive 2003/109 must be understood as allowing Member States to limit the equal treatment enjoyed by holders of the status conferred by Directive 2003/109, with the exception of social assistance or social protection benefits granted by the public authorities, at national, regional or local level, which enable individuals to meet their basic needs such as food, accommodation and health.
>
> In that regard, it should be recalled that, according to Article 34 of the Charter, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources. It follows that, in so far as the benefit in question in the main proceedings fulfils the purpose set out in that article of the Charter, it cannot be considered, under European Union law, as not being part of core benefits within the meaning of Article 11(4) of Directive 2003/109. It is for the referring court to reach the necessary findings, taking into consideration the objective of that benefit, its amount, the conditions subject to which it is awarded and the place of that benefit in the Italian system of social assistance.[63]

Moreover, the German Supreme Social Court (Bundessozialgericht) has advocated an even stricter reading of fundamental rights, inter alia in its judgment in the Alimanovic case referred to the ECJ, by granting economically inactive Union citizens whose residence has become stable (which is usually assumed after a stay of six months) access to social assistance according to § 23(1) sentence 3 Social Code XII in view of the constitutional guarantee of a minimum subsistence level.[64] This jurisprudence is controversially debated[65] and questioned by some lower social courts[66]; moreover, in a recent amendment to the Social Code II,[67] the legislator has explicitly rejected this jurisprudence – the compatibility of this legislation with (national) fundamental rights (and, by the way, also with EU law) remains to be seen, though.[68]

---

63 ECJ, Case C-571/10 *Kamberaj* ECLI:EU:C:2012:233, paras 91 f.

64 German Supreme Social Court (Bundessozialgericht), Decision of 3 December 2015, B 4 AS 44/15 R, paras 36 ff; *cf* also Decisions of 20 January 2016, B 14 AS 15/15 R and B 14 AS 35/15 R, Press Release no 1/16 of the German Supreme Social Court referring to social assistance for jobseekers.

65 I Kanalan, 'Das Menschenrecht auf das Existenzminimum ernst genommen – Sozialleistungsansprüche von Unionsbürger_innen' (*Verfassungsblog*, 1 March 2016) <http://verfassungsblog.de/das-menschenrecht-auf-das-existenzminimum-ernst-genommen-sozialleistungsansprueche-von-unionsbuerger_innen/> accessed 3 January 2017; F Wilksch, 'Das BSG und die Existenzsicherung arbeitssuchender und wirtschaftlich inaktiver Unionsbürger*innen' (*Juwiss-Blog*, 15 December 2015 and 16 December 2015) <https://www.juwiss.de/89-2015/> and <https://www.juwiss.de/90-2015/> accessed 3 January 2017.

66 Social Court of Second Instance Rheinland-Pfalz (Landessozialgericht Rheinland-Pfalz), Decision of 11 February 2016, L 3 AS 668/15 B ER, paras 22 ff; Social Court of First Instance Dortmund (Sozialgericht Dortmund), Decision of 11 February 2016, S 35 AS 5396/15 ER, paras 23 ff; Social Court of First Instance Berlin (Sozialgericht Berlin), Decision of 11 December 2015, S 149 AS 7191/13, paras 26 ff. Social Court of Second Instance Niedersachsen-Bremen (Landessozialgericht Niedersachsen-Bremen), Decision of 17 March 2016, L 9 AS 1580/15 B ER.

67 Gesetz zur Regelung von Ansprüchen ausländischer Personen in der Grundsicherung für Arbeitsuchende nach dem Zweiten Buch Sozialgesetzbuch und in der Sozialhilfe nach dem Zwölften Buch Sozialgesetzbuch vom 22. Dezember 2016, BGBl 2016 I, 3155.

68 *cf* on the Dutch model of a 'sliding scale' Kramer (n 37) 283 ff.

5th Situation of jobseekers and former workers

a) First-time jobseekers

First-time jobseekers enjoy an unconditional right of residence in economic terms. Hence, there is no issue regarding fulfilment of economic criteria. The only limitation refers to the chances of finding a new job. They 'may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged' [Art 14(4)(b) Directive 2004/38/EC]. The downside of this privileged position in terms of economic residence criteria is, however, a complete exclusion from access to social assistance [Art 24(2) Directive 2004/38/EC] – a situation which corresponds to the pre-citizenship Acquis as confirmed in the Lebon-ruling of 18 June 1987[69].

Yet, the partial extension of the claim to social solidarity to economically inactive persons, as a consequence of the introduction of Union citizenship, (see supra, II.) raised the question whether this development had to be transferred to the treatment of jobseekers, which seemed all the more justified since jobseekers, unlike other economically inactive persons, may be qualified as potential market actors and thus enjoy a janus-faced status[70].[71] The Court adopted this position and explicitly overruled Lebon in its Collins-judgment handed down on 23 March 2004: 'In view of the establishment of citizenship of the Union and the interpretation in the case-law of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of [Art 45 para. 2 TFEU] – which expresses the fundamental principle of equal treatment, guaranteed by [Art 18 TFEU] – a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State. The interpretation of the scope of the principle of equal treatment in relation to access to employment must reflect this development, as compared with the interpretation followed in Lebon …'.[72] There were, however, limits to this claim to equal treatment. For, the Member States were allowed to introduce conditions for access to such benefits securing a 'connection between persons who claim entitlement to such an allowance and [the host Member State's] employment market'.[73]

---

69 ECJ, Case 316/85 *Lebon* [1987] ECR 2811, paras 25 f. For a critical view: M Dougan, 'Free Movement: The Workseeker as Citizen' (2001) 4 *Cambridge Yearbook of European Legal Studies* 93, 98 f.

70 *cf* also ECJ, Joined Cases C-22 and C-23/08 *Vatsouras and Koupatantze* [2009] ECR I-4585, opinion of AG Colomer, para 55: jobseekers 'are midway between being engaged in economic activity and not being so engaged'.

71 See on this development F Wollenschläger, 'The judiciary, the legislature and the Evolution of Union citizenship' in P Syrpis (ed), *The Judiciary, the legislature and the EU Internal Market* (Cambridge, Cambridge University Press, 2012) 302, 315 ff.

72 ECJ, Case C-138/02 Collins [2004] ECR I-2703, paras 63 f.

73 ECJ, Case C-138/02 Collins [2004] ECR I-2703, paras 67 f.

The conflict of this jurisprudence with the explicit and complete exclusion of jobseekers from entitlement to social assistance in Art 24(2) Directive 2004/38/EC was evident.[74] In recent rulings, however, the Court – after having had confirmed and even widened the Collins-jurisprudence[75] – has narrowed it down by findings not always in line with former judgments and notably by excluding social assistance within the meaning of Art 24(2) Directive 2004/38/EC from the scope of application of the Collins-jurisprudence.[76] Thus, the only question which remains (open) is whether the complete exclusion of jobseekers from access to social assistance provided for by Art 24(2) Directive 2004/38/EC conflicts with the proportionality-based concept regarding economically inactive persons not seeking employment and is therefore in line with EU primary law.[77]

b) Former workers (unemployment)

Regarding former and now unemployed workers (whether looking for a new job or not), Art 7(3) Directive 2004/38/EC contains a distinction in terms of the retention of their status as worker (associated with an unconditional right of residence and access to social benefits), which is based on the duration of previous employment:

> For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances …
>
> (b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;
>
> (c) he/she 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 twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;

In Alimanovic, the Court has confirmed this clear distinction as proportionate and not required a further individual assessment for persons having worked for less than one year (lit c):

---

74 See only Wollenschläger (n 71), 324 ff; further Iliopoulou-Penot (n 1) 1009 ff.

75 See ECJ, Case C-258/04 *Ioannidis* [2005] ECR I-8275; Joined Cases C-22 and C-23/08 *Vatsouras and Koupatantze* [2009] ECR I-4585; Case C-367/11 *Prete* ECLI:EU:C:2012:668.

76 ECJ, Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597, paras 40 ff; further Case C-299/14 *García-Nieto* ECLI:EU:C:2016:114, para 37. See, however, ECJ, Joined Cases C-22 and C-23/08 *Vatsouras and Koupatantze* [2009] ECR I-4585, paras 42 ff. *Cf* for a critical view on Alimanovic in this respect O'Brien (n 1) 947 f; Iliopoulou-Penot (n 1) 1019 f.; Wallrabenstein (n 1) 354.

77 Disagreeing (proportionate): ECJ, Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597, opinion of AG Wathelet, para 98, and Case C-299/14 *García-Nieto* ECLI:EU:C:2016:114, paras 73 ff. *Cf.* also Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597, para 58: 'It follows from the express reference in Article 24(2) of Directive 2004/38 to Article 14(4)(b) thereof that the host Member State may refuse to grant any social assistance to a Union citizen whose right of residence is based solely on that latter provision.' See, however, O Golynker, 'Jobseekers' Rights in the European Union' (2005) 30 *EL Rev* 111, 119; HM Heinig, 'Art. 18 i.V.m. Art. 12 EG als Schlüssel zur Teilhabe von arbeitsuchenden Unionsbürgern aus anderen Mitgliedstaaten an steuerfinanzierten Sozialleistungen in Deutschland' (2008) *Zeitschrift für europäisches Sozial- und Arbeitsrecht* 472, 473; further Wollenschläger (n 7) 272 ff.

> It must be stated in this connection 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 …, no such individual assessment is necessary in circumstances such as those at issue in the main proceedings.
>
> Directive 2004/38, 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.
>
> By enabling those concerned to know, without any ambiguity, what their rights and obligations are, the criterion referred to both in Paragraph 7(1) of Book II, read in conjunction with Paragraph 2(3) of the Law on freedom of movement, and in Article 7(3)(c) of Directive 2004/38, namely a period of six months after the cessation of employment during which the right to social assistance is retained, is consequently such as to guarantee a significant level of legal certainty and transparency in the context of the award of social assistance by way of basic provision, while complying with the principle of proportionality.[78]

This interpretation is convincing. Not only does Art. 7 (3) Directive 2004/38/EC contain a clear rule. Moreover, with this distinction, the legislator has balanced the competing interests in a proportionate manner. Notwithstanding the rejection of a claim to social assistance in the case of Mrs. Alimanovic in view of the one-year threshold, the rules of Directive 2004/38/EC for former workers may be considered rather generous. For, it grants an unemployed person having worked for more than one year and looking for a new job the same rights as a worker and thus full and unconditional entitlement to all forms of social assistance (and presumably for an unlimited period of time). This mitigates the criticism sparked off by the outcome of the Alimanovic-judgment.[79]

IV. Conclusion: Consolidating the Acquis

With the right to non-discrimination depending on enjoyment of a right to residence, the latter's criteria determine access of economically inactive persons to social assistance. While requiring self-sufficiency as a residence criterion would mean an exclusion of non-economic actors from equal access to social assistance, a more generous approach would broaden respective claims. Positioning the EU law framework in this context, the result is ambivalent. For, on the one hand, it demands sufficient resources, but, on the other hand, not possessing them does not

---

78 ECJ, Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597, paras 59 ff. Disagreeing ibid, opinion of AG Wathelet, paras 97 ff.

79 See for such a criticism, eg Farahat (n 1) 50 f; Iliopoulou-Penot (n 1) 1015 ff; further O'Brien (n 1) 959; T Kingreen, 'In love with the single market? Die EuGH-Entscheidung Alimanovic zum Ausschluss von Unionsbürgern von sozialen Grundsicherungsleistungen' (2015) *Neue Zeitschrift für Verwaltungsrecht* 1503, 1504 f. Moreover, in *Saint Prix*, the ECJ (Case C-507/12 ECLI:EU:C:2014:2007) has interpreted Art 7(3) Directive 2004/38/EC not as exhaustive in terms of grounds for retention of the worker status (in casu: extension to pregnancy) – *cf* on this judgment only S Currie, 'Pregnancy-related employment breaks, the gender dynamics of free movement law and curtailed citizenship: *Jessy Saint Prix*' (2016) 53 *CML Rev* 543 –; this shows, by the way, that the Court is, as stated earlier (see Wollenschläger (n 71) 322), 'when secondary law is considered to leave room for manoeuvre, … still prepared to continue its integrationist jurisprudence and to find citizenship- and free movement-friendly solutions.'

necessarily mean losing the right of residence; rather, a proportionality test is ultimately decisive. This tension brings legal uncertainty into the free movement regime – a situation for which not only the Court's jurisprudence on Union citizenship may be blamed, but also the Union legislator having transformed it into indeterminate provisions of secondary law. Notably recent judgments of the ECJ have in many respects done what could be done in court rulings to bring more clarity into the legal framework and thus consolidated it:[80] Clear rules in the directive have been confirmed as proportionate and thus have not been subjected to an individual assessment (*contra legem*) when applying them (access to social assistance for students, economically inactive persons residing for less than three months and former workers seeking a job); moreover, it has been stressed that self-sufficiency is the rule and deviating from this requirement the exception. The ECJ's recent jurisprudence, notably the Dano case, should, however, not be misunderstood as restoring the economic residence criteria as conditions *strictu sensu*. Rather, with regard to the right of residence of non-market actors for stays exceeding three months, they are still subject to a proportionality test; a contrary understanding would, as explained (supra III.2.c.), not only contradict established case-law, but also require an amendment of Arts 7(3)(b) and 14(3) of Directive 2004/38/EC. Considering this – and in addition, the generous treatment of former workers having become unemployed after a period of work of more than a year and the wide understanding of the concept of worker – economically inactive persons still enjoy an – albeit limited – claim to social solidarity in the host Member State. Against this background and in view of the fact that the aforementioned limitations on free movement rights of economically inactive persons contained in Directive 2004/38/EC, which have been explicitly confirmed by the Court so far, may hardly be considered disproportionate in view of the free movement guarantees enshrined in EU primary law, parts of the criticism the recent jurisprudence has drawn seem to go too far.[81] Rather, these limitations reflect the current state of integration in a politically sensitive area – a status quo which leaves room for and requires further consolidation.

---

80 See for a distinction of three phases in the development of EU citizenship already Wollenschläger (n 71) 305 ff: 1) the Court's reassessment of the acquis in light of Union citizenship introduced in 1993; 2) the reception of the Court's jurisprudence in the new Citizenship Directive 2004/38/EC enacted in 2004; 3) the Directive's careful interpretation by the Court, however, not precluding citizenship- and free movement-friendly solutions beyond its scope of application.

81 See, eg Nic Shuibne (n 1) 908 ff, quotation 909, further 926 ff: 'That method turns the standard approach to conditions and limits on its constitutional head – the latter no longer *temper* equal treatment rights; they *constitute* the rights.'