Has the Court changed, or have the cases? A fact-based theory of Court of Justice adjudication.

Gareth Davies, Vrije Universiteit Amsterdam

*Note: This is a preliminary and incompete draft. In particular, I have not yet written the law part at the end (although I have written it elsewhere:* [*https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2825041*](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2825041)

*However, what follows contains an overview of the facts of some of the cases concerning migrants and social assistance, and tries to show that which litigants won or lost is more easily explained by looking at their personal stories and deservingness than at changes in the Court or in doctrines.*

Introduction

There is a perception that the European Court of Justice has changed its attitude towards the rights of migrant Union Citizens. After an early expansionist phase, in which it constructed a generous rights regime, often using general principles and purposive reasoning, it has begun to put more emphasis on the interests of states in controlling inclusion, and to show more respect for the detailed restrictions found in secondary legislation. It has apparently lost sight of the bigger vision of an inclusive non-economic citizenship which seemed to animate its early law.

At the heart of this story is the case law concerning access to social assistance for migrant citizens. It is true that other groups of cases are also sometimes put brought within the frame of rise and fall: those concerning ‘real link’ integration requirements, those concerning acquisition of permanent residence, the Ruiz Zambrano series, and even those concerning expulsion of criminal migrants. However, the social assistance case law is pre-eminent, and will be the focus of this paper.

That case law addresses one of the most central and difficult questions of free movement: to what extent should Union citizens have rights to receive public assistance in a host Member State? The written law contains an unequivocal tension: one the one hand, the very use of the citizenship label implies a form of membership in the Union which is universal, and transcends the ability to be self-sufficient or economically active. A citizenship for the rich and strong, while it might be loyal to the Greek roots of the idea, would be contrary to the interpretations which formally predominate in Europe today. On the other hand, the rights associated with that citizenship are expressed in the Treaty to be subject to conditions, and these are quite clearly present in the Citizenship directive. That central piece of legislation essentially allows citizens to move to other Member States and live there as long as they are either economically active or have sufficient means to be self-sufficient. This reflects the fear of Member States that if free movement were unrestrained there would be mass migration of the poor to the states with the most generous welfare regimes.

The rise and fall pattern raises many intriguing questions. Why has the Court changed? Is it to do with new appointees to the Court? Have judges been influenced by the prevailing political mood? Is the Court concerned about its own legitimacy if it pushes unpopular policies too far? Is it perhaps worried that Member States will seek to limit its power? Does it fear that national courts will cease to refer or start ignoring its judgments? Or does it fear that they will loyally apply its judgments, and fuel Euroscepticism and hostility to migration in the Member States?

All of these questions would be worth investigating, were it not for one thing: there is very little evidence that any kind of change in the attitude of the Court has occurred. Why do people – lawyers – think then that it has? The perception is primarily based on the fact that a phase in which migrants seemed to win every case was followed by a phase in which the cases were slightly more ambiguous, and now a new phase in which migrants seem to lose every time, while restrictive Member States triumph. There is an indisputable pattern, like a war in which early losses are on one side, and then there is a sort of stalemate, and now the ground is being recaptured at a furious pace.

However, the mere fact that a case is won or lost by one side or another tells us very little. In order to compare cases we need to know if they raise the same issues. It is only if the Court decides similar questions differently that we can speak of a change in judicial approach. If the later cases are different from the earlier ones in the issues that they raise, then the rise and fall story falls apart.

It is the suggestion in this paper that they are very importantly different, and that difference explains the change in success rates far more plausibly than any change in the Court. The difference is this: early cases involved meritorious litigants and Member States taking deeply unsympathetic, often indefensible, positions. Later cases involved less meritorious litigants, and Member States taking positions that are far easier to understand.

Certainly, the case all involve a similar underlying question: should a migrant Union citizen be entitled to social assistance from their host Member State? However, the legal frame for answering this question is, in all cases, relatively open. That means that the written law is not determinative of these cases: they might have been decided in different ways without that doing any more violence to text or logic than we are accustomed to from the Court. Indeed, this is precisely the point of the rise and fall storytellers: it is because the Court could have decided recent cases differently that they criticize it. Otherwise their critique would be of the legislature.

This may make the pattern of win-draw-lose in the case law seem more supportive of a rise and fall story – clearly it reflects judicial choice, not textual constraint. However, the argument of this paper is that the choices involved are better explained by reference to the facts of the cases than in terms of changes in judicial approach.

There are two reason why a fact-based explanation is more convincing. One is the lack of any overt change in the law: the reasoning and results of the later cases do not contradict the earlier ones, which continue to be cited and relied upon by the Court. At most one may identify a failure to extrapolate: principles and techniques applied on one context were not applied in a new one. That, however, does not tell us that the Court has changed. Such a conclusion would only follow if we could say that they were equally applicable in that new context, but that is precisely the question which only an analysis of the facts can reveal.

The second reason to prefer a fact-based explanation is that it fits the data: if we look at the cases we see that deserving litigants win, and less deserving ones lose. This pattern is in fact repeated throughout the case law of the Court, and of courts generally. It is a cliché among lawyers that courts are primarily adjudicators, influenced by a meta-legal sense of justice and fairness, and it is often better to have a sympathetic client and a nasty opponent than a clever legal argument. Of course, the question of who is deserving is a profoundly political one, which will be addressed below, but if we make the assumptions that the Court is moderately mainstream in its normative perceptions, and moderately accepting of the general philosophy of the written law on citizenship, then these assumptions explain all the cases it has decided.

Why does it matter though? There is a certain academic interest in rebutting over-enthusiastic claims that the Court has changed its tune, but the primary reason is that it helps us understand how EU law works, and takes us towards appropriate future research. For there is, undeniably, that pattern of win and lose. If this does not come from a changing Court, then it comes from changes in the cases that have been referred, which means a new set of questions are raised, which are the ones that now require research. These questions seek to understand why it is that less deserving litigants are now coming to the Court. Is it the inevitable pattern of any new rights regime, in which the first cases establish that rights exist and litigation continues until the rights reach their limit? Perhaps win-draw-lose is just what happens when a new individual right is introduced into the law. Or is it that Member States have become more skilled with EU law and no longer fight hopeless cases? The ones that they defend all the way to Luxembourg are perhaps the ones where they are confident, now they have learned a little EU law, that they are right. Perhaps deserving litigants no longer need to sue, because they largely receive what they are due. Or is the pattern of the references to do with some change in national courts? Have they become more strategic in the way that they ask questions, less inclined to give the Court an opening to expand the law and more inclined to steer it towards a conservative answer? All of these factors may play some role, and deserve investigation.

The structure of this paper is as follows: the following section outlines what is meant by ‘deserving’. The section thereafter looks the leading case law on migrants and social benefits, examining them in the light of what may be called a conventional mainstream morality. The part after that then provides a summary of the legal issues, explaining in brief why the newer cases involve no legal change. A conclusion concludes.

Who is deserving?

The law on citizenship does not allow Union citizens to move to another Member State with the intention of subsisting from public assistance. The directive expresses this by saying that non-economically-active migrants – those who are not employed or self-employed - must have ‘sufficient resources not to be a burden on the social assistance system’ of the host state. However, both the directive and the Court also express the idea that this should not be interpreted too strictly: not every request for a form of public assistance should mean that a migrant loses their right of residence. Broadly, the question is whether they have become an ‘unreasonable’ burden. In its case law the Court has indicated some factors which it considers relevant to deciding this, and those factors are now in the directive too. They include matters such as how much help is asked for, how long it is likely to be necessary, and how long the migrant has been resident beforehand and how integrated they are in the host state. The long-term resident who has always supported themselves and participated in host state life but then has a bit of bad luck and needs some temporary help, is the archetype of a good case. It would be harsh to throw them out and turn their life upside down, just like that. The migrant who arrives in a new state with no funds and no particular plans to seek work, and says ‘sorry, I’m broke, do you have any social assistance?’ is the archetype of a poor case. They are not pleading exceptional circumstances, but simply challenging the essence of the law.

Alongside these fairly conventional perceptions one may add some more general observations on the merit of a case: when a party is perceived to be exploiting technicalities to avoid a result, or using the law for a purpose which it was not intended, or behaving in a dishonest or inconsistent way this tends to violate our sense of justice, and the law quite often provides a form of redress. If a landlord fails to maintain a staircase, and a step breaks, and the tenant falls and smashes a window, then when the landlord sues for the cost of the window we might feel very little sympathy for him, and expect the law to have some doctrine avoiding this result (which it probably would). If a student studies for a degree and passes their exams and then because of a misunderstanding submits the wrong form and so fails to qualify, we might feel much sympathy for them, and hope that there would be some way of rectifying the error. This is not always possible - procedural law can be cruelly strict – but a mainstream sense of justice would have us rooting for the student far more than for another one who also didn’t get her degree because she never went to class. We often hope that our substantive sense of who deserves is not undermined by what seem to be formal or technical rules.

In the context of migrant citizens who ask for social assistance it is then worth asking the following questions: Has the citizen done their best to support themselves? Do they seem to want to support themselves in the future? Are they, in general, contributing members or society or ones who hope to be supported by others? Have they behaved honestly? Of the Member State resisting their application, it is worth asking some questions too: Has the Member State behaved honestly and consistently? Does its refusal seem to be based on some genuine and understandable concern about the migrant in question or people like them? Can we see what the risk is for their state or budget or society? And then, perhaps finally, we should ask some wider policy questions: what is the individual, national or European interest here? What happens to the person or the policy if this assistance is granted or refused? Would granting the assistance open the door to exploitation of the benefits system? Would refusing it undermine the social fabric in some way?

The questions above can be seen as reflecting a reactionary agenda. It is certainly arguable that the migrant benefits-seeker is no less deserving than the hard worker with a temporary injury. Those who seem to live as passive recipients of public assistance, without seeking to support themselves or advance themselves by the conventional means of work or study, are perhaps those who need public help the most. In a meritocracy it is precisely those capable of self-help who are the privileged, and those unable to help themselves who are the deserving. One may argue that the very normative structure of Union citizenship law is based on entrenching privilege, on giving to those who already have. It rewards those with the personal qualities that offer potential success, while excluding those, who through accidents of birth or environment, have not been granted these gifts.

This paper does not intend to engage with this debate, except insofar as clarity about the normative structures of our law and its adjudication is more likely to help us achieve social wellbeing then is politically correct obfuscation. Rather, this paper suggests that, as a matter of fact, there is what one might call a mainstream perception of what is fair and just, and this is broadly what is captured in citizenship law, and this is broadly the view that the Court has always adhered to, and this is made clear by reading the facts of the cases that it has decided. In doing so, we see a gradual change in the merits and the facts, but not in the attitude of the Court.

The changing character of social assistance litigants

The cases discussed in this section are those on which the rise and fall story is commonly based. In the first group, the rise, are Martinez-Sala, Grzelczyk and Baumbast, universally seen as the foundations stones of Union citizenship law. Then there is a brief plateau, occupied by Trojani and Brey, cases which are deployed by academics in different ways, and where the judgments certainly do contain grains of hope for both sides. Then there is the fall, consisting of Dano, Alimanovic, and the Commission v UK case on benefit applicants, decided just before the Brexit referendum. In this group one might also place Garcia-Nieto, although it is seen more as confirming the trend of the others than adding very much which is new.

Ms Martinez Sala

Ms Martinez Sala went to live in Germany as a child, and had been resident for about 20 years before the situation leading to her lawsuit. She had worked as a young adult, but stopped around the time she had children. The legality of her residence had never been disputed. However, at a certain point the German government had stopped issuing her with residence documents, simply giving her a sort of receipt indicating that she had applied for them. Why they did this – it seemed to be a sort of administrative practice – does not become clear in the case. However, it did not seem to be a problem in practice – she continued her life in Germany and was treated as a lawful resident.

However, when she applied for child benefits it suddenly was a problem: the German law provided that she could only get child benefits if she physically produced her residence permit. This of course she could not do. The bizarreness of the case is that the German government conceded that Ms Martinez Sala was lawfully resident. They also conceded that lawfully resident migrants in her position were entitled to the benefit. The problem was a purely documentary one, and the only reason why she did not have the documents was because of some obscure failing in the administration, which the German government was unable to explain during the case. It was through no fault of Ms Martinez Sala’s, and it was not disputed that she was entitled to the documents and had taken all the appropriate steps to obtain them.

Is it not hard to hear this story without feeling a kind of fury at the German authorities, without wanting to see some civil servant or policy maker dismissed from their job? Can one imagine a less meritorious position than theirs? The Court found that Ms Martinez Sala should get the benefit and one wonders who would not cheer this result.

Mr Grzelczyk

Mr Grzelczyk was a young French man who went to study at the university of Louvain-la-neuve in Belgium. For the first three years of his study he supported himself by part-time work and loans. In his fourth and final year - note that he was completing his studies on time, something relatively unusual in continental Europe at that time – he applied for the minimax, a Belgium basic benefit for those without means or income. The local benefit authority noted that he had worked hard during his studies, but in his last year would have to write a dissertation which would take a lot of time, and also do a period of training, both of which would make keeping a job difficult. They granted him the minimex. However, the federal government challenged this decision on the grounds that the minimex was only for Belgians. It was not disputed that a student in his situation who was Belgian would get the minimex.

The judgment displays a picture of a hard-working and praiseworthy young man. The fact that he supported himself suggests that he did not come from a privileged background. He explained lack of parental support by saying that his father was unemployed and his mother seriously ill. When we meet him he has studied hard and successfully, and is about to obtain a university degree which will no doubt open many possibilities for him. He is studying physical education, making it not unlikely that he will become some form of teacher – perhaps indeed in Belgium. All he needs is a few months of support, to get through his final stage. The view of the authorities closest to him is that he deserves it. His classmates will be receiving it – it is more or less standard for students in his situation in Belgium.

On the one hand, these few months may open the door to a professional life, one perhaps very different from that of his parents. Or, if the Belgian federal government has its way, he might fail to complete his degree because he cannot afford to stop working in order to do his practical placements. Four years might be wasted and a different kind of life open up before him.

What do we want to happen in these circumstances? What is in the interests of Europe, or even of Belgium? Do we feel any sympathy for Mr Grzelczyk? Is he an exploiter? Do we want him to win or lose?

The Court found that as long as Belgium accepted Mr Grzelczyk was lawfully resident, they should give him the minimex. They did concede that Mr Grzelczyk’s lack of resources might mean that he was not legally resident, but they warned the Belgian state not to leap to this conclusion: they should first look at all the facts and circumstances and see if it was really unreasonable to provide the help required. The case is not the clear win for the litigant that is sometimes assumed, but the Court is clearly pushing the Belgians: ‘Are you sure you want to deny him the benefit and residence? If you must, you may, but look at his story and his circumstances first, and then ask yourself, Belgian state: what is really reasonable here?’

Mr Baumbast

The Baumbast family moved from Germany to the UK when Mr Baumbast got a job there. After some years he lost this job, and could not find another satisfactory one, so he took a job working on projects in China and Lesotho, but employed by a German company. Mrs Baumbast and the children stayed in the UK, where the children were in school. Although the details are not in the case, Mr Baumbast presumably spent some time in these far-off places, and some time with his family in the UK.

Legally, Mr Baumbast had changed from being a migrant worker to being a non-economic migrant resident in the UK. Although he was economically active, his activity was not in the host state, so for the purposes of EU law he did not count as a migrant worker after he began work for the German company.

Non-economic migrants and their families are required to have sufficient resources and comprehensive sickness insurance in their host state. It was not disputed that the family had never been a burden on the state and had sufficient resources. However, two years after Mr Baumbast began his new job, when the family had been resident in the UK for five years and went to renew their residence documents, the UK government refused, on the basis that they did not have comprehensive sickness insurance. A UK tribunal decided that Mrs Baumbast and the children could stay on the basis of other law, but the authorities continued to refuse residence documents to Mr Baumbast, relying on the sickness insurance argument.

It is not clear why the UK government was so keen to expel Mr Baumbast and his family. Perhaps it was simply because they could. There is, in any case, no suggestion that the family had ever been anything other than model residents.

So why were they uninsured? In fact they maintained German health insurance, probably via Mr Baumbast’s work, and in practice went to Germany for elective health care. However, it was admitted that they had no insurance covering emergency care in the UK, and could not be said to have comprehensive medical insurance in their host state.

The major reason why they did not have such insurance is that it does not exist. The UK provides health care free to patients via a tax-funded National Health Service. There is a market for private health insurance, which about ten percent of the population buy, but this is invariably not comprehensive: it typically excludes emergency care, addiction-related care, or chronic care, or other categories too. The costs of such health insurance can moreover go up to thousands of euros per month. To demand that migrants purchase this would be to radically change the nature of free movement.

It is a defect in EU law that it requires health insurance even in states which do not have insurance-based healthcare systems. It essentially requires migrants to buy something which does not exist. That is an argument for interpreting the law slightly differently, and the UK’s approach to it is not only out of tune with other Member States, but extremely hard to defend. The Commission at one point began an enforcement action against the UK on this, but suspended it for political reasons.

The Baumbasts can hardly be blamed for this legal mess. They did what almost all migrants to the UK do: they paid their taxes and, if they had needed emergency care, would have used the NHS. They almost certainly had no idea that the UK government would make a fuss about the insurance, because it is the policy of the UK not to raise this issue when migrants first arrive and register, but only when they renew their residence documents after 5 years. Normally at this point they would be entitled to permanent resident status, but it is the UK practice to, at this point, for the first time, raise the insurance issue and say ‘oh, but you haven’t been lawfully resident for the last 5 years – so you can’t become a permanent resident.’

Apart from being almost certainly wrong as a matter of EU law, this is a particularly sneaky policy which is undoubtedly designed to allow migrants to come and go – because if the UK enforced its insurance opinions when migrants arrive this would essentially end non-economic migration, and cause an enormous legal conflict, which the UK would undoubtedly lose – while preventing them from ever acquiring the status of a permanent resident.

The Court did not go into the legal detail, simply finding that it would be disproportionate to deny a right of residence to Mr Baumbast purely on this point. That is not quite the same as saying that the UK could not insist on sickness insurance. Thus, the UK government being what it is, they probably did maintain their insistence on this, and Mr Baumbast may well have had to buy some expensive private policy. Moreover, the Court did not say that Mr Baumbast was entitled to the status of permanent resident, merely that he could not be denied residence. After all, permanent residence only arises after 5 years of residence in conformity with the directive conditions, and since the Court does not clearly deny that possessing sickness insurance is one of these, the UK government will undoubtedly have taken the view that his first five years did not count. Baumbast is a judgment with several stings in the tail, even if the major question – whether he could stay or not – is clearly settled in his favour.

Mr Trojani

Mr Trojani was a Frenchman who found himself in Belgium. He appeared from the judgment to be struggling a little with life: while not actually claiming social assistance, he was not employed either, and spent some time living at a campsite, and then at a hostel, before finally ending up in a Salvation Army reintegration programme. As part of this he could live at a hostel – although he was required to pay for this - and receive food and some pocket money in return for which he was required to do various jobs for 30 hours a week. Although the Salvation Army ran this programme, it did so within a framework of Belgian law, and in some respects looked like an agent of the state, providing reintegration services to the marginalized.

Shortly after starting his programme Mr Trojani applied for the minimex. He had obtained a residence document from the Belgian authorities certifying that he was lawfully resident in Belgium.

One issue in this case was whether Mr Trojani was a worker. This would give him substantial rights. However, to be a worker, the work done has to be ‘genuine and effective’ and part of the ‘normal labour market’. The Court did not decide this – it told the national court to look at all the facts and come to a conclusion. One can understand the approach. Everything about the Trojani story is borderline – is he really just living on benefits and trying to exploit the system, or is he someone genuinely earning his keep by real hard work? We would want to know what these jobs were, for whom, and so on. It is quite imaginable that if one knew more about his story either picture could emerge.

The most important part of the case though was about his citizenship rights. What if he was not a worker? What were his rights then? The Court did not decide this, but instead gave him a sort of procedural protection. It said that if he was not a worker, then the Belgian state would have to decide – after investigating all the facts of the case - whether he could be seen as having sufficient resources, and perhaps he did not. Then he would have no right of residence, and no right to the minimex. However, as long as the Belgian government acknowledged that he was lawfully resident, which they had done by giving him a residence document, they were obliged to treat him equally, and give him social assistance.

It may well be that the Belgian authorities revoked his residence document and expelled him. The Court does not prevent this. What it does do is say that the Belgian government cannot have it both ways: if they give him documents saying he is lawful, they must treat him as lawful, with all the associated rights. If they think he is not lawful, they must follow the established procedure for showing this. Which they do, is a matter for national courts and authorities.

Again, this is a middle way in a case with borderline facts. We just don’t know enough about Mr Trojani to know which stereotype would fit him: doing his best to overcome a no-doubt complicated past, or the cliché of a travelling waster? If we gave him to Hollywood, which role would they assign him? What point of view would a mainstream newspaper take? Society does sympathise with those in difficulty when they try to ‘reintegrate’, but it loses that sympathy if they seem to be claiming more and trying less. The Court defers the question, but warns the state to make sure it looks at all the facts. Its rhetoric is broadly sympathetic and supportive, emphasizing the standard of procedural fairness expected of the state – regarding documents, investigation of the facts, and of whether he is a worker - while rather skipping over the fact that Mr Trojani may well nevertheless lose.

Mr Brey

Mr Brey was a German who moved to Austria with his wife. Although it is not entirely clear from the case, they appeared to be of retirement age. Their income consisted of an ‘invalidity pension’ for Mr Brey and a care allowance for his wife, both paid by the German authorities. These amounted to about 1100 euros per month. The case does not tell us why they moved to Austria, but they appear to have been living in the Graz region, a pretty Alpine area.

Shortly after settling in Austria, Mr Brey applied for a ‘compensatory supplement’. This is an extra income paid in Austria to those living on what is considered to be a low retirement or invalidity pension. On the basis of their household income, Mr Brey was entitled to an extra 326 euros per month.

There was some disagreement between the Austrian authorities as to whether he was entitled to this, but finally it was decided that he was not. The reason was that he did not have ‘sufficient resources’ as the Citizenship directive requires. As a result, he had no right of residence in Austria at all, and therefore no right to social assistance.

Mr Brey was in a difficult situation. If he had not applied for the benefit it is hard to imagine that Austria would have taken steps to expel him, or that they would have succeeded if they had tried. While his pension was not large, it seems likely that he and his wife could have supported themselves, and an income of 1100 euros per month is almost certainly ‘sufficient resources’ in the sense of the directive. Yet once lawfully resident, a migrant citizen is entitled to equal treatment, so why should he not apply for the generous supplements that were available in Austria? But in doing so he became a ‘burden on the social assistance system’ and his right of residence became precarious. He was in a Catch-22 situation, for which he can hardly be blamed: if he exercised the right of equality that he enjoyed, then that exercise undermined his right of residence.

Yet one can also understand the position of the Austrian authorities. Austria is a very wealthy state with excellent social provision and low levels of poverty. Even those whose incomes and standard of living would be good by the standards of many states are entitled to top-ups from the public purse. However, if all foreign pensioners whose income is enough to let them get by, but below the generous Austrian thresholds, are entitled to top-ups, then Austria may indeed become a very attractive place to retire to, and the system could quite plausibly be threatened. How many pensioners are there in the EU with an income between say 800 and 1200 euros who would find a life in Austria and a few hundred extra per month attractive? It is always a difficult empirical question whether such scenarios will play out, but the Austrian state’s fear is understandable. The legal regime of the directive is premised on the idea that if one receives social assistance this is evidence that one does not have enough to live on, but in more wealthy European welfare states even those with adequate incomes may receive extra help, undermining the coherence of the law.

What should the Court do? There is no real villain here, no state that is playing dishonest games, but also no migrant that is trying to exploit – or at least there is no suggestion raised in the case that Mr Brey had moved purely in order to get benefits. There is, instead, clumsy law creating a difficult situation. The Court, as it does in such situations, referred it back to the national court to deal with, giving them its standard guidelines: not every use of social assistance undermines residence rights, only an ‘unreasonable’ use. They emphasized the need to look at all the facts and engage in an individual assessment.

This makes the judgment read quite sympathetically, and given Mr Brey’s personal situation it is easy to think that it is a supportive judgment. One might think that an individual assessment of a disabled pensioner who has not behaved badly is likely to conclude in his favour. Yet the Court also restated the factors which help determine ‘unreasonableness’; how long would the social assistance be for? How much would it be? What would be the consequences for the state budget? How integrated is the applicant in the host state? All these factors work against Mr Brey: he was newly arrived, there was no prospect of his income increasing, so that the benefit were presumably permanent, and it was not implausible that he would create a very attractive precedent, creating significant budgetary consequences.

So rather as in Trojani, the Court packed an iron fist in kid gloves: it insisted that the state follow procedure and look at all the relevant facts, but gave them plenty of grounds to expel Mr Brey and his wife.

Brey is the first case where the possibility of strategic behaviour arises. There is no suggestion that Mr Brey was doing this, but it is possible that pensioners would move to Austria in order to enjoy their supplements. By contrast, it is unimaginable that people would move to Germany as children in order to obtain child benefits when they became parents themselves, and it is very unlikely that people would go and study in Belgium, and support themselves for three years, because they planned to obtain six months of minimex in their fourth year. It is perhaps conceivable that some people, from the poorest two or three Member States, might migrate to the UK in order to use the NHS, but that was manifestly not the situation in Baumbast. These cases were obviously about individuals in difficult, atypical, and genuine situations. Brey raised the first shadow of a dangerous precedent.

Ms Dano

Ms Dano was a Romanian citizen who went to live in Germany with her baby son in 2010. She lived with her sister, who provided for them both materially, according to the referring court. However, Ms Dano also received child benefit from the German authorities of about 130 euros per month, and applied for further social assistance for herself. This was refused, which is what led to the reference.

The national court documents revealed, according to the Court, that Ms Dano was neither working nor looking for work in Germany. Nor did she have any resources of her own. Now, it is established that ‘sufficient resources’ can come from another person, so if Ms Dano had simply lived with her sister, without making any call on public assistance she would have had a right of residence. However, she did receive benefits, and was applying for more. Were these applications sufficient to show that she would be an unreasonable burden?

The Court’s answer is identical to Brey, but briefer: the national court must look at all the facts, and make an individual assessment. However, there is nothing in the judgment that provides much hope to Ms Dano. There is no suggestion of a temporary difficulty like Grzelczyk, or a complicated story like Baumbast, or a Member State playing games as in Martinez Sala. It looks rather like someone who moves to Germany with no resources at all, and no ambitions to work, but finds she cannot get by purely on family support, and needs social assistance.

That she is Romanian, has never worked nor looked for work, and the father of her child is apparently unknown, at least to the authorities, merely provides depth and colour to the prejudices that she inspires, rather than challenging them: the question whether she may have been supporting herself by begging is not asked, but will have been present in the minds of those involved. If one wished to design a litigant in order to lose a benefits case, one would come out close to Ms Dano.

Not that these factors were necessary – her situation was enough to destroy her case. If migrants could find a friend or family member to stay with for a few months and that justified an application for social assistance then a very large door would be opened, and both the letter and spirit of the directive would be undermined. Ms Dano, as portrayed in the case, is the stereotype of the purely dependent migrant, the apparently passive recipient, the archetype of the person who was never intended to have access to social assistance or even to residence rights in other Member States. Nothing in any of the previous cases suggests otherwise.

If the judgment inspires outrage it should not be because of this reasoning, which is merely a repetition of what came before it, but because it reveals that the EU is indeed a limited project. Citizenship offers something for many people, but not for all, and often not for the weakest. After all, Ms Dano may well have been the greatest victim of all the cases to date: Mr Baumbast could probably just have paid for his insurance, and Mr Grzelczyk might have just taken longer to graduate and if Ms Martinez Sala had not got her child benefit perhaps she still would have got by with family and friends: at least she was integrated and had a work history. What does Europe offer Ms Dano? What does it mean to be a penniless and almost uneducated single mother from the Union’s poorest state? There are plenty of reasons to feel frustration that EU law has relatively little to offer those whose need is greatest. However, there is nothing new in the case, and nothing in earlier cases to suggest that it would ever have been decided differently.

Ms Alimanovic

Ms Alimanovic was born in Bosnia, but became Swedish. She had three children, who were born in Germany, but she left that country in 1999, returning in 2010. She and her eldest daughter, who was then around 16, perhaps nearly 17, worked in temporary jobs for a little less than a year. Shortly after these jobs finished, Ms Alimanovic and her daughter applied for unemployment benefits, and for other forms of social assistance for her other two children.

The case was quite complex, but the referring court took the view that Ms Alimanovic and her eldest daughter were both job-seekers, and this was the basis for any right of residence that they might have in Germany. The Court of Justice did not dispute this. The question for the Court was whether job-seekers such as Ms Alimanovic and her daughter had a right to social assistance.

On the face of it this is not difficult, because Article 24(2) of the Citizenship directive explicitly provides that they do not have a right to social assistance. However, the directive also provides that non-economic migrants should not be a burden on the social assistance system of the Member State, but the Court has reinterpreted this to mean that they should not be an ‘unreasonable’ burden, and requires an individual assessment of all the facts before reaching this conclusion. Perhaps it should be the same for job-seekers and benefits? Perhaps, despite Article 24(2), when a job-seeker applies for social assistance the national authority should look at all the facts and consider whether it would be unreasonable or not? Ms Alimanovic felt that the unreasonableness stemmed from the fact that she had been a worker. As a result of this period of work she had maintained the status of worker for six months, as the directive provided, and with that came the right to social assistance. But after the six months was over she became simply a job-seeker again, with no social assistance rights. Was that not harsh? Should the six-month limit not be extended a bit? Should there not be a personal assessment?

What would be the personal circumstances that might justify looking at her situation differently? Perhaps if she had an offer of a job that was to start in a month, or if she was about to obtain some qualification that would enormously improve her chances, and perhaps if the loss of the benefit for that month or so would have terrible consequences, she might have had a good case. But it looked as if she was simply challenging the rule itself: Six months? Really? Can’t I have some more? However much one may sympathise with her, there is no precedent for this kind of approach to the law.

Mr Grzelczyk complied with the conditions of residence for years before falling off the wagon for a few months. Do we accept that this ends his residence and his education, or help him back on? Mr Baumbast probably had no idea that he was doing anything wrong, because of a UK policy of not saying anything, until they sprung it on him at the last minute. He had never cost them a penny, nor was he likely to. Did his mistake justify ending his residence (with his family) or not?

Ms Alimanovic’s case has three weaknesses by comparison with these. One concerns deservingness – the credit that a migrant builds up by showing compliance with the law, effort, integration and so on. She had certainly worked in the past, to her credit, but for this she had already received the legally allocated ‘reward’: six months of benefits. Now she wanted more. Why? What was special about her case? Nothing reveals this. Grzelczyk and Baumbast had lived for three and five years in their host states, had been self-sufficient, and in the former case had supported himself through his studies. Their case was stronger.

Another weakness is to do with what they ask for. Baumbast wanted nothing – and had cost nothing. His case was very strong. Grzelczyk wanted a defined period of support, which would deliver definable and fairly probably benefits – his degree. The downside was limited, the upside considerable. It is not clear exactly what Ms Alimanovic wanted – the extension of social assistance until she found a job? That might be indefinite. Or just another month? Three months? Why? What is the logic of such a claim? What is it that makes six months the right period, and eight nor nine better? Without some kind of story, some logic to a claim for special treatment, a court has no reason to begin bending rules and subordinating clarity to individual requests.

The third weakness is to do with consequences: the two earlier litigants both faced a challenge to their right to remain. Belgium and the UK claimed that they did not meet the conditions for residing lawfully at all. For the one, about to graduate and the other, with a family integrated in the UK, the consequences were potentially serious. By contrast, there was no suggestion that Ms Alimanovic had no right to remain. She was free to continue looking for work. Certainly, the absence of benefits would have been a blow, but the challenge made to her was of a different nature.

It is not unusual in law that a rule may be set aside, or made flexible, in exceptional circumstances – if it would lead to undue hardship if applied in a particular case. Mr Grzelczyk and Mr Baumbast had plausible stories that this was the case, particularly if one feels that supporting oneself as a student is admirable, and that study should be encouraged. Ms Alimanovic also faced consequences as a result of applying Article 24(2), but they are exactly the consequences that this law envisages: that work-seekers should have to support themselves. If she had worked for longer, her case might have been stronger – one can imagine that a history of several years of employment might make a court slower to cut off the income to a mother of three. Yet then she would have enjoyed benefits for a longer period anyway. In Grzelczyk the Court emphasized that the logic of giving him social assistance was primarily because it was for a limited period, and temporary loosening of a requirement is a different matter than permanently letting it go. Yet as the Court in Alimanovic said, that extension of a helping hand through a difficult period is precisely what the directive intends with its extension of worker status for six months after work has been lost. Ms Alimanovic had been helped through her temporary difficulties, and was now in the situation that Mr Grzelczyk would be when he approached graduation: time to stand on her own two feet again.

The legal changes

To be completed….