26 The Limits of Member State Solidarity

The Legal Analysis of the Dano and the Alimanovic Cases

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26.1 Introduction

The institutions of the Union are forced ever more often to shield the fundamental principle of free movement of European citizens from political and legal attacks. At the centre of the debate on free movement are the right of *economically inactive EU citizens to access social assistance* and, linked to that, the problem of *social tourism*. The debate, of course, is not new; it has been on the table since the moment the institution of EU citizenship was born and since the rulings have started interpreting this special status quite broadly. Nonetheless, the debate has gained a new dimension: certain Member States' political discourses and interventions aiming to protect their welfare systems seem to be questioning the *institution of free movement itself and its fundamental nature*. In the meantime, the Court of Justice of the European Union has been ever more often faced with the question whether the economically inactive EU citizens are also entitled to claim social assistance and special non-contributory benefits. The 2014 Dano judgment[1] in the focus of the present study, and the Alimanovic judgment[2] that seems to confirm it are good examples of that. These judgments could signal a change in the jurisprudence of the CJEU, so far propagating the idea of "equal treatment for all citizens of the Union". The aforementioned judgments of the Court have basically accepted that, in the future, Member States can deny special non-contributory benefits from the citizens of other Member States who do not wish to integrate into the economy of the Member States in question, while they seem to be unable to sustain themselves.[3]

The present study seeks answers to the questions in what extent the *Dano* judgment and the *Alimanovic* judgment seemingly confirming *Dano* have changed the CJEU case-

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1 Judgment of 11 November 2014 in Case 333/13 *Elisabeta Dano, Florin Dano v. Jobcenter Leipzig*, [nyr].

2 Judgment of 15 September 2015 in Case 67/14 *Jobcenter Berlin Neukölln v. Nazifa Alimanovic and Others*, [nyr].

3 Not surprisingly, both the Dano and the Alimanovic judgments were very well received by the member states, since they gave an answer to the pressing issue whether social assistance could be denied from economically inactive citizens without any modification to the Treaty or the secondary law.

law relating to EU citizenship, and what problems that may generate in the future as regards the fulfilment of the basic EU requirement of *legal certainty*.[4]

26.2 The *Dano* and *Alimanovic* Cases

The subject matter of the dispute in Dano was the refusal of the social assistance claimed by Romanian nationals Elisabeta Dano and her son, Florin, by the Leipzig employment agency, Jobcenter.

At the end of 2010, Ms Dano moved to Leipzig, Germany, to her sister who provided them with food and lodging. The documentation reveals that Ms Dano did not enter Germany in order to look for work nor was she actively seeking work in that country. Despite all this, she approached the Leipzig Jobcenter claiming the so-called basic provision for jobseekers. The authority refused this claim by reference to the limitation contained in the German legislation that is specifically aimed at those who come to the country solely in order to benefit from the social assistance scheme. In the administrative objection against the refusal of her application Ms Dano objected that the German agency made a discriminatory decision based on nationality by refusing her application, which is explicitly prohibited by Article 18 of the Treaty on the Functioning of the European Union (TFEU).[5]

The case came before the Court of Justice of the European Union for preliminary ruling that established that the means-tested basic social benefits were classified as "special non-contributory cash benefits" and that Member States could circumscribe the conditions under which such benefits were granted. Furthermore, in its judgment, the CJEU declared a very important thesis: if the economically inactive citizens, such as Dano, do not engage in any professional occupation, neither are they looking for employment, so far as access to social benefits is concerned, they can only claim equal treatment with nationals of the host Member State if their residence in the territory of the host Member State is *lawful*, that is it complies with *the conditions of Directive 2004/38* on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states[6] (Directive on Free Movement). The question from this point was whether Ms Dano complied with the requirements set out in the Directive.

4 As we will see below, legal certainty is lost not just because the ECJ deviates from former case-law without explicit reasoning but it returns to the text of Directive while still leaving the requirement of sufficient resources an obscure concept.

5 The case was challenged before the Social Court of Leipzig, which referred the question to the Court of Justice for a preliminary ruling on whether the afore mentioned German limitation complies with EU law, in particular with Art. 4 of Regulation (EC) No. 883/2004 on the coordination of social security systems, and with the general principle of non-discrimination resulting from Art. 18 of TFEU, and the general right of residence resulting from Art. 20 TFEU.

6 Commission Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States OJ L 158, 30.4.2004, pp. 77-123.

If the period of residence on the territory of the host Member State is longer than three months but shorter than five years, the aforementioned Directive makes the right of residence of economically inactive citizens conditional on the requirement, among others, that they must have *sufficient resources* for themselves and their family members, so that they don't become an *unreasonable burden* for the *social assistance system* of the host country for the period of their residence.[7]

The citizens in the case – according to the referring court – did not meet that requirement, thus, in accordance with the decision of the CJEU, they may not claim the equal treatment contained in that decision.

The *Dano* case made clear that Member States may reject claims to social assistance by EU citizens who have no intention to work and cannot support themselves.

Alimanovic case that followed the *Dano* case gave the Court the opportunity to clarify the application of this principle in a more complicated factual situation. The *Alimanovic* case concerned a Swedish woman and her daughter who had applied for social benefit. In contrast with the *Dano* case, in which the EU citizen in question had never worked and was not seeking work, mother Alimanovic and her daughter did have temporary jobs between June 2010 and May 2011 in Germany. As a result, they received social benefits from December 2011 to May 2012, after which the responsible German authority, withdrew their grant. The authority justified its decision by stating that the persons in question lost their 'employee' status half a year after becoming involuntarily unemployed. Consequently, they could be refused the benefits on the basis of the German provision which excludes workseekers from entitlement to social assistance benefits. The referring court was seeking an answer, in its reference for a preliminary ruling, to the question whether it could exclude from the entitlement to certain benefits EU citizens who came to the host Member State with the purpose of seeking work and had already worked there for a certain period, although those benefits were granted to nationals of the host Member State who were in the same situation.

In the Alimanovic judgment, the Court confirms its finding in Dano that so far as concerns access to social benefits, a Union citizen can claim equal treatment only if his residence in the territory of the host Member State complies with the conditions for lawful residence of the Citizenship Directive. However, the Court ruled that they were not still covered by the Directive as former workers,[8] instead they could rather be classified as first-time job seekers. And the host Member State may deny any social assistance from the job

7 Directive Art. 7(1)b.

8 The Directive says that those who work in the host State for less than one year retain 'worker' status for at least six months after becoming unemployed. After that point, a Member State can (as Germany did) terminate their worker status, which means they are no longer covered by the equal treatment rule and lose access to social assistance benefits.

seeker.[9] As far as the unreasonable burden caused to the social assistance system of the host Member State by that person's residence on its territory is concerned, the Court deemed it unnecessary to examine the specific circumstances, considering that the gradual system as regards the retention of the worker status outlined by the Directive had already taken them into consideration.

26.3 The Political Background of the Judgments

As it was mentioned above, the debate surrounding the question of free movement is not new; it has been re-ignited periodically, basically all the way through the entire history of European integration.[10] It is not surprising in the case of a prerogative that concerns every Member State citizen at least in an indirect manner, and that is reaching ever deeper into the territory that used to fall within Member States' competence. In periods of economic recession or high internal political tension due to unemployment, the question of restricting the freedom of movement arises almost routinely.[11] The freedom of movement has gained a "symbolic function" if you will, it serves as a sort of external projection of the currently arisen economic, social and political concerns.[12] This is why it is very important that political actors respond to the general public's above mentioned fears by handling the question of free movement in an adequate manner. This is especially true in a period when crisis is substantially affecting Europe and when the very institution of free movement is at risk. This, of course, is not an easy task. Nothing illustrates this better than the political statements – sometimes taking a threatening tone – aiming to vigorously cut back the entitlements associated with free movement. For example let us take the claim[13] of the

9 The job seeker cannot be removed from that Member State while they can prove that they are seeking for a job and they have an actual chance to be employed. See Antonissen, Collins and Ioannidis cases.

10 Let us think of the belated realisation of the goals set out in the founding treaties of the Union, or of the fears concerning the different rounds of enlargement – especially the accession of the Central and Eastern European countries. Due to those fears the basic freedom of movement of workers could be subject to limitations during the transitional period.

11 "This points towards changing economic conditions that affect workers irrespective of their nationality or migration status, although national governments seem less inclined to portray national workers as (net) users of welfare rather than producers thereof." See S. Mantu & P. Minderhoud, 'Solidarity (still) in the making or bridge too far?', *Nijmegen Migration Law Working Papers Series*, 2015/1, p. 8.
For more details see: C. Bruzelius et al., 'Semi-Sovereign Welfare States, Social Rights of EU Migrant Citizens and the Need for Strong State Capabilities', Oxford Institute of Social Policy 2014/3.

12 Such symbolic functions create a risk that they start to point beyond themselves and their actual significance.

13 Steve Peers have compared Prime Minister David Cameron and his ultimatum-like package on the reduction of the number of migrants and their access to social benefits directly to the mythological hero Hercules and his labours. Cameron is standing by his pledge to obtain significant Community level changes in the regulation of the free movement of EU citizens. If no changes are made, he will campaign for the exit of the United Kingdom from the European Union. This is the only way he can be absolved of failing to meet his earlier promise to hugely reduce the amount of migration to the UK – which was made in a moment of

British Prime Minister David Cameron that foreigners working in the UK should only be able to access the British social assistance system after four years of continuous residence and employment. Such an affirmation, of course, reaches far beyond the question of social tourism. Moreover, it goes obviously and sharply against the essence of economic integration, and as such, is unacceptable. At the same time, we have to acknowledge that more and more countries are sending signals to the Commission suggesting that the issue of social dumping needs to be resolved.[14] The Commission, in order to reduce the Member States' above-mentioned concerns and to emphasize the importance of the question, published a study in October 2013[15] on the "impact on the Member States' social security systems of the entitlements of non-active intra-EU migrants". This study does not seem to support the hypothesis that the primary motivation of EU citizens moving to other Member States would be to access the different social benefits, as opposed to work and family related migration incentives.[16] Other empirical studies carried out in the afore mentioned area have also come to the conclusion that there is no strong support for the welfare magnet hypothesis, immigration is primarily driven by differentials in unemployment and wages between sending and destination countries.[17]

The Member States' concerns thus are unfounded in so far as the economically inactive EU citizens make up only a small fraction of the number of all migrating EU citizens.[18] However, the question has real political weight, given that it concerns a field on the

political madness. Steven Peers, http://eulawanalysis.blogspot.hu/2014/11/the-nine-labours-of-cameron-analysis-of.html.

14 In May 2013 the United Kingdom, Austria, Germany and Holland addressed the above question to the Commission, which replied that EU law included appropriate guarantees to avoid abuses. Speech by the then EU Justice Commissioner Viviane Reding at the Justice and Home Affairs Council on December 5th 2013, text available at http://europa.eu/rapid/press-release_SPEECH-13-1025_en.htm.

15 A fact finding analysis on the impact on the Member States' social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence, DG Employment, Social Affairs and Inclusion via DG Justice Framework Contract, 14 October, 2013.

16 On one hand, the main findings of the study indicate that the majority of EU citizens go to another country to work, and a significant number of economically inactive EU citizens (64%) currently residing in host Member States had previously been employed in the Member State in question, and finally, that the group in question amounts to a small part, that is 0.7%-1% of the entire population. The employment rates by country are similar; nevertheless, unemployment rates are higher among those citizens who came from Bulgaria and Romania.

17 C. Giulietti, 'The welfare magnet hypothesis and the welfare take-up of migrants', IZA World of Labour 2014. 37. http://wol.iza.org/articles/welfare-magnet-hypothesis-and-welfare-take-up-of-migrants/long.

18 D. Guimaraes, 'The right to free movement and the access to social protection in the EU. The economical dimension. Notes on the case Elisabeta Dano v. Jobcenter Leipzig', *EU Law Journal*, Vol. 1, No. 1, July 2015, 116. Furthermore, a number of studies were published which suggest that benefit tourism is not taking place on a large scale and that generally EU migrants have positive effects upon the economies of their host states. See E. Guild, S. Carrera & K. Eisele, 'Social Benefits and Migration: A Contested Relationship and Policy Challenge in the EU', CEPS, 2013.

boundary between Union and Member State law. As a European Parliamentary Research shows

> […] Some member states feel they have lost control over one of the core competences of a sovereign state, namely, their welfare system, not by agreeing to such a shift of competences, but through the back door of EU citizenship.[19]

Traditionally it is indeed for Member States to determine who is covered by the solidarity plan that entitles them to be eligible for different benefits and financial allowances of the Member State's social assistance system. In the absence of harmonization at Community level, Member States retain the power to organize their social security schemes.[20] However, in accordance with the case law of the CJEU, the Member States "must none the less, when exercising that power, comply with Community law and, in particular, the provisions of the EC Treaty on freedom of movement for workers"[21] and the principle of non-discrimination at the heart of them. However, the questions where the boundary of national solidarity lies and where the Union and its legal order may intervene in drawing that boundary are rightly being asked.

26.4 The Legal Background of the Judgments

The right to free movement between the Member States, according to the original Treaty provisions, was strictly linked to *economic activity*, and was then progressively extended to cover the economically inactive EU citizens as well. Today the right of free movement is referred to as the *most important right attached to EU citizenship*, thus Article 21(1) of the founding treaty in force (TFEU) directly ensures the right to move freely to every citizen of the European Union "subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect".[22]

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19 E.M. Poptcheva (2014) Freedom of movement and residence of EU citizens – Access to social benefits, European Parliamentary Research Service, p. 4.

20 Art. 153(2) of TFEU authorises the Union to adopt minimum standards in order to support the social security and social protection of workers. However, the EU has never acted upon this authorisation and it seems to be lacking any political will to do so in the future either. See Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 200, 7.6.2004, pp. 1-49).

21 Judgement of 11 September 2008 in Case 228/07 *Jörn Petersen v. Landesgeschäftsstelle des Arbeitsmarktservice Niederösterreich.* ECR 2008 I-06989, para. 42.

22 Art. 21(1) TFEU "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect."

Despite all this it is clear that the right to move freely is still not a single legal category, it has kept its historically layered nature.[23] This is reflected by the secondary legislation implementing the Treaty provisions, such as the Free Movement Directive provisions – which keep the workers and self-employed persons in the focus – underlying the Dano and Alimanovic judgments. While the former, in possession of the wide-ranging prerogatives ensured by EU law, can benefit from the advantages of the single internal market,[24] the economically inactive are in a very different situation. As we mentioned above, the economically inactive EU citizens' right of residence in the host Member State is conditional on their having sufficient resources and comprehensive sickness insurance cover set out in the Free Movement Directive. EU citizens and their family members thus enjoy the right to reside on the territory of the Member State only as long as they comply with the above conditions set out in the Directive.[25]

The jurisprudence of the CJEU on EU citizenship, nevertheless, has been showing a trend from the very beginning that was seeking to relax the strict conditions of the freedom of movement and of residence with reference to EU citizenship as a *fundamental status*.[26] The strictly economic approach has been overstepped and this was demonstrated by the cases[27] where the Court of Justice sought to provide a protective shield for the economically

23 D. Thym, 'The elusive limit of solidarity: residence rights of and social benefits for economically inactive Union Citizens', *CMLR* 2015, 52(1) 17-50, p. 18.

24 The fullest possible exercise of these rights is also supported by the extending nature of the European Court of Justice's case law, in particular concerning equal treatment in the field of family reunion, social benefits and tax advantages. In the case of workers and self-employed persons, not even the capacity of self-sufficiency is required, thus even salary supplements paid out of public funds are permitted in the exercise of the freedom guaranteed by the Treaty. Those who travel to another Member State to receive services also enjoy the right to unconditional freedom of movement.

25 Art. 14(2) of the Directive.

26 Nevertheless, the jurisprudence of the Court of Justice was severely criticised by certain Commentators who view this process as undermining the solutions negotiated by the Member States with the occasion of the adoption of secondary legislation in the field of free movement.
See S. Giubonni, 'Free movement of persons and European solidarity', *European Law Journal* 13/3, pp. 360-379. A. Tryfonidou: The impact of Union Citizenship on the EU's market freedoms, Hart Publishing, 2016; N. Nic Shuibhne, The Coherence of EU Free Movement Law, OUP, 2013.

27 It started with the *Martinez Sala* case in which the Court of Justice declared that since the introduction of EU citizenship by the Maastricht Treaty, non-economic migration between Member States also triggers the application of the Treaty prohibition of discrimination on grounds of nationality in the host State. Judgement of 12 May 1998 in Case 85/96 *Maria Martinez Sala v. Freistaat Bayern* ECR 1998 I-02691. Martinez Sala was followed by Grzelczyk (Judgment of 20 September 2001 in Case 184/99 *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, ECR 2001 I-06193); Trojani (Judgment of 7 September 2004 in Case 456/02 *Michel Trojani v. Centre public d'aide sociale de Bruxelles*, ECR 2004 I-07573); Bidar (Judgment of 15 March 2005 in Case C209/03, ECR 2005 I-02119); Vatsouras (Judgment of 4 June 2009 in Case 22/08 and 23/08 *Vatsouras and Koupatantze v. Arbeitsgemeinschaft (ARGE) Nürnberg 900*, ECR 2009 I-04585).

inactive EU citizens both against the trap of *reverse discrimination*,[28] and the host Member State's *discriminatory practice based on nationality*.

The Dano and the subsequent Alimanovic cases seem to break exactly that trend. The Court, setting aside its previous generous jurisprudence based on the unwavering idea of EU citizenship and the expanded interpretation of the rights derived from it, now only wishes to grant the right of free movement and residence to those who support the economy of the host country by their presence.[29] This means that the Court of Justice has still not managed to break free from the stubborn hold of the *economic approach* that had characterized the first phase of integration. This, however, comes at a price: abandoning the requirement of *legal certainty* in such a sensitive and important field as the free movement of persons.[30] In the following, we will examine that question through the analysis of the relating case law of the Court of Justice.

26.5 Legal Analysis of the *Dano* and *Alimanovic* Cases in Light of the Relevant Case Law of the Court of Justice

The first thing that strikes us in Dano is that the Court of Justice – unusually – is sticking to the text of the relevant legislation.[31] If you like, the Court of Justice "resigns itself to the EU legislation", and instead of standing by its previous expanding case law, it simply accepts the strict limitations set out in the Free Movement Directive.[32] This is why it is no surprise that in the statement of reasons for the judgment it barely makes any reference

28 One of the peaks of that trend was marked by the Zambrano judgment that granted family reunification rights, first of all the right of residence on the territory of Belgium, to the third country national parents of a child of Columbian origin who had obtained EU citizenship as a Belgian national. Judgement of 8 March 2011 in Case 34/09 *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*, ECR 2011 I-01177.

29 Moreover, the ECJ made it clear that even one person seeking social benefit can become a burden on the social assistance system. That was not the case in former jurisprudence. In Alimanovic the ECJ made it clear that individual claims will have an aggregate effect on social security. Case *Alimanovic* C-67/14 para. 62. See in this sense: S Peers, 'Case Comment Case C-67/14 Alimanovic', *Journal of Immigration, Asylum and Nationality Law*, 2016, 30(1), 54-56: "the Court's interpretation, which seems to set out an irrebuttable presumption that any individual application for social assistance constitutes an "unreasonable burden" on national systems, due to the applications made by other people in the same situation". See more about this question: D. Thym, 'The elusive limit of solidarity: residence rights of and social benefits for economically inactive Union Citizens', *CMLR* 2015, 52(1) 17-50, pp. 27-30.

30 The right to free movement of persons is one of the original four fundamental freedoms making up the basis of what is now the European Union. In the meantime, it is astonishing that the Court of Justice, paradoxically, is referring to the requirement of legal certainty in the grounds for the Alimanovic judgment.

31 It applied a literal interpretation instead of purposive or contextual.

32 It is important to stress that the ECJ is not using Art. 18 TFEU in this sense, in Dano it returns to secondary law. See in this sense R. Zahn: "The principle of equal treatment enshrined in Art. 18 TFEU has been used by the Court in the past to mitigate any differences in entitlement to rights which may arise by virtue of different statuses." R. Zahn, '"Common sense" or a threat to EU integration? The Court, economically inactive EU citizens and social benefits', *Industrial Law Journal*, 2015, 44(4), 573-585, p. 581.

to its previous cardinal decisions in the field of EU citizenship, as if to "gloss over the inconsistency of its case law".[33]

It is equally peculiar that the legal arguments of the Court represent a real U-turn. The Court previously stated that the purpose of the "Free Movement Directive" was to facilitate the exercise of the freedom of movement and of residence;[34] however, the present judgment interprets the Directive's provision on sufficient resources, the condition of residence,[35] expressis verbis as "seeking to avoid that the economically inactive EU citizens use the host Member State's social assistance system as a means of subsistence".[36]

Moreover, in relation to the formula on EU citizenship as fundamental status, the CJEU reactivated the sub-paragraph setting out the exceptions to equal treatment it had only "forgotten about" in its previous decisions.[37] In the Dano judgment, the emphasis on the conditions and limitations of free movement as opposed to constitutional arguments[38] already indicate a shift towards Member State interests.

Such a sharp change of direction on behalf of the Court clearly does not favour the requirement of legal certainty,[39] especially as the set of conditions of the economically inactive EU citizens' free movement contained in the Directive was defined a priori in an ambiguous way.[40] The legislation in question – as we mentioned above – contains uncertain notions such as the requirements of "unreasonable burden" or "sufficient resources".[41] Instead of giving specific guidelines, it prescribes a case based analysis by the national authorities.[42] Thus, it is unclear when a EU citizen becomes an "unreasonable burden" to the social assistance system. The confusion gets even deeper looking at the provision of the Directive according to which an expulsion measure shall not be the automatic conse-

33 Thym p. 24.

34 Judgment of 25 July 2008 in Case 127/08, *Metock v. Minister for Justice, Equality and Law Reform* [2008] ECR I-6241, 82.

35 Point 1b, Art. 7 of the Directive.

36 Case 333/13, *Dano* para. 76.

37 "As the Court has held on numerous occasions, the status of citizen of the Union is destined to be the fundamental status of nationals of the Member States, enabling those among such nationals who find themselves in the same situation to enjoy within the scope *ratione materiae* of the FEU Treaty the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for in that regard." *Dano* judgment para. 58.

38 That supposedly would have led to different results in the case in question.

39 G. Barbone, 'Dano and Alimanovic: the end of a social European Union' https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=1012#.V2es6buLTDc.

40 According to Verschueren, "it would be much clearer if the provisions of the Directive excluded economically inactive EU citizens from all social assistance, moreover, social benefits until they obtain their long-term residence status. However, the Directive does not contain any such provisions, and Art. 24(2) limits equal treatment only as regards maintenance aid for studies." See H. Verschueren, 'Preventing benefit tourism in the EU. A narrow or broad interpretation of the possibilities offered by the ECJ in Dano?', *CMLRev* 52, Kluwer Law International, 363-390, p. 381.

41 Directive 7(1)b.

42 Directive 8(4).

quence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State.[43]

In the meantime we need to recognize the "voluntarily obscure phrasing"[44] – that was presumably some sort of a compromise during the drafting of the legislation – comes at a price. That price is the burden on the practitioners to define *in which cases* a claim for social assistance means that the economically inactive person has the necessary sources for their lawful residence without putting an *unreasonable burden* on the social assistance system of the host country.[45]

The practitioner had the same burden in the *Brey* case preceding the *Dano* judgment, similar in subject matter.[46] In this case, the Court of Justice had to interpret EU law concerning the application for compensatory supplement of a retired couple. The CJEU, in Brey, applied a purposive interpretation of the norms of the directive ensuring rights to union citizens. Recognising the discrepancy of the Directive, it explicitly highlighted the necessity of the *"effet utile"* of the provisions therein and of the *strict interpretation* of the restrictions on free movement.[47] In the light of the above, the CJEU concluded in the *Brey* case that *in absence of an overall assessment*, the Member States did not have the right to *automatically* refuse the assistance in question from economically inactive EU citizens, nor did they have the right to consider such persons automatically as not having sufficient resources and thus the right to reside in the country.[48] In this case, the CJEU ultimately left it to the referring court to determine whether granting the social benefit that was the subject of the case was likely to become an unreasonable burden in that specific situation.[49] In the meantime, in Brey the Court prescribed the factors to be examined during the *overall assessment*, among others, the extent of *the burden* which that grant would place on the *national social assistance system* and, in accordance with the requirement of the *principle of proportionality*, the personal circumstances characterising the individual situ-

43 Directive 14(3), Moreover, as long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. Preamble, paras. 10 and 16.

44 Thym p. 26.

45 In the *Dano* case the Court had a relatively easy task, given that the referring court had stated that the applicants did not have sufficient resources and they could not claim a right of residence under the Directive. See *Dano* judgment para. 81.

46 The *Brey* case concerned German couple that moved from Germany to Austria in 2011 in order to reside there. Mr Brey had an EUR 862 pension in his home country. Given that the couple did not have any other income or assets, they applied for compensatory supplement the granting of which was made conditional by the Austrian authorities upon fulfilling the requirements for the right to residence. The German couple had to prove that their residence fulfilled the requirements set out in the Free Movement Directive and that they did not place an unreasonable burden on the social assistance system of Austria.

47 H. Verschueren, 'Free movement of benefit tourism. The Unreasonable burden of Brey', *European journal of Migration and Law* 6, 147-179, p. 158, Case 140/12, *Brey* paras. 65-71.

48 The mere fact that a national of another Member State applies for social assistance does not prove that they are becoming an unreasonable burden for the social assistance system of the country.

49 Case 140/12, *Brey* para. 79.

ation of the person concerned, the amount of the benefit applied for and the period during which it is likely to be granted.[50]

On that basis the question arises why, in the *Dano* case, the Court did not mention the test of proportionality set out in the Directive[51] and its previous case law (see *Brey*).[52] Verschueren replies that proportionality, being one of the most important principles of EU law, "may have a particularly important role in decisions concerning different goals and competing interests, however, in cases as self-evident as the *Dano* case, its application can be cast aside."[53]

Nevertheless, the Court did not clarify what the circumstances were on the basis of which such a special, "self-evident" case was to be defined. In the judgment of the CJEU, it refers only to "claiming social benefits being the main motivation of Ms Dano's residence", and to the fact that Ms Dano "did not come to Germany to look for work". On the basis of this, Verschueren assumes that it was the absence of intent of *integration* on Ms Dano's side and her marginalised situation in German society[54] that lead the Court to establish that Ms Dano was not entitled to equal treatment, without applying the test of proportionality. According to the Commentator, these signs suggest that in the case of economically inactive citizens, the purpose/motive of travelling to another Member State might also be decisive in the assessment of equal treatment concerning social assistance and the right of residence. It was in the *Dano* case that the Court acknowledged the importance of the motive for the first time, even if restricted to particular circumstances. Even though we cannot fully agree with the above statement,[55] we must realise that the absence of social integration indeed could play an important role in the outcome of the *Dano* case.[56] This

50 Id. 78.

51 Arts. 8(4), 14(3) and Point 16 of the Preamble of the Directive.

52 "The ECJ 'creates an automatic right of refusal […] without recourse to a proportionality test (like in Brey)" Zahn p. 579; N. Nic Shuibhne, 'Limits rising, duties ascending: the changing legal shape of Union Citizenship', *CMLR* 2015, 52, 889-938, p. 913.

53 Verschueren note 35, p. 373.

54 In Ms Dano's case it had become clear at the start of her residence that she did not wish to integrate into the society of the host country by seeking work, among others. The documentation also indicates that, in Romania, Ms Dano had only attended school for three years, nor did she have any professional or vocational qualification. She understood German, however, she could not write it and her German reading skills were limited. These circumstances suggested the absence of integration.

55 This would be in sharp contrast with the previous case law of the Court of Justice concerning economically active citizens in which the Court found that the reasons leading a citizen of a Member State to seek work in another Member State were completely irrelevant as long as the employment was real. Judgment of 23 March 1982 in Case 53/81, *D.M. Levin v. Staatssecretaris van Justitie*, [1982] ECR 1035, 23. Judgement of 23 September 2003 in Case 109/01 *Secretary of State for the Home Department v. Hacene Akrich* [2003] ECR I-9607, 55.

56 Daniel Thym also highlights the significant role of the absence of social integration as regards the Court's decision. He reckons that Ms Dano's physical presence on the territory of Germany is, in itself, irrelevant because irregular residence does not result in a "legally significant social integration quality" on the basis of EU law.

point is confirmed by a judicial practice that is increasingly emphasising the requirement of *social integration* in the field of free movement.[57] In the case law concerning economically inactive citizens and job seekers, the Court of Justice has been applying for nearly one and a half decades the requirement of a "real link"[58] and of a "certain degree of integration"[59] as the objective norm to justify the derogation from equal treatment.[60] Moreover, the *test of integration/real link* is not only applied in relation to economically inactive citizens anymore. In the Court's most recent practice concerning the freedom of movement it is used generally, as guidance in every case concerning the interpretation of the principle of non-discrimination. With particular regard to the Court's decisions concerning the granting of long-term residence permit[61] and the application of the exception concerning public security/expulsion,[62] a significant shift can be observed from the "equal treatment as an instrument of integration" model towards the "rights granted according to the degree of social integration" approach.[63]

As a matter of fact, this concept is reflected in Directive 2004/38/EC insofar as it promotes a "gradual system" for equal treatment and protection against expulsion, including through permanent residence status with wide ranging guarantees after five years of lawful residence.[64] In the Alimanovic decision that followed the Dano judgment and was similar to it in subject matter, the Court referred expressis verbis to the "*gradual system*" of retaining the worker status established by the Free Movement Directive as the basis of its decision. According to the Court's judgment, that system seeks to safeguard the right of residence and access to social assistance.[65]

The judgment in Alimanovic takes exactly the same approach as seen in Dano. The Court states first that, as in *Dano*, those benefits should be considered as "social assistance". Subsequently the Court recalled its finding in Dano that a Union citizen can only claim

57 Thym p. 39.

58 Judgment of the Court of 11 July 2002 in Case 224/98, *Marie-Nathalie D'Hoop v. Office national de l'emploi sz. D' Hoop* [2002] ECR I-6191, para. 38; Judgment of 23 March 2004 138/02, *Brian Francis Collins v. Secretary of State for Work and Pensions*, para. 67.

59 Judgment of 15 March 2005 in Case 209/03 *The Queen, on the application of Dany Bidar v. London Borough of Ealing and Secretary of State for Education and Skills* [2005] ECR I-2119, para. 57.

60 S. Mantu and P. Minderhoud. 'Solidarity (still) in the making or bridge too far?', *Nijmegen Migration Law Working Papers Series*, 2015/1, p. 20.

61 Judgment of 21 July 2011 in Case 325/09 *Secretary of State for Work and Pensions v. Maria Dias* [2011] ECR I-6387 para. 64. "…the integration objective which lies behind the acquisition of the right of permanent residence laid down in Art. 16(1) of Directive 2004/38 is based not only on territorial and time factors but also on qualitative elements, relating to the level of integration in the host Member State."

62 Judgment of 23 November 2010 in Case 145/09, *Land Baden-Württemberg v. Panagiotis Tsakouridis* [2010] ECR I-11979, Judgment of 22 May in Case 348/09 *P.I. v. Oberbürgermeisterin der Stadt Remscheid* [nyr].

63 The "integration model" considers social integration as an objective to be achieved and expects the individual to actively pursue incorporation into societal structures. Success or failure of this venture may regulate the degree of residence security and equal treatment under EU law.

64 Thym p. 36.

65 Case *Alimanovic*, 67/14 para. 60.

equal treatment with regard to social assistance on the basis of the Citizenship Directive if his residence complies with the stated conditions.[66] The question is whether the applicants may reside on the territory of the host country under the Directive. Having carefully examined the question, the Court stated that the applicants no longer enjoyed their former worker status under Article 7(3)(c) of the Directive by the time they were refused entitlement to the benefits at issue.[67] Under the rules set out in the Directive those who work in the host State for less than one year retain 'worker' status for at least six months after becoming unemployed.[68] After that point, a Member State can terminate their worker status, which means they are no longer covered by the equal treatment rule.[69] In this case they can be classified under Article 14(4)(b) of the Directive as *first-time job-seekers*. A job-seeker cannot be expelled from that Member State for as long as he can provide evidence that he is continuing to seek employment and that he has a genuine chance of being engaged. However, in this case the host Member State may refuse to grant any social assistance.

As far as the rules on the retention of the worker status under Article 7(3)(c) to be applied by the Court are concerned, certain Commentators point out the anomalies of the strict, word by word interpretation.[70]

Against this backdrop, the interesting thing is that the Court, similarly to *Dano* (and contrary to the previous *Brey* case) *does not apply the test of proportionality* in this case either. The Court simply states that in the present circumstances no proportionality test in the form of an *individual assessment* of the person concerned is required. This statement is justified by the above mentioned argument that the citizens' Directive itself already took account of the *individual position of workers*.[71] Thus the Court deems the question concluded and acknowledges that the specific period of retaining worker status set out in the Directive ensures legal certainty, 'while complying with the principle of proportionality'.[72]

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66 Id. para. 49.

67 Id. para. 55.

68 Id. paras. 53-54.

69 Case *Alimanovic*, 67/14 paras. 56-57.

70 According to Barbone, the applicants "could not be categorised as 'job-seekers' under Art. 7(3)(c) CRD only owing to a technicality of their situation". Barbone, Giuila: Dano and Alimanovic: the end of a social European Union, https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=1012#.V2es6buLTDc.
In this regard, Kramer notes that "If the words of the Court are taken literally, it follows that if mother and daughter Alimanovic had only worked one month longer, Germany should have granted them unlimited access to social assistance". D. Kramer, 'Had they only worked one month longer! An analysis of the *Alimanovic* case'. http://europeanlawblog.eu/?p=2913.

71 Case *Alimanovic*, 67/14, para. 59. It observes that no such individual assessment is necessary in circumstances such as those at issue in the main proceedings, since the gradual system as regards the retention of the status of 'worker' provided for in the 'Free Movement of Citizens' Directive itself takes into consideration various factors characterising the individual situation of the applicant for social assistance.

72 Id. para. 60.

Certain Commentators, however, rightly take the view that the Court's discussion of the principle of proportionality is far from convincing.[73] They find it particularly problematic how the Directive takes account of 'factors characterising the individual situation of *each* applicant for social assistance.'[74]

In summary of the above, the shift in the practice of the Court of Justice from *Brey* to *Alimanovic*, the fact that applying for social benefits may not only have indicative value but might also prove that the applicant does not have sufficient resources,[75] consequently, an individual examination would become unnecessary, deserves attention concerning the changes in the scope of EU citizenship. With particular regard to the fact that while in *Dano* the Court still refers to the 'fundamental status' of Union citizenship *Alimanovic* confirms this symbolic reversal by skipping any reference to Union citizenship and straightly moving to residence conditions.[76] At the same time, it is important for us to see that this is about the Court trying to manoeuvre in the maze of economic rationality and the requirements dictated by the political sphere, while putting the requirement of *social integration* at the forefront, since this has been playing an ever more significant role in the judicial practice in the field of free movement. This of course does not entitle the Court to overlook in its jurisprudence fundamental principles of EU law such as fulfilling the requirements of proportionality and of legal certainty.

26.6 "Legal Uncertainties" Arising from *Dano* and *Alimanovic* – Demarcation Problems

As we know, the right of entry and the right of residence of citizens of other Member States are based directly on the Treaty and on the provisions adopted in implementation of the Treaty.[77] Thus the residence permit confirming this, issued by the Member State, is of merely declaratory nature. However, it is exactly the automatic acquisition and loss of the

73 Kramer, Mantu & Minderhoud, Barbone. Moreover, the Commentators draw attention to Communication 2009 (313) on guidance for better transposition and application of Directive 2004/38/EC published by the Commission, according to which "in assessing whether an individual whose resources can no longer be regarded as sufficient and who was granted the minimum subsistence benefit is or has become an unreasonable burden, the authorities of the Member States must carry out a proportionality test". http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0313:FIN:en:PDF, p. 8.

74 Concerning the assessment, or to be precise, the rejection of assessing the circumstances in *Alimanovic*: The fact that mother Alimanovic was born in Bosnia and Herzegovina and her children were born in Germany between 1994 and 1999 hints at her possible history in Germany as a refugee which potentially reflect a connection with German society and hint at the existence of family relations, circumstances which can impossibly be taken into account by the Directive. See Kramer id.

75 Moreover, the Court's interpretation in Alimanovic judgment seems to set out an irrebuttable presumption that any individual application for social assistance constitutes an 'unreasonable burden' on national systems.

76 Case *Alimanovic*, 67/14 paras. 49-51.

77 Judgement 21 July 2011 C-325/09. *Dias* case, para. 48.

right of residence that makes it difficult to determine whether a person is lawfully resident on the territory of the Member State in question.[78] Thym is absolutely correct by saying "the citizens that have scarcer resources basically live in a grey zone,[79] with an uncertain resident status."[80]

This uncertain status, if we can put it this way, became even more so with Dano, given that the Court apparently made equal treatment and the access to social assistance conditional solely to the requirement of lawful residence under the Directive. At least this is what Paragraph 69 of the judgment suggests, according to which a Union citizen "…can claim equal treatment with nationals of the host Member State only if his residence in the territory of the host Member State complies with the conditions of Directive 2004/38."[81]

From this we could conclude even that a Union citizen whose lawful residence in the host country is not based on the Directive itself but on some other EU source, such as the provisions of the Treaty,[82] a European Union regulation[83] or the more favourable provisions contained in the national legislation,[84] according to the above, would not be entitled to equal treatment concerning social benefits. Such an interpretation would mean a significant change compared to the previous case law of the Court of Justice, according to which lawful residence could also be based on other sources than the Free Movement Directive. Moreover, it would be contrary to the fundamental thesis of EU law according to which the exceptions to the principle of non-discrimination on the basis of nationality should be interpreted strictly in every case.[85]

In the future, national courts will probably be faced with further challenges, not only the issue of defining "lawful residence". Thus, also the wide interpretation of the worker status given by the Court of Justice may lead to seemingly arbitrary decisions.[86] Under the

78 This is well illustrated by Dano: the city of Leipzig granted permanent resident permits to the EU citizens in question.

79 Some authors even go further and argue that the Dano judgement has the potential of creating a "subclass of EU citizens". See R. Zhan, '"Common sense" or a threat to EU integration? The Court, economically inactive EU citizens and social benefits', *Industrial Law Journal*, 2015, 44(4), 573-585, p. 577.

80 The situation of EU citizens who do not have sufficient resources is quite uncertain concerning their lawful residence, even if – as we saw in Dano – the Member State grants them a permanent residence permit. Thym p. 41.

81 Case *Dano* 333/13 para. 69.

82 On Art. 45 TFEU (Judgement of 12 December 2013 in Case 507/12 *Jessy Saint Prix. v. Secretary of State for Work and Pensions*) or Art. 20 TFEU (see *Zambrano* above).

83 Judgement of 23 February 2010 in Case 480/08 *Maria Teixeira v. London Borough of Lambeth and Secretary of State for the Home Department* [2010] ECR I-1107, or Judgment of 8 May 2013 in Case 529/11, *Olaitan Ajoke Alarape and Olukayode Azeez Tijani v. Secretary of State for the Home Department*.

84 See *Trojani* and *Martinez Sala* above.

85 According to Verschueren, the migrating EU citizens are put in a very vulnerable situation; he also brings examples. Verschueren p. 379-380.

86 In its judgment in Saint-Prix the Court asserted that a woman who gave up work just before giving birth, retained 'worker' status and so access to benefits under certain conditions. Judgement of 19 June 2014 in Case 507/12 *Jessy Saint Prix v. Secretary of State for Work and Pensions.*

current extending judicial practice of the CJEU even 5 hours of weekly work and 175 Euros of monthly salary[87] can be enough for "gaining" the worker status and the equal treatment attached to it.[88] For example, if Ms Dano was married and her husband was employed as required by the above, the family would be entitled to approximately 1000 Euros of social assistance, in accordance with the requirement of equal treatment of workers and their family members. These discrepancies indicate the future difficulties that will arise from the sharp difference between the economically active and inactive citizen status.[89]

26.7 Conclusion

On the basis of Dano and Alimanovic explained above, we might rightly feel that even though the EU citizenship has created a comprehensive status encompassing all the active and inactive statuses, the historically layered nature of free movement, however, remains.

The Court is not able to detach itself from the notion of the market citizen, and wishes to continue to interpret EU citizenship in the framework of the internal single market. This also means that the rights arising from it can be enjoyed by the citizens of the Member States only if their migration is deemed useful from an internal market point of view, and if it does not become an unreasonable burden for the social assistance system of the host country.

In this regard, it is regrettable that the Court chose not to give intra-EU migration a wider assessment focusing on its advantages and disadvantages occurring in every Member State. The judgments concerned could have allowed giving Union citizenship and the rights arising from it a new interpretation built upon cross-border solidarity.[90] The hope behind the Dano and the subsequent *Alimanovic* case was that the CJEU would fully engage with the constitutional issue as to the legal concept of Union citizenship and the complex

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This is also indicated by the above presented *Alimanovic* case: if mother and daughter Alimanovic had only worked one month longer, Germany should have granted them unlimited access to social assistance. Steve Peers noted that in Alimanovic the ECJ was inconsistent with its prior case-law on the notion of workers. In C-507/12, *Saint-Prix* the Court "insisted that the concept of worker was set out in the Treaties, not secondary legislation, and so it fell mainly to be defined by the Court", p. 55. Steve Peers: Case Comment Case C-67/14 *Alimanovic*, *Immigration, Asylum and Nationality Law*, 2016, 30(1), 54-56.

87 "…the fact that a worker's earnings do not cover all his needs cannot preclude him from being a member of the working population and that employment which yields an income lower than the minimum required for subsistence or normally does not exceed even 10 hours a week does not prevent the person in such employment from being regarded as a worker within the meaning of Art. 39 EC." Judgment of 4 February 2010 in Case 14/09 *Hava Genc v. Land Berlin* [2010] ECR I-931, para. 25. It can be supplemented even from public funds (Judgement of 3 Jun 1986 in Case 139/85 *Kempf* [1986] ECR 1741, para. 14).

88 Provided that the employment in question is real and genuine.

89 Thym p. 43.

90 Varjú M and Nyircsák A., 'A tagállamokat minimális szolidaritási kötelezettség sem terheli az uniós polgárságból eredő elvárások alapján', http://jog.tk.mta.hu/blog/2014/11/europai-birosag-dano-itelet.

question on the interaction between primary and secondary legislation. This, however, has remained an unfulfilled hope.[91] While delivering its judgment, the Court strictly followed the path set out in the Free Movement Directive reflecting its "spirit of compromise" by looking for solutions to reconcile internal market goals and Member States wishing to protect their social assistance system, and compliance with the EU principle of solidarity. In its above explained judgments, the Court, like a good pupil, simply repeats the provisions contained in secondary law, and does so without any attempt to clarify the obscure provisions of the Free Movement Directive on the basis of which the decisions were taken, thus maintaining the *uncertain nature* of the residence status of EU citizens who do not have sufficient resources. Moreover, the Court in its Alimanovic decision paradoxically chooses to refer exactly to the requirement of legal certainty as grounds for declaring that the proportionality test and the assessment of the individual circumstances of the applicants are unnecessary.[92] However, the implementation of the requirements of *legal certainty and of proportionality as principles of EU law* is indispensable in relation to the legal institution of Union citizenship, in so far as we accept the fundamental nature of that status.

In Dano and in Alimanovic, the Court however appears to be moving ever further away from the concept of EU citizenship as a general value and common solidarity, and a sign of this is that the Court chooses to focus on the limitations of that status instead of its fundamental nature.

Nevertheless, first and last, any far-reaching conclusions regarding the impact of the decisions on EU citizenship would be somewhat premature. The Court is simply trying to manoeuvre in the maze of economic rationality and the requirements dictated by the political sphere, while putting the requirement of *social integration* at the forefront. *Dano* only means a shift in the practice of the Court of Justice from the "place of residence model" towards the "integration model" that requires a certain degree of social integration on the side of the newcomers in exchange for equal treatment in the field of social assistance, mainly in the shape of carrying out an economic activity on a lasting basis in the host country.

91 Even though in *Dano* the Court mentioned the fundamental nature of EU citizenship, in *Alimanovic* it did not even refer to it.

92 The CJEU was not willing to assess the situation of the individuals in question and the reasons why they would constitute a financial burden on the host Member State's financial system.