18 Legal Challenges of the Retention of Worker Status as Reflected in Recent Case-Law of the CJEU

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Abstract
In recent years, a growing number of cases related to the retention of worker status have emerged in CJEU jurisprudence with reference to welfare benefits, requiring a much deeper analysis of the field treated earlier as peripheral. Such an analysis seems especially justified in light of the current political and legal discourse concerning the issue of free movement, focusing on the question of equal treatment in the field of welfare assistance for mobile citizens. The purpose of this study is to present and put into context the relevant case-law of recent years by analyzing the judgments of the CJEU in two cases that are benchmarks in this field: the *Tarola* and *Saint Prix* cases. Both cases highlight the key role that economically active status continues to play in integration law. These judgments also shed light on the challenges arising from the difficulties in distinguishing between the economically active and inactive EU citizen statuses. This issue emerged as an increasingly grave problem in the field of law of free movement, posing a serious dilemma for law enforcement.

18.1 Introduction

In legal literature the issue of the retention of worker status[1] is generally discussed only peripherally, within the framework of the general presentation of the field of free movement of persons, as an inherent but marginal slice of it.[2] This is not surprising, for in the history

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1 The retention of worker status refers to the legal statuses defined under Article 7(3) of Free Movement Directive, meaning all economically active statuses including the self-employed status. Where the differentiation between the two statuses has relevance, this is obviously indicated.

2 *Cf. e.g.* Éva Gellér Lukács, *Munkavállalás az Európai Unióban*, KJK Kerszöv, Budapest, 2004.

of integration the number of court cases in this field can be regarded marginal on the whole.[3] In recent years, a growing number of cases in relation to welfare benefits emerged in the jurisprudence of the CJEU however, requiring a much deeper analysis of the field treated earlier as peripheral. Such an analysis seems especially justified in light of the current political and legal discourse concerning the issue of free movement, focusing on the question of equal treatment in the field of welfare benefits for mobile EU citizens.

The purpose of this study is to present and put into context the relevant case-law of recent years by analyzing the judgments of the CJEU in two cases that are benchmarks in this field: the *Tarola*[4] and *Saint Prix* cases.[5] Both cases focus on *de facto* unemployed persons who had drifted to the periphery of worker status having lost their earlier worker or self-employed status. However, following from Article 45 TFEU or by virtue of the rules laid down in secondary legislation, *i.e.* Directive 2004/38/EC[6] (Free Movement Directive) could retain their status and the broad entitlements stemming from it.

In the *Tarola* case it is remarkable how, in relation to examining the legal status of a mobile EU citizen who had pursued just a few weeks' gainful activity he was forced to terminate, the Court blended its very marked case-law attitude towards economically active citizens, with the case-law governing economically inactive citizens reflecting a much more considerate approach due to a change of trend in the past few years.[7] What is more, the ruling adds a new hue to the spectrum of welfare benefit issues arising in the context of free movement.[8]

The significance of the *Saint Prix* case, on the other hand, lies in the fact that it provided an exceptional opportunity for the Court to evaluate the special situation of pregnancy and childbirth in the context of free movement. What is more, it was called upon to

3 Sandra Mantu, *Analytical Note – Retention of EU worker status – Article 7(3)(b) of Directive 2004/38*, European Network on Free Movement of Workers, 2013, p. 12.

4 Judgment of 11 April 2019, *Case C-483/17, Neculai Tarola v. Minister for Social Protection (Tarola)*, ECLI:EU:C:2019:309.

5 Judgment of 19 June 2014, *Case C-507/12, Jessy Saint Prix v. Secretary of State for Work and Pensions (Saint Prix)*, ECLI:EU:C:2014:2007.

6 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

7 Opinions in legal literature vary as regards the question whether this was a genuine change in the Court's approach. There is no doubt however, that in its recent judgments on economically inactive citizens the Court has increasingly insisted on the literal interpretation of the Free Movement Directive. For more details *cf.* Herwig Verschueren, 'Preventing Benefit Tourism in the EU. A Narrow or Broad Interpretation of the Possibilities Offered by the ECJ in Dano?', *Common Market Law Review*, Vol. 52, Issue 2, 2015, pp. 363-390; Daniel Thym, *Questioning EU Citizenship. Judges and the Limits of Free Movement and Solidarity in the EU*, Hart Publishing, Oxford, 2017.

8 Francesca Strumia, *Unemployment, Residence Rights, Social Benefits at Three Crossroads in the Tarola Ruling*, at http://eulawanalysis.blogspot.com/2019/04/unemployment-residence-rights-social.html.

interpret this special case of retaining worker status in the light of the CJEU case-law on gender discrimination.[9] Although the Court did not fully exploit this opportunity, as an important contribution of the case it made the declaration of theoretical significance that the list in the Directive in force laying down the conditions for retaining worker status was not of an exhaustive nature. As such, the CJEU underlined the fundamental role of primary law in defining and enforcing the scope of employee rights.[10]

In what follows I shall first outline the relevant legislative background, focusing chiefly on secondary legislation governing the retaining of worker status, mentioning in general the legislative uncertainties that may cause problems of interpretation in this field. Next, I outline the relevant case-law in the recent years, especially the *Tarola* and *Saint Prix* cases, which are excellent examples for the existing lacunae in the legislation on retaining worker/self-employed status. By providing interpretative explanations and some criticism for the above judgments I attempt to throw light, beyond the shortcomings in the actual wording of the legislation, on systemic problems as well. Thus, also on the challenges arising from the difficulties in distinguishing between the economically active and inactive EU citizen statuses, which have emerged as increasingly grave problems in the field of law of free movement, posing a serious dilemma for law enforcement. Finally, in light of these future challenges I evaluate the judgments of the Court chosen for this analysis.

18.2 A Short Overview of the Effective Legislation Governing the Retention of Worker Status

While there are no express primary law rules on the retention of worker or self-employed status,[11] the relevant rules may be found in the secondary legislation of the EU.[12] Article 7 of the Free Movement Directive lays down EU citizens' right of residence in the territory of Member States exceeding three months, setting out the conditions thereof. The novelty of the Directive is that it seeks to replace the former sectoral approach by setting out the conditions of residence for all EU citizens and their family members in a single legal act. However, the former fragmented approach – as a kind of political compromise - continues to exist in the sense that the right of residence and the conditions thereof are adjusted to the performance of an objective recognized by EU legislation, *e.g.* work. The rationale

9 Samantha Currie, 'Pregnancy-Related Employment Breaks, the Gender Dynamics of Free Movement Law and Curtailed Citizenship', *Common Market Law Review*, Vol. 53, Issue 2, 2016, p. 544.

10 Eleanor Spaventa, *The Impact of Articles 12, 18, 39 and 43 of the EC Treaty on the Coordination of Social Security Systems in 50 Years of Social Security Coordination: Past – Present – Future*, European Commission, Luxembourg, 2010, p. 121.

11 Article 45 TFEU referring to employees and Article 49 TFEU referring to self-employed persons do not have any express provisions on this issue.

12 Mantu 2013, p. 5.

lying behind this is the twofold aim of the Directive, which is to guarantee a wide range residence rights on the one hand, and to protect member states' welfare assistance systems on the other. Thus, while EU workers or self-employed persons as economically active persons have no other conditions to meet in order to make residence lawful, students or self-sufficient (*i.e.* economically inactive) persons are required to have comprehensive sickness insurance cover and sufficient financial resources for residence, thereby ensuring that they will not become an unreasonable burden for the welfare system of the host Member State. Within the framework of Article 7 guaranteeing the right of residence in general, Article 7(3) explicitly regulates the issue of retaining the worker and the self-employed status, as well as the right of residence following from the former.

The Directive introduces a system of gradation in respect of the existence and conditions of the right of residence. In addition, it establishes a stepwise system as regards the retention of worker and self-employed status, based on two guiding principles: the reasons for the person's inactivity and the initial duration of work. These two organizational principles establish a hierarchical system, by virtue of which persons who have temporarily become unable to work as a result of an illness or accident, [Article 7(3)(a)], embark on vocational training [Article 7(3)(d)][13] or are in duly recorded involuntary unemployment after having been employed for more than one year [Article 7(3)(b)] shall retain worker status without time limitation. By contrast, the status of worker can be retained with time limitation, thus for a period of time guaranteed by the Member State concerned which shall be no less than six months, in cases laid down under Article 7(3)(c).

This latter provision, which was the subject of interpretation in the *Tarola* case was formulated in a somewhat complicated way.[14] Namely, it included two different scenarios simultaneously, which were only clearly distinguished by the judgment.[15] The regulation stipulates that an EU citizen who "is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year"[16] or "has become

13 In the case of vocational training it is a strict condition of retaining legal status that training be related to the previous occupation, with the exception of the case of becoming involuntarily unemployed. *See* Judgment of 7 June 1988, *Case C-39/86, Sylvie Lair v. Universität Hannover*, ECLI:EU:C:1988:322, para. 37; Judgment of 6 November 2003, *Case C-413/01, Franca Ninni-Orasche v. Bundesminister für Wissenschaft, Verkehr und Kunst*, ECLI:EU:C:2003:600, para. 14.

14 Steve Peers, *Pregnant Workers' and EU Citizens' Free Movement Rights*, at http://eulawanalysis.blogspot.com/2014/06/pregnant-workers-and-eu-citizens-free.html.

15 Before the Court judgment concerned there was even uncertainty as to whether the provision in fact referred to two distinguishable scopes of cases. The Court maintained that the use of the conjunction 'or' clearly indicated that the legislator had this intention. *Case C-483/17, Tarola*, para. 30.

16 It was on the basis of this first clause that the Court decided in the recently delivered *Alimanovic* judgment that migrant citizens who had just worked for 11 months were entitled to retain this status for six months only, after which they qualified as jobseekers. Judgment of 15 September 2015, *Case C-67/14, Jobcenter Berlin Neukölln v. Nazifa Alimanovic and Others*, ECLI:EU:C:2015:597. For a detailed analysis *see* Dion Kramer, *Had They Only Worked One Month Longer! An Analysis of the Alimanovic Case*, at https://euro-

involuntarily unemployed during the first twelve months" shall also retain their worker status provided they have been registered as jobseekers with the relevant employment office.

The provisions of Article 7(3) clearly reflect the legislators' intention to protect those who are temporarily unable to work or are unemployed. This includes those who did not quit the labor market voluntarily but were forced to do so for some reason such as an illness, accident or the fact that there are no vacancies on the labor market. The temporary nature of the protection is emphasized by the wording of the regulation itself in the case of persons unable to work as a result of an illness or accident [Article 7(3)(a)]. Meanwhile in the case of persons who have become unemployed [Article 7(3)(b) and (c)] it is apparent from the legislative requirement according to which the former must be registered with the employment office, clearly with the purpose that, with time, they should return to the labor market.

At the same time, the above provisions leave several questions open, including first of all whether the above list of the Directive is of an exhaustive nature as regards the conditions of retaining the worker status or can be further extended through case-law based on the provisions of primary legislation. It must also be clarified whether the above provisions also govern those who are self-employed. While Article 7(3) is about retaining the worker and the self-employed status in general, at several points later on the text mentions only 'worker status' expressly[17] or operates with the expression 'employment'.[18] Finally, in relation to the legal institution of worker status for the sake of completeness it should be mentioned that if the person in question is unable to retain their worker status, their situation becomes uncertain in view of the fact that he/she already qualifies as a jobseeker. Although the scope of Article 45 TFEU does cover jobseekers, their right of residence and especially their right to equal treatment as regards social benefits are much more restricted than of those who retain their worker status.[19]

Although the CJEU judgments to be outlined below provide an answer to the above problems arising from the shortcomings of the provision's wording, at the same time, as will be demonstrated below, they raise further and far more serious questions. These questions concern the outstanding role of worker status in EU legislation and in general

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peanlawblog.eu/2015/09/29/had-they-only-worked-one-month-longer-an-analysis-of-the-alimanovic-case-2015-c-6714/.

17 "In this case, the status of worker shall be retained for no less than six months". *Cf.* Article 7(3) of the Directive.

18 "He/she is in duly recorded involuntary unemployment after having been employed for more than one year […]". *Cf.* Id. Article 7(3)(b).

19 In compliance with Article 14(4)(b) of the Directive, EU citizens and their family members may not be expelled for as long as EU citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged. However, Article 24(2) provides that in this period the host Member State shall not be obliged to confer to them entitlement to social assistance.

the sustainability of the fragmented system of the law governing the free movement of persons, which survives in the Directive. As Dion Kramer's metaphor perfectly illustrates, "economic activity has been the Holy Grail of free movement of persons since the start of the European integration project" and continues to be even today.[20] The marked distinction in EU law between economically active and inactive persons[21] in parallel with the transformation of the world of employment and the expansion of the welfare state has increasingly brought about difficult-to-manage circumstances, which is well reflected by the judgments of the Court in the *Tarola* and *Saint Prix* cases, analyzed below.

18.3 The Tarola Case

18.3.1 Statement of Facts and the Questions Referred for Preliminary Ruling

In its *Tarola* judgment, the Court interpreted in response to the request for preliminary ruling by the Court of Appeal of Ireland, Article 7(3)(c) of Free Movement Directive. What is special about the case in question is that it lies at the intersection of legislations on the economic freedom of free movement of workers and the free movement of EU citizens.

According to the statement of facts, the Romanian citizen Mr. Tarola pursued gainful activity for periods of several weeks, alternately as an employee or as a self-employed person in Ireland. In 2013 and 2014 he applied for jobseeker's allowance and supplementary welfare allowance, which the competent authorities denied with reference to the lack of a habitual residence in Ireland, in view of the fact that his employment in Ireland was not long enough and he was unable to produce evidence proving he had sufficient resources to sustain himself. Mr. Tarola appealed to the High Court with reference to Article 7(3)(c) of the Free Movement Directive providing for the retention of worker status, by virtue of which, he claimed he was entitled to reside in the Member State concerned for six months following his employment of merely two weeks in July 2014. The High Court ruled that the above provision applied only to persons who were on fixed-term employment contracts of less than a year. However, the period of two weeks of work Mr. Tarola reported to have completed – in construction – did not meet this requirement.[22]

20 Dion Kramer, *A Right to Reside for the Unemployed Self-Employed: The Case Gusa*, at https://europeanlaw-blog.eu/tag/gusa-case/.

21 A question organically related to this is whether the EU citizenry are able to fulfil their role, or the EU is becoming increasingly distanced from a solidarity community. Although these questions have serious significance, discussing them would go beyond the framework of this study.

22 The referring court itself noted that the terms of casual work contracts were not specified in advance; these depended on labor market conditions in the construction industry.

The case finally reached the Court of Appeal, which referred the following questions to the CJEU for preliminary ruling. Does a citizen exercising free movement who before his involuntary unemployment worked for a two-week period – otherwise than on a fixed-term contract – thereby retain the status of worker for the purposes of Article 7(3)(c) of the Directive, such as would entitle him to receive social assistance payments or – as the case may be – social insurance benefits on the same basis as if he were a resident citizen of the host State?

18.3.2 The Judgment in the Tarola Case

Thus the first question the Court had to answer was whether fixed-term employment of merely two weeks in a framework other than a fixed-term contract was appropriate grounds for retaining worker status under the Directive, and as a corollary, lawful residence in the territory of the Member State in question.

Article 7(3)(c) provides that an EU citizen who "is in duly registered involuntary unemployment after completing a fixed-term employment contract of less than a year" or "has become involuntarily unemployed during the first twelve months" shall retain the worker status for a period of time to be specified by the Member State, but for no less than six months, provided that he has been registered as a jobseeker with the relevant employment office.

The Court found it important to point out first of all that the purpose of the Free Movement Directive was to facilitate the exercise of EU citizens' right to move and reside freely, which right was granted by virtue of Article 7(1)(a) to EU citizens pursuing gainful activity in the territory of another Member State for a period longer than three months.[23] As regards retaining the right of this worker status it noted that "the referring court – which has not questioned the Court in this regard, considers that […]"[24] Mr. Tarola has the status of worker on account of the activity that he pursued in the host Member State for a period of two weeks.

After establishing the retention of worker status, the Court proceeded to examine the provision of the Directive on the retention of worker status with the tools of legal interpretation, *i.e.* Article 7(3)(c).

23 In this respect the Court cited two judgments with a rather broad scope, *i.e.* its earlier judgments in the *Metock* and *Coman* cases where the CJEU declared the right of residence of EU citizens' third-country national spouses, what is more, irrespective of the circumstances of concluding the marriage or of the fact whether the host country acknowledged same-sex marriage.

24 *Case C-483/17, Tarola*, para. 25.

Similarly to the opinion of the Advocate General, the Court first of all pointed out that the two clauses referred to two distinct situations.[25] Furthermore, it was clear from the documents that Mr. Tarola was not employed in the host state during the period concerned, within the framework of a fixed-term work contract, so that he was not covered by the first situation. The question that essentially remained was whether he was covered by the second situation.

The problem was that while the first situation was formulated quite clearly, the second was worded rather vaguely. It only said to cover persons who "became involuntarily unemployed in the first twelve months", not clarifying either within the framework of what contract or type of activity the persons in question actually became involuntarily unemployed, or[26] whether the twelve months referred to therein referred to the period of residence spent by the worker concerned in the host state or in the employment itself. With reference to the opinion of the Advocate General[27] the Court concluded that it was impossible to establish from the wording of the provision in question whether Mr. Tarola was covered by the second situation.[28] Thus the Court gleaned the above interpretation of the wording of the regulation from the context of the provision, the purpose of the Directive and the origin of the Directive.[29]

As regards the context of the provision in question the Court noted[30] that the provision under discussion was to be interpreted in conjunction with Article 7(1)(a) guaranteeing the right of residence to EU citizens pursuing a gainful activity beyond three months. Thus the right to retain the earlier legal status is granted to all EU citizens who pursued gainful activity in the host Member State, either as a worker or as a self-employed person. In order to underpin its statement of grounds, the Court cited[31] the substance of the earlier *Gusa* judgment,[32] in which the CJEU established with reference to a Romanian plasterer active

25 Id. para. 30.

26 "That provision does not specify whether it applies to employed or self-employed persons or to both categories of worker, or whether it concerns fixed-term contracts for more than a year, contracts of indefinite duration or any type of contract or activity […]", Id. para. 35.

27 *Case C-483/17, Tarola*, Opinion of the Advocate General, para. 30.

28 *Case C-483/17, Tarola*, para. 34.

29 Id. para. 37.

30 At the same time, it certainly stipulated the double requirement of the efficient enforcement of the Directive and the prohibition of a restrictive interpretation. Id. para. 38.

31 Id. para. 39.

32 Judgment of 20 December 2017, *Case C-442/16, Florea Gusa v. Minister for Social Protection and Others*, ECLI:EU:C:2017:1004, paras. 37 and 38. Gusa pursued self-employed activity as a Romanian national in Ireland for several years, but he ceased working due to the absence of work later on. He applied for social assistance, which he was refused on the grounds that he no longer pursued a gainful activity; what's more, Article 7(3)(b) of Free Movement Directive was not applicable in his case because only persons who had earlier had a worker's status could retain it. The question was whether the provision of the Directive according to which the person in question "was employed for more than a year" excluded self-employed persons from the scope of beneficiaries. The Court found that although Article 7 of the Directive setting

in the Irish construction industry as a self-employed person for several years that the retention of the legal status regulated by Article 7(3) was independent of the nature of the economic activity.[33] The CJEU considered it important to mention[34] its earlier *Prefeta* judgment,[35] according to which the opportunity of an EU citizen temporarily ceasing to practice their activity as a worker or self-employed person to retain the legal status was based on the precondition that the citizen concerned was willing and able to return to the labor market of the host country within a reasonable period.

The Court added moreover that Article 7 introduced gradation with regard to the duration of the residence right granted to all citizens in the host Member State. This stepwise system followed from Article 7(3) itself with respect to the retention of the right of residence for temporarily inactive workers and self-employed persons. By virtue of this stepwise system EU citizens who pursued work or self-employed activity in the host state for less than one year are entitled to keep their worker status for six months only.[36] This is the case if the worker's activity ceases when the fixed-term work contract for less than one year terminates, as is stipulated by the first scenario of the relevant provision, and this is the situation also in the case of the second scenario when, irrespective of their intention, the worker is forced to cease activity before one year is completed irrespective of the type of contract concluded or the nature of the activity performed.[37]

According to the Court such an interpretation is consistent with the principal aim pursued by the Free Movement Directive, to strengthen the right of free movement and residence of all EU citizens and within its scope, the granting of the right of residence to

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the conditions of residence beyond three months made a distinction between economically active and inactive persons, it applied no further distinctions within the first group. An interpretation contrary to the above would not be in line with the objectives of the Directive, which was expressly meant to surpass the previous sector-by-sector approach. Finally, such an interpretation would introduce unjustified differentiation in the treatment of the two categories. This latter approach by the Court is especially welcome in light of earlier case-law where such rigid differentiation was kept in several cases. *See e.g.* Judgment of 6 2012, *Case C-147/11, Secretary of State for Work and Pensions v. Lucja Czop and Margita Punakova*, ECLI:EU:C:2012:538.

33 *Case C-442/16, Gusa*, paras. 35-38.

34 *Case C-483/17, Tarola*, para. 40.

35 Judgment of 13 September 2018, *Case C-618/16, Rafal Prefeta v. Secretary of State for Work and Pensions*, ECLI:EU:C:2018:719, para. 37.

36 *Case C-483/17, Tarola*, paras. 43-45.

37 Id. paras. 47-48. At this point it is worth mentioning the Advocate General's reasoning with regard to the context of the provision in question. The Advocate General opines, while Article 7(3)(b) lays the emphasis on the initial duration of beyond one year, irrespective of the activity performed or the type of contract, Article 7(3)(c) emphasizes the initial duration of less than one year while establishing a second distinction, too, according to whether or not the EU citizen could predict the precise duration of their contract or activity. The second scenario – at least in the opinion of the Advocate General – settles the situation of the citizens who, contrary to their expectations or at least without a chance to predict the actual term of their activity, became involuntarily unemployed in the first twelve months of their employment. *Case C-483/17, Tarola*, Opinion of the Advocate General, para. 35.

persons who "have ceased their occupational activity because of an absence of work due to circumstances beyond their control".[38] The Court found moreover that this solution was in line with the other important objective of the Directive, *i.e.* the protection of the welfare system of Member States. According to the provisions of the Directive the retention of the status presupposes that the citizen concerned actually held the status of worker earlier, has registered as a jobseeker, *i.e.* actually has the intention to return to the labor market and finally, it is sufficient guarantee that the retention of the status can be restricted to six months by the host state.[39] In order to confirm the above the Court noted that the preparatory materials for the Directive[40] already reflected the legislator's intention to extend by way of the second clause the right of retention to persons in involuntary unemployment after having worked for less than a year otherwise than under a fixed-term employment contract.[41]

After establishing that a person who had worked for merely two weeks otherwise than under a fixed-term employment contract and became involuntarily unemployed afterwards could retain the legal status there was nothing left for the Court but to declare the principle many times confirmed in earlier case-law,[42] namely, that a citizen lawfully residing in the territory of a host Member State was entitled to the requirement of equal treatment laid down under Article 24(1) of the Directive.[43]

Following the opinion of the Advocate General the Court drew its final conclusion stating where national law excludes persons who have performed gainful activity only for a short period of time from the entitlement to social benefits that exclusion applies the same way to workers from other Member States. The judgment in this case, *i.e.* whether Mr. Tarola was entitled to receive the requested social benefits based on national law and

38 *Case C-483/17, Tarola*, para. 49.

39 Id. para. 52. The contents of this paragraph are partly in accordance with the substance of the Advocate General's opinion in which the latter examines if it is possible to set a minimum duration of gainful activity as a requirement for the retention of the worker status. In relation to this he concludes that the provision of the directive prescribing equal treatment does not necessarily involve guaranteeing entitlement to jobseeker's allowance. It also allows for avoiding misuse to require that unemployment should happen involuntarily and that the person concerned should be registered. On the whole he opines with regard to the Member State's making the retention of the worker status subject to working in an employed capacity for a minimum period of time beyond what is set in the directive would be such as to introduce an additional requirement not provided for by the EU legislature, which would certainly violate the requirement of legal certainty.

40 This is confirmed by the Amended proposal for a Directive of the European Parliament and the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of Member States [COM(2003) 199 final] and Common Position (EC) 6/2004 of 5 December 2003.

41 *Case C-483/17, Tarola*, para. 53.

42 It was in the *Martinez Sala* case where the Court laid down the principle that has continued to be decisive for the development of integration law.

43 *Case C-483/17, Tarola*, para. 55.

considering the requirement of equal treatment, was ultimately referred back by the CJEU to the competence of the national court.[44]

It is clear from the above, that the Court skillfully blended its marked case-law referring to economically active citizens with its much stricter approach towards economically inactive EU citizens, thereby complying with the requirements following from the twofold objective of the Directive.

18.4 The Saint Prix Case

18.4.1 Statement of Facts and the Questions Referred for Preliminary Ruling

A French lady called Ms. Saint Prix arrived in the United Kingdom in 2006 to start a teaching career. For one year she worked as a teaching assistant, after which she enrolled at the University of London with the aim to obtain a teacher qualification certificate. As Steve Peers somewhat ironically noted, in the course of that she acquired much more knowledge than she had ever assumed, at least as far as EU and English law are concerned.[45] In the meantime she became pregnant and quitting her studies, in the hope of getting a teacher's position at a secondary school, she registered with an employment agency. As no secondary school work was available, she worked at nursery schools as a replacement teacher. Finally, when she was nearly six months pregnant, she stopped that work on the grounds that it had become too strenuous for her.[46] Eleven weeks before her expected date of confinement she made a claim for income support, but the claim was refused by authorities on the grounds that she no longer qualified as a worker and thereby lost her right of residence in the United Kingdom. Eleven weeks are relevant in this respect because under British law at that stage of pregnancy British citizen mothers become entitled to the income support in question without having to prove that they work or are looking for a job.

Three months after the premature birth of her child, Saint Prix resumed work. She brought an appeal against the rejecting judgment, which was upheld by the First Tier Tribunal but rejected by the Upper Tribunal. Finally, she appealed to the Supreme Court, which requested a preliminary ruling from the CJEU. The question was essentially whether Article 45 TFEU guaranteeing the free movement of workers and Article 7 of the Free Movement Directive granting the right of residence beyond three months were to be interpreted as meaning that a woman who gave up work or seeking work because of the

44 Id. paras. 56-57.
45 Peers 2014.
46 Although for a few days she looked for work that was more suited to her pregnancy, without success.

physical constraints of the late stages of pregnancy and the aftermath of childbirth retained the status of worker within the meaning of those Articles.

18.4.2 The Judgment in the Saint Prix Case

The main track followed by the Court in the case was essentially to determine by virtue of what provisions of EU legislation Saint Prix could retain her worker status and following from that, the various benefits.

The CJEU stipulated at the outset that Article 7(3) governing the retention of worker status did not expressly envisage the case of a woman who was in a particular situation because of the constraints of the late stages of pregnancy and the aftermath of childbirth.[47] The Directive itself does not say at all whether the above list can be added to. In no way did this fact stop the Court, however, from repeatedly insisting in its judgments that the EU concept of worker was a matter of primary law. As secondary legislation may not, in itself, restrict the scope of worker under TFEU, it shall be interpreted broadly in every case.[48] At the same time the Court considered it necessary to note that Saint Prix could not be considered a person temporarily unable to work by virtue of Article 7(3)(a) of the Directive.[49] This is because the case-law developed in relation to the Directive referring to discrimination on the grounds of sex[50] foresaw that pregnancy had to be clearly distinguished from illness in that pregnancy was not in any way comparable with a pathological condition. As regards Saint Prix's worker status, following the above extensive interpretation the Court concluded that the physical constraints associated with pregnancy and childbirth, which required a woman to a give up work for a period needed to regain physical strength, were not of a nature in principle that they could deprive this person of the 'status of worker' within the meaning of Article 45 TFEU.[51]

Following the Advocate General's opinion, the CJEU used a surprising analogy when drawing a parallel between the *Saint Prix* and the *Orfanopoulous*[52] cases. In the latter case it was established that a person spending his/her sentence was still under the scope of Article 45 TFEU provided that after his/her release he/she would ensure employment within reasonable time. Thus, the Court maintained that the circumstance that Saint Prix had not been present at the labor market of the host state for a few months did not mean

47 *Case C-507/12, Saint Prix*, para. 27.
48 Id. paras. 31-37.
49 Id. paras. 29-30.
50 *See* the *Webb* case, cited by the Court directly. Judgment of 14 July 1994, *Case C-32/93, Carole Louise Webb v. EMO Air Cargo (UK) Ltd. (Webb)*, ECLI:EU:C:1994:300.
51 *Case C-507/12, Saint Prix*, paras. 39-40.
52 Judgment of 24 April 2004, *Joined Cases C-482/01 and C-493/01, Georgios Orfanopoulos and Others and Raffaele Oliveri v. Land Baden-Württemberg*, ECLI:EU:C:2004:262.

that she had ceased to hold that legal status, provided that she would return to work or find a job within reasonable time after confinement.[53] This, too, reflects the tenet often mentioned by the Court that the retention of legal status was not without limitations by far. But what can be considered reasonable time as far as returning to work is concerned?

In order to determine whether the period that has elapsed between childbirth and taking up work again may be regarded as reasonable, according to the CJEU, the national court concerned should take account of all the specific circumstances of the case as well as the applicable national rules on the duration of maternity leave, in accordance with the provisions of the directive[54] on pregnant women.[55] The directive itself prescribes a leave of at least 14 weeks, requiring that at least two weeks from this should be allocated before confinement. At this point it should be noted that the Court did not mention the requirement of compliance with national law as regards the period of leave prior to childbirth.

The Court finally found it necessary to support its above argumentation with a reference, on the one hand, to the deterrent effect doctrine. According to this doctrine, an EU citizen would be deterred from exercising her free movement right in the event of her pregnancy and her being absent from the labor market she would risk losing her worker status in the host state.[56] On the other hand they emphasized that EU legislation on free movement granted special protection to women in the event of maternity, in relation to the right of permanent residence.[57] In this respect they concluded that if an absence for an important event such as pregnancy or childbirth did not affect the continuity of residence required for granting the permanent residence status, these circumstances could not, *a fortiori*, result in losing worker status.[58]

Based on the above, the CJEU's argumentation was centered on the worker status of Ms. Saint Prix following from Article 45 TFEU, essentially disregarding the secondary legislation on the retention of worker status or the treaty provision on the free movement of EU citizens (Article 21 TFEU). At this point, however, there is a significant discrepancy between the Advocate General's opinion and the ruling of the Court. The former makes a long-winded argument in his opinion about the consequences it may have if a migrant EU citizen in the situation of Ms. Saint Prix is not allowed to retain her worker status. In

53 *Case C-507/12, Saint Prix*, para. 41.

54 Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

55 *Case C-507/12, Saint Prix*, para. 42.

56 Id. para. 44.

57 By virtue of Article 16(3) of the Directive continuity of residence shall not be affected by absence of a maximum of twelve consecutive months for important reasons such as pregnancy or childbirth.

58 *Case C-507/12, Saint Prix*, para. 46.

this respect the Advocate General refers to the fundamental nature of EU citizen status and the rights following from it.[59]

18.5 Comments on the Tarola and Saint Prix Cases

There is no doubt that in both cases the Court met its task of interpretation when filling the regulatory gaps in secondary legislation. It met its task when declaring in the *Saint Prix* judgment that further conditions could be added to the Directive's list stipulating the grounds for the retention of the legal status, following from primary legislation. It also clarified in relation to the *Tarola* case – and confirming the conclusions of the *Gusa* case – that the provisions of the Directive for the retention of the worker status were independent of the nature of economic activity or the type of contract serving as the basis of gainful activity.

Beyond resolving the interpretation problems following from the wording of the regulation or its shortcomings, the two law cases gave the Court an opportunity to interpret the legislation on free movement in the light of the case-law on gender discrimination *(Saint Prix* case), adding a new hue to this area, as well as to respond to the increasingly pressing issues in the area of free movement, namely to the challenges arising from difficulties in the distinction between the economically active and inactive EU citizen statuses (*Saint Prix* and *Tarola* case).

As regards the first issue, the fact that the appellant of the main proceeding was pregnant clearly played a role in the outcome of the Saint Prix case since this special condition otherwise enjoys broad protection in EU legislation.[60] In integration legislation, facilitating and encouraging the equal treatment of women – and within that category of expectant and young mothers – at the labor market has a long history. In light of this it is surprising that, contrary to the Advocate General's opinion, the Court only alluded to the provisions of the Charter of Fundamental Rights and EU regulations on gender discrimination and expectancy in general.[61] What is more, even earlier CJEU case-law related to expectancy

59 The Advocate General, emphasizing the fundamental nature of EU citizenship in the CJEU case-law, declared that an EU citizen who did not enjoy the right of residence in the host member state under what is now Article 45 TFEU, may nonetheless, simply as a result of EU citizenship, enjoy it by direct application of what is now Article 21(1) TFEU. *See Case C-507/12, Saint Prix*, Opinion of the Advocate General, para. 45.

60 Peers 2014.

61 As Currie puts it: "Substantive equality, previously said by the CJEU to be the basis of the pregnancy rights contained in the Pregnancy Directive, receives no attention." What is more, there is no clear declaration that pregnancy and childbirth – necessitating a break in employment – should not result in a woman, effectively, being treated in a disadvantageous way. Currie 2015, p. 554.

and discrimination[62] is solely mentioned in the context of the relationship between illness and expectancy (or the lack thereof).[63]

The central core of the Court's argument is the free movement of workers and within that the EU concept of worker under Article 45 TFEU. The Court does not even mention alternatives to the retention of worker status as regards ensuring the right of residence and related social rights of mobile EU citizens. Namely, they do not discuss the issue that for want of retention of worker status EU citizens are entitled to residence in the host state by the direct application of Article 21(1) TFEU,[64] *i.e.* simply arising from this fundamental status.[65] Although the questions asked by the referring court do not make any reference to this, Currie's question whether the Court would have made a similarly generous ruling if the questions had directly referred to the right of residence granted by Article 21 TFEU was absolutely justified.[66] The answer is clearly no, especially considering the case-law on economically inactive citizens, in relation to which the Court, contrary to its marked case-law on citizens performing a gainful activity, represents a much more cautious and moderate approach.

While, however, it is true in the case of Ms. Saint Prix that during her stay in the host country she assumingly paid more into the state finances than she received therefrom, this was by far not the case in the case of *Tarola*, who applied for a benefit with reference to merely a few weeks' gainful activity, *de facto* swelling the ranks of economically inactive citizens. The Court apparently ignoring this circumstance, provided social protection for mobile EU citizens following a well-trodden path of EU worker status.[67] Thus, after Mr. Tarola's 'actual' quality of worker was confirmed by the CJEU on the basis of the referring court's motion, the Court almost automatically proceeded[68] to the broad interpretation of

62 *Case C-32/93, Webb*.

63 Thus, no reference is made among others to *C-177/88, Dekker*, ECLI:EU:C:1990:383, or *C-207/98, Mahlburg*, ECLI:EU:C:2000:64.

64 Article 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 measures adopted to give them effect."

65 According to the Advocate General's argumentation it is a fact that secondary legislation sets conditions for exercising this right, among others the condition of sufficient financial resources. At the same time, these conditions should in every case be applied by respecting the principle of proportionality. And from the fact that some expectant woman applies for a benefit-like income support it does not automatically follow that she no longer has sufficient resources for residence in the host country. As the Advocate General points out, the subsistence problems arising in the *Saint Prix* case were of a temporary nature, the expectant lady applied for social assistance only for a temporary period, which happened to coincide with the regular maternity leave granted to UK citizens. *Case C-507/12, Saint Prix*, Opinion of the Advocate General, paras. 49-52.

66 Currie 2015.

67 Peers 2014.

68 For the sake of completeness, it is necessary to note, however, that, beyond the implementation of individual rights, the Court already at this point mentioned the emphatic nature of removing the burden from the social assistance system. In this respect the Court found that Article 7(3) offers sufficient guarantee as on

the provision of the Directive on the retention of worker status. This of course, is less than surprising in the light of the generous CJEU case-law concerning persons pursuing gainful activity.

The Court's much more cautious approach towards economically inactive EU citizens is, at the same time, also apparent from the final conclusion of the judgment in question in that it does not automatically put an equation mark between equal rights following from lawful residence and actual entitlement to social benefits. By virtue of the *Tarola* judgment the retention of worker status and, as the Court asserts, the retention of the right of residence inevitably related to the former,[69] do not mean automatic access to the social provisions of the host state. Retention only means that the assessment of Tarola's application by the authorities must in every case take place under the conditions of the host state applicable to its own citizens. The Court thereby offers the guarantee to Member States that they will continue to enjoy a high degree of latitude in establishing their own system of social provisions. If these do not wish to provide assistance to those who work little or show little activity in the labor market in general, they continue to be able to do so in their national legal order.

The Court's gesture towards Member States properly reflects the intention of the former to follow a well-balanced practice with respect to the double objective of the Free Movement Directive:[70] to strengthen EU citizens' right to free movement and residence on the one hand and to safeguard the welfare system of host states on the other.[71] The conflict of the two above objectives, as is also apparent from the *Tarola* case – are deeply woven into the legislation on welfare benefits arising in the area of free movement.

In light of the above it can be said that the Court maneuvered skillfully in the case in question when, by applying the legislation on workers, essentially not moving from its comfort zone[72] it guaranteed social protection for mobile EU citizens. It certainly did so only with a theoretical nature since, as I mentioned above, the CJEU ultimately left it to the court of the Member State to give the ultimate answer with respect to the actual invocability of welfare benefits.

According to certain opinions the substance of the *Saint Prix* judgment, too, provided support to the mobile expectant mother only at a theoretical level in that the Court set the

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the one hand it requires return to the labor market and on the other hand it limits the invocability of these rights in time.

69 *Case C-483/17, Tarola*, para. 55.

70 With reference to the hybrid nature of the case the Court lays down these two objectives with reference to workers and inactive citizens in separate paragraphs. *Case C-483/17, Tarola*, paras. 49-50.

71 The Court's approach applied in relation to the *Tarola* case, thus considering the double objective thereof, seems to follow the Court's 'Dano' stance in the case-law with reference to economically inactive persons represented in recent times, more restrictive than the former jurisprudence, in contrast to its case-law after the *Trojani* judgment.

72 Peers 2014.

return to employment within a reasonable time as a strict requirement for the retention of worker status.[73] Thus if return to employment is not performed within reasonable time, the young mother shall be considered a jobseeker, with much more restricted entitlements, as mentioned in the introduction. The question what qualifies as reasonable was furthermore referred by CJEU to the competence of the national court, raising several further questions. What if the young mother is unable to go back to work because her workplace has closed in the meantime, or she is unable to find suitable work because of her changed family circumstances?[74] The situation is made even more complicated if an ill or special needs child must be looked after, with whom early return to work is impossible or very difficult to organize. This, in turn, leads us to the delicate issue how to relate to home care and to unpaid work in general. In its case-law up until today, the Court has consistently refused to include unpaid home care work under the scope of economic freedom.[75] Although Ms. Saint Prix can be considered fortunate as she easily found a job, a situation may arise when, after completing maternity leave the young mother is unable to find work despite utmost efforts.[76] In this case she enjoys protection according to EU legislation only from expulsion.

Considering the range and scope of entitlements of EU citizens it is not at all irrelevant if a mobile citizen qualifies as an economically active citizen and within that concept, as a worker, a self-employed or an economically inactive citizen. Sometimes there is a very narrow margin between these statuses and making a distinction involves a considerable burden for law enforcers. It is this issue that will be considered in brief, below.

18.6 Difficulties in Distinguishing the Categories of Free Movers

As regards the group of economically active persons, making a distinction between the worker and self-employed status and thereby establishing the governing legal framework may involve great difficulties in future, in view of the fact that the concept of work is

73 Currie 2015.

74 It is not clear, either if in such cases the benefits already paid are to be paid back.

75 Judgment of 7 November 1996, *Case C-77/95, Bruna-Alessandra Züchner v. Handelskrankenkasse (Ersatzkasse) Bremen*, ECLI:EU:C:1996:425; Judgment of 21 July 2011, *C-325/09, Secretary of State for Work and Pensions v. Maria Dias*, ECLI:EU:C:1992:327. In the *Dias* case, a mother caring for her child stopped working. The Advocate General opined that the two issues had to be treated separately because in the former the mother's absence from work went beyond the period when she did not return to work because of the illness. *Case C-325/09, Dias*, Opinion of the Advocate General, para. 24. According to Currie, this is indicative of the fact that there is no intention to consider opportunities for expectant and young mothers' flexible return to the labor market in future, either. Currie 2016, p. 560.

76 Steve Peers opines, on the other hand, that in this case the consideration of individual circumstances can help. *Cf.* Peers, 2014.

undergoing a considerable transformation.[77] The digital world has reshuffled the world of labor, too, which is well illustrated by a new phenomenon in the labor market called the 'gig economy', the essence of which is that private persons may apply for short-term occasional work through online platforms or applications.[78] In the *Gusa* and *Tarola* cases discussed this posed no problems as the Court established that from the point of view of retention of legal status it was totally irrelevant what kind of economic activity the person in question used to perform. This is certainly not so in every case as in other areas of free movement the fragmented approach has survived, *i.e.* if a specific regulation governs only certain groups of economically active citizens, *e.g.* workers, the Court will obviously not expand the rights laid down therein to self-employed persons. A good example for this is the *Czop* case[79] where the Court established with reference to Regulation (EEC) of the Council 1612/68 on freedom of movement for workers within the Community[80] that it could be applicable to workers only, *i.e.* it did not grant a right of residence to persons providing parental care for self-employed citizens' children.

A problem much more serious than the above could be making a distinction between economically active and inactive statuses. While in the *Tarola* case the referring forum decided on the retention of worker status, in the *Saint Prix* case this was confirmed by the Luxembourg forum itself. From the justification of the *Tarola* judgment it is clear, however, that although the CJEU accepts the decision of the referring forum, it very much has its own stance, too.[81] This is exemplified by the earlier *Kempf* case, although somewhat surprisingly but, in view of the division of labor between the courts it did consider the decision of the referring forum.[82] Here, it found that the work performance of a teacher teaching

77 Niamh Nic Shuibhne, 'Reconnecting Free Movement of Workers and Equal Treatment in an Unequal Europe', *European Law Review*, Vol. 43, Issue 4, 2018, p. 502.

78 As such type of employment has been spreading, a question has arisen with regard to the labor law status of private persons employed in the 'gig economy' in several EU countries including the United Kingdom and France. Namely if *e.g.* private persons who work as drivers for Uber qualify as employees of the companies or as customers using the platform? The British court found that they belonged to the former category, as a consequence of which they were covered by some work law regulations. Thus, they were entitled to minimum salary, paid leave and rest periods. *See Uber BV v. Aslam [2018]*, England and Wales Court of Appeal, Civ. 2748.

79 *Case C-147/11, Czop*.

80 Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community. This regulation has since then been repealed by Regulation No 492/2011/EU of the European Parliament and the Council of 5 April 2011 on freedom of movement for workers.

81 "In the present case it is clear from the order for reference that the referring court, which has not questioned the Court in this regard, considers that the appellant in the main proceedings has the status of worker within the meaning of the latter provision, on account of the activity he pursued in the host Member State for a period of two weeks." *Case C-483/17, Tarola*, para. 25.

82 "According to the division of jurisdiction between national courts and the Court of Justice in connection with references for a preliminary ruling, it is for national courts to establish and to evaluate the facts of the case. The question submitted for a preliminary ruling must therefore be examined in the light of the

12 hours a week could not be considered marginal or ancillary even if their salary had to be supplemented from welfare assistance.[83] Thus, according to the case-law of the Court, the EU concept of worker may cover those working part-time, even if their earnings are scarce for subsistence but their activity does reach a certain threshold. As regards what that threshold means, no specific guidance has been given, but it can be gleaned from the case-law that work performance of one or two days per week may lay the basis for such legal status.[84] The *Tarola* case is a further addition in this respect since in this case the retention of worker status was confirmed based on work performance of merely two weeks. The broad application of the concept of EU worker status may, however, even lead to seemingly arbitrary decisions. As is well known people pursuing gainful activities have enjoyed widespread entitlements from the outset of integration already; including comprehensive equal treatment in the area of welfare assistance. The question therefore arises if the legislative intent at the beginning of integration extended to covering financing workers' subsistence from public funds.

The answer is probably 'no', considering that the economic freedom of free movement of persons was based on the assumption that the latter enjoyed free movement (and extensive related social entitlements) because they contributed to the host country's economy, *i.e.* were able to sustain themselves. The Free Movement Directive, too, reflected the above political consensus in that albeit it granted the right of free movement to all EU citizens, it did so only under the conditions and with the restrictions included in secondary legislation. Accordingly, the right of free movement and residence is granted to economically active citizens as net contributors whose migration, at least at the theoretical level, poses no burden on the welfare system of the host country. This right is furthermore granted to jobseekers as well as they are close to that status and finally it is enjoyed by self-sufficient persons who are able to sustain themselves. Dependents are not granted the right of residence in other Member States, at least not in their own right.

Thus, although the Directive lays down the theoretical framework, some Member States tend to view persons exercising free movement – irrespective of whether they are inactive persons or workers – increasingly as sources of danger. The question of welfare benefits

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assessment made by the Raad van State." Judgment of 3 June 1986, *Case C-139/85, R. H. Kempf v. Staatssecretaris van Justitie*, ECLI:EU:C:1986:223, para.12.

83 "[…] The fact that the 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 Article 39 EC." Judgment of 4 February 2010, *Case C-14/09, Hava Genc v. Land Berlin*, ECLI:EU:C:2010:57, para. 25. "Those supplementary means of subsistence can be drawn from the public funds." *Case C-139/85, Kempf*, para. 14.

84 Judgment 3 of July 1986, *Case C-66/85, Deborah Lawrie-Blum v. Land Baden-Württemberg*, ECLI:EU:C:1986:223, para. 21; Judgment 21 of February, *Case C-46/12, L. N. v. Styrelsen for Videregående Uddannelser og Uddannelsesstøtte*, ECLI:EU:C:2013:97, para. 41.

became "one of the hottest political topics in the public debate prior to the Brexit referendum".[85] But it is not only the British who are skeptical. The German and Austrian governments also promised to reduce incentives for migration and to take steps towards reducing benefits by adopting more restrictive laws. This is well illustrated by the fact that the new Austrian government already cut family benefits for workers whose children live abroad.[86] This shows that not even the situation of workers seemingly enjoying a secure position should be taken for granted.[87] At this point it is worth briefly examining the main reasons underlying Member States' criticism of the institution of free movement.

While in the case of economically inactive citizens already the dubious wording of the regulation poses a challenge,[88] the main problem in the case of economically active citizens is that in this area law seems to break away from the above political compromise that serves as the basis of integration. There are several reasons for this, primarily including changes ongoing in society, *i.e.* transformation in the world of labor on the one hand and in parallel with that the excessive expansion of the welfare state by overtaking responsibilities from market players.[89] In western societies namely part-time employment has become increasingly frequent what is more, special in-work benefits related to low-paid jobs have become increasingly general. It is exactly these benefits that raise concern with *e.g.* the British.[90]

While the actual number of active migrants and the volume of welfare benefits they use may be subject to dispute, it is a fact that in fields where wages are low and the costs of living are high, even economically active citizens can be a serious burden for the state, thus, the substance of the *Kempf* judgment may have graver consequences than one could ever have expected. The assumption that the original idea of free movement and the automatic awarding of the right of residence are based on, *i.e.* that economically active

85 Daniel Thym, 'The Judicial Deconstruction of Union Citizenship', *in* Daniel Thym (ed.), *Questioning EU Citizenship. Judges and the Limits of Free Movement and Solidarity in the EU*, Hart Publishing, Oxford, 2017, p. 2.

86 A government decision that would mostly affect employees from Central European countries such as Poland, Slovakia and Hungary. The Commission has already initiated infringement proceedings with reference to new regulations, by virtue of which the family allowances and tax benefits of EU citizens working in Austria shall undergo indexation if their children live abroad.

87 Shuibhne 2018, p. 478.

88 It is beyond the purpose of this study to analyze the legislation on economically inactive citizens, yet it is worth mentioning that immature concepts, legal gaps, dubious passages generate legal uncertainty and render the enforcement of rights difficult in this area. "Making the right to social assistance dependent on lawful residence, while lawful residence is in turn dependent upon the degree of use of social assistance creates a confused and confusing circularity in the law." Gareth Davies, 'Migrant Union Citizens and Social Assistance: Trying to be Reasonable about Self-Sufficiency', *Research Paper in Law*, Issue 2, 2016, p. 4.

89 This phenomenon gives grounds for concern also from the point of view of competition law because the governments of Member States may indirectly support whole branches through benefits related to certain low-salary jobs.

90 Considering that housing costs are extremely high in the United Kingdom and especially London, the government supplements the earnings of low-paid workers with various social benefits required for subsistence.

migrants are at the same time self-sufficient, is no longer the case in several Member States today. In fact, a considerable proportion of the workforce can claim and does claim housing support, various health services, tax benefits and other income supports.

According to some views the fact that worker status has become the ace with respect to the right of residence and related welfare rights may even reverse the original idea as, in extreme cases, this legal status may be the key to access services provided by the welfare state.[91] Clearly in the vast majority of the cases – as illustrated by the *Saint Prix* and the *Tarola* cases – this is not the case. We have to see at the same time that, while at the outset of integration the *Kempf* case was the exception, by now, application for in work benefits has become widespread. Coupled with populist political communication this may easily generate tension, as it did in the area of free movement. What could be the solution in this case?

In the context of Brexit, the idea of amending Regulation (EU) No 492/2011 arose, which the Commission proposed for the case that the British voted for EU membership.[92] Through the application of a protection mechanism, the proposal would have given a solution to concerns raised by the United Kingdom arising as a result of an exceptional influx of workers from other EU Member States over the last few years.[93] It would have allowed the United Kingdom to restrict access to work-related benefits for migrant workers in exceptional situations in the first four years of their residence. This restriction would have been gradual, proportionate in time to the labor market participation, *i.e.* the lawful stay of the workers concerned.[94]

At the same time, this ruling from 2016 did not arouse much enthusiasm in legal literature; Shuibhne for instance went so far as calling it a "double attack" against the basis of the EU. In his view, it both violated the institution of free movement and the principle of

91 Davies 2016, p. 5, Éva Gellérné Lukács *et al.*, 'Szabad mozgás az Európai Unióban a Brexit tükrében', *in* Ilona Pajtókné Tari & Antal Tóth (eds.), *Magyar Földrajzi Napok 2016*, Eger, 2016, 11 p.

92 Draft Declaration of the European Commission on the Safeguard Mechanism referred to in paragraph 2(b) of Section D of the Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union. EUCO 9/16, at www.consilium.europa.eu/media/24423/declaration-cion-safeguard-mechanismen16.pdf.

93 The other proposal would have targeted the abovementioned indexation of the family allowances.

94 This solution would essentially introduce a system based on the principle of proportionality, similar to that of economically inactive citizens, where the duration of time spent in the host state and the requirement of social integration would appear with growing emphasis. *Cf.* Judgment of 11 November 2014, *Case C-333/13, Elisabeta Dano, Florin Dano v. Jobcenter Leipzig*, ECLI:EU:C:2014:2358. This concept could, at the same time, be questioned in the light of the higher moral quality of the employer status. Certainly, the question, too, arises what the outstanding nature of this status is based on if the worker is unable to sustain themselves. According to some views, the fetishizing of gainful activity involves the danger of underestimating other, socially useful and important activities. These questions, however, lead far beyond the scope of this study.

equal treatment granted to workers.[95] It was for this reason that Davies made an alternative proposal according to which the equal treatment enjoyed in the field of welfare benefits could be retained, in that case, however, the worker status itself would depend on a certain salary threshold.[96] This proposal would, however, lead too far, to the issue of the harmonization of the EU concept of worker, which is beyond the scope of this study.

18.7 Conclusion

In its latest case-law related to the retention of worker status the Court undoubtedly performed duty of interpretation by filling the gaps in secondary legislation, turning it into a coherent system. The analyzed cases, however, go far beyond the semantic questions of the retention of worker status considering that they created an opportunity for the Court to examine the legislation concerned in a broader context and as a corollary, to reconsider the slippery slope area of the free movement of persons. This would have been especially desirable in light of the criticism that the Court and law enforcers have had to face in recent years, centering on the broad interpretation of the worker status, which lead to seemingly arbitrary decisions. This criticism is not completely unfounded in that the societal changes that have taken place since the outset of integration, including the transformation of the world of labor and the excessive expansion of the welfare state seem to undermine the political compromise that serves as the basis of the integration. This compromise entailed that economically active persons are self-sufficient and thus do not pose any burden for the host state.

The outstanding role of the economically active status in integration law is well illustrated by the fact that in both cases analyzed above the argumentation of the Court focused on the worker status. As we have seen, in its *Tarola* judgment the CJEU wished to guarantee the social protection of EU citizens following the well-trodden path of extensive worker rights. While doing so, however, the Court continued to keep in mind the twofold objective of the free movement Directive, *i.e.* beyond granting extensive free movement and residence rights, the requirement of protecting the welfare system of the Member State. Thereby it clearly indicated that it wished to assume a more emphatic role than before in balancing the competing interests in the sphere of free movement.

In the *Saint Prix* judgment of the Court the argumentation was similarly built on the central element of worker status. At the same time, in this case, too, it considered the enforcement of the interests related to the protection of the welfare system of the Member

95 Respecting equal treatment does in fact belong to the fundamental values of the EU (Article 2 TFEU). *See* Shuibhne 2018, p. 478.

96 Davies 2016, p. 24.

State when leaving it up to the national forum to decide at which time they considered reasonable for the retention of the worker status for the young mother to resume work. All these reflect that the Court is absolutely aware of the pervasive implementation problems in the sphere of free movement but, however pressing these issues may be, it obviously does not wish to take over the role of the legislator.