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Off Track, Again?

EU Citizenship and the Right to Social Assistance

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Abstract

The right of EU citizens to equal treatment with nationals of the host Member State in respect of social assistance has been subject to significant changes on several occasions between the Treaty of Maastricht and now. The CJEU has struggled to establish consistent standards prescribing when economically inactive citizens can claim social protection, and in 2014 its tendency to construe this right broadly suddenly came to an end. It backtracked on one-and-a-half decades of case law by ruling that citizens could lay no claim to social assistance unless the respective conditions set out in secondary legislation were met. This article discusses the relevant law and its evolution over the past decades for a twofold aim. (i) First, to clarify in an accessible manner in what respects the law has changed from 1993 to the present. (ii) Second, to articulate a framework that allows us to evaluate the CJEU judgments rendered during this period. This framework departs from established ways of thinking about this evaluative question. Much of the EU citizenship literature evaluates the case law by the outcome it brings about. I will argue, instead, that this evaluation is a matter of comparative institutional choice. Such a comparative institutional assessment shows that disputes over the right of EU citizens to claim social assistance should be decided in line with what the EU legislature intended. It follows that the application of a principle of judicial deference to legislation in the second period of social assistance case law from 2014 onwards was justified.

Keywords: EU citizenship, social assistance, jobseekers, EU legislature, Directive 2004/38.

1. Introduction

Few developments in EU law over the past three decades have caused more public commotion than that concerning the right of EU citizens to equal treatment with nationals of the host Member State in respect of social assistance. Long before EU citizenship was introduced by the 1993 Maastricht Treaty, Member State nationals

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were able to move to other Member States and claim social assistance while residing there. Initially, however, the right to freedom of movement was mostly reserved for Member State nationals exercising an economic activity and their family members.[1] In the 1990s, the EU passed legislation to facilitate the free movement of persons who did not pursue any economic activity, such as students and pensioners.[2] Yet unlike workers, who enjoyed the same social and tax advantages as national workers, economically inactive persons could not claim equal treatment in respect of social assistance. Their right to reside in the host state was conditional upon them having 'sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence'. As a basic rule, access to social assistance was contingent on economic activity in the host state.

Initially, the introduction of EU citizenship in 1993 did not change this. EU citizens were given the right to move and reside freely within the territory of all Member States (Article 21 TFEU) together with the right to non-discrimination on grounds of nationality Article 18 TFEU), but these rights are 'subject to the *limitations and conditions* laid down in the Treaties and by the measures adopted to give them effect' (Article 21 TFEU). Since the limitations and conditions set out in secondary legislation were not amended at the time, it appeared that the conditions under which recourse could be had to social assistance had not changed either. However, spurred on by the CJEU, things started to change slowly but surely in the late 1990s and early 2000s. In a series of controversial but widely acclaimed judgments, the Court ruled that economically inactive citizens such as students and jobseekers can claim social assistance under specific conditions – usually when they have established strong enough ties with the host country. Yet the CJEU has struggled to establish clear and consistent standards prescribing when economically inactive citizens can claim social protection, and in 2014 its tendency to construe this right broadly suddenly came to an end. Ostensibly out of nowhere, it backtracked on one-and-a-half decades of case law by ruling that citizens could lay no claim to social assistance unless the respective conditions set out in secondary legislation were met. As a result, this right is now reserved yet again almost exclusively for economically active citizens. However, while this line of case law seems firmly established by now, in its latest rulings the CJEU has again found ways to allow mobile citizens to claim benefits outside the limitations and conditions laid down in secondary legislation.

This article zooms in on these developments and discusses the relevant law and its evolution over the past decades. My aim in doing so is twofold. First, I want to clarify in an accessible manner the extent to which, and in what respects, the law

1 Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community. Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services.

2 Council Directive 93/96/EEC of the Council of 29 October 1993 on the right of residence for students. Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity. Council Directive 90/364/EEC of 28 June 1990 on the right of residence.

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has changed from 1993 to the present. Second, I want to articulate a framework that allows us to evaluate the relevant judgments the CJEU has rendered during this period and the changes the law underwent in the meantime. This framework departs from established ways of thinking about this evaluative question. Much of the EU citizenship literature is plagued by 'outcome-thinking', which is to say that it evaluates the choices made by the CJEU almost entirely by the outcome they bring about. I will argue, instead, that this evaluation is a matter of comparative institutional choice. That is, it depends on the comparative institutional qualities of the judiciary versus other authorities involved in the articulation of EU citizenship rights – in our case, the EU legislature. Such a comparative institutional assessment shows that disputes over the right of EU citizens to claim social assistance should be decided in line with what the EU legislature intended. More specifically, it demonstrates why the application of a principle of judicial deference to legislation in the second period of social assistance case law from 2014 onwards was justified. Hence the question this article poses: has the CJEU gone off track again in circumventing the relevant legislative conditions in its latest case law?

This article is structured as follows. Section 2 discusses the period between the introduction of EU citizenship and the adoption of Directive 2004/38 (the Citizenship Directive) to show how, under the CJEU's impetus, the right to social assistance was extended to certain categories of economically inactive citizens. Section 3 explains the relevant changes introduced by the Citizenship Directive and how, despite some initial hesitation, these changes ultimately led the CJEU to reverse prior case law. Section 4 evaluates both periods and argues that the second period in which it accorded respect to the choices of the legislature is eminently defensible. Finally, Section 5 examines the most recent judgments of the last three years to discuss whether the CJEU has gone off track again by apparently ignoring the legislative provisions governing entitlement to claim social assistance. I will argue that this is not the case: the CJEU now accepts the limits of judicial power without abdicating its judicial responsibility to ensure that the application of secondary legislation complies with the fundamental rights of the persons concerned.

2. The Right to Receive Social Assistance Before Directive 2004/38

At what point should EU citizens who move away from their Member State of nationality be entitled to social assistance in another Member State? Until 1993, the answer to this question was straightforward. According to Article 7 of Regulation 1612/68, a worker 'shall enjoy the same social and tax advantages as national workers' in the host state. In contrast, jobseekers had in accordance with Article 5 of the same Regulation only a right to 'the same assistance there as that afforded by the employment offices'. In the 1990s, the EU passed legislation to facilitate the cross-border mobility of economically inactive persons such as students and pensioners,[3] but unlike workers, they were denied equal treatment in

3 *See* the legislation cited above.

doi: 10.5553/HYIEL/266627012023011001003

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respect of social assistance. Their right of residence in the host Member State was conditional on having 'sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence'. As a basic rule, access to social assistance was contingent upon economic activity in the host state.

Things started to change from the *Martínez Sala* judgment, in which the CJEU established the basic principles governing access to social assistance. Mrs Martínez Sala's situation was unusual. Her application for a child-raising allowance was rejected because she did not have a residence permit at the time of her application. However, her right to reside in Germany was secured by the European Convention on Social and Medical Assistance. She had also lived legally in Germany for 25 years, working various jobs during that time and even receiving social assistance.[4] The CJEU ruled that she, "[a]s a national of a Member State lawfully residing in the territory of another Member State, [...] comes within the scope *ratione personae* of the provisions of the Treaty on European citizenship".[5] It went on to say that the Treaties attach to the status of EU citizenship the right "not to suffer discrimination on grounds of nationality within the scope of application *ratione materiae* of the Treaty".[6] It followed that EU citizens lawfully resident in the host Member States could invoke the right to non-discrimination on grounds of nationality in all situations falling within the material scope of EU law.[7] Since the child-raising allowance fell within the scope of the Social Security Coordination Regulation, it fell within the material scope of EU law and had to be granted to Mrs Martínez Sala.

This approach was confirmed in the *Grzelczyk* judgment. This case concerned a French national enrolled at a Belgian university who had applied for a minimum subsistence allowance in the fourth year of his studies. The situation was governed by Directive 93/96/EEC, which allowed students to settle in another Member States provided they have "sufficient resources to avoid becoming a burden on the social assistance system". In addition, Article 3 made clear that the Directive "shall not establish any entitlement to the payment of maintenance grants by the host Member State on the part of students benefiting from the right of residence". However, despite these provisions, the CJEU decided that all situations involving the exercise of the right of free movement fall within the material scope of EU law.[8] It thereby extended the scope of *Martínez Sala*: from then on, all mobile citizens lawfully resident in another Member State could rely on the principle of non-discrimination on grounds of nationality. The applicant enjoyed lawful residence in Belgium, which meant that he could benefit from equal treatment and claim social assistance. The CJEU recognized that Directive 93/96/EEC made the right of residence conditional upon a sufficient resources requirement, but decided that this right could not be withdrawn as an "automatic consequence of a national

4 Judgment of 12 May 1998, *Case C-85/96, Martínez Sala*, ECLI:EU:C:1998:217, paras. 13-16.
5 Id. para. 61.
6 Id. para. 62.
7 Id. paras. 61-63.
8 Judgment of 20 September 2001, *Case C-184/99, Grzelczyk*, ECLI:EU:C:2001:458, para. 33.

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of another Member State having recourse to the host Member State's social assistance system".[9]

The full potential of this approach became apparent with the *Trojani* ruling. Mr Trojani, a French national, was staying in Belgium and given accommodation in a Salvation Army in exchange for board and lodging and some pocket money. Mr Trojani could not derive a right of residence from Directive 90/364, which made the right to reside conditional upon having sufficient resources. However, since he enjoyed lawful residence in Belgium under national law, the CJEU decided that,

> "while the Member States may make residence of a citizen of the Union who is not economically active conditional on his having sufficient resources, that does not mean that such a person cannot, *during his lawful residence* in the host Member State, *benefit from the fundamental principle of equal treatment* as laid down in Article 12 EC."[10]

It added that Member States can take the view "that a national of another Member State who has recourse to social assistance no longer fulfils the conditions of his right of residence [but that] recourse to the social assistance system [...] may not automatically entail such a measure".[11] In other words, the CJEU substituted the legislative restrictions for a more limited possibility to withdraw the right of residence when citizens risk becoming a burden on the national welfare system.

Perhaps aware of the far-reaching implications of these decisions, subsequent rulings construed earlier findings more narrowly by introducing tests that sought to integrate the extent of social integration in the host state into the examination of whether EU citizens should be granted the benefits requested. The CJEU allowed Member States to make their treatment of non-national EU citizens as equal to their nationals conditional upon "a real link [with] the geographic employment market"[12] or "a certain degree of integration into the society of the host State".[13] The judgments in *Collins* and *Bidar* illustrate these developments clearly.

The *Collins* case concerned a dispute over whether jobseekers from other Member States could claim the same social advantages as national jobseekers. The applicable legislative provisions stipulated that that they could not. As we saw earlier, Regulation 1612/68 EEC put workers on equal footing with national workers as regards social and tax advantages,[14] but only entitled jobseekers to assistance offered by national employment offices.[15] Case law prior to the

9 Id. para. 43.
10 Judgment of 7 September 2004, *Case C-456/02, Trojani*, ECLI:EU:C:2004:488, para. 40 (emphasis added).
11 Id. para. 45.
12 Judgment of 11 July 2002, *Case C-224/98, D'Hoop*, ECLI:EU:C:2002:432, para. 38; Judgment of 15 September 2005, *Case C-258/04, Ioannidis*, ECLI:EU:C:2005:559, para. 30; Judgment of 25 October 2012, *Case C-367/11, Prete*, ECLI:EU:C:2012:668, para. 33.
13 Judgment of 15 March 2005, *Case C-209/03, Bidar*, ECLI:EU:C:2005:169, para. 57; Judgment of 18 November 2008, *Case C-158/07, Förster*, ECLI:EU:C:2008:630, para. 49.
14 Article 7(2) of Regulation 1612/68.
15 Id. Article 5.

doi: 10.5553/HYIEL/266627012023011001003

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introduction of EU citizenship reflected this distinction between workers and jobseekers.[16] However, the *Collins* case overturned previous case law and strengthened the position of jobseekers in the host state. The CJEU required that secondary legislation is interpreted in the light of the Treaties, in particular the right to non-discrimination on grounds of nationality.[17] It affirmed that EU citizens lawfully resident in the territory of a host Member State can rely on this right and enjoy the same treatment as nationals, but then added that it was legitimate for Member States to ensure that "there is a genuine link between an applicant for […] a social advantage […] and the geographic employment market in question".[18] It was legitimate for a Member State to grant jobseeker allowances only to persons who "for a reasonable period, in fact genuinely sought work in the Member State in question".[19]

The *Bidar* case concerned the right of students exercising their right to free movement to claim assistance for maintenance. Directive 93/96 did not create a right to maintenance grants for students, as had previously been confirmed by the CJEU in *Lair* and *Brown*.[20] In *Bidar*, however, the CJEU changed course and decided that citizens lawfully resident in the host Member State fall within the scope of the Treaties "for the purposes of obtaining assistance for students, whether in the form of a subsidized loan or a grant, intended to cover his maintenance costs".[21] It admitted that Directive 93/96 did not establish such an entitlement, but stated that the legislative act did not preclude

> "a national of a Member State who, by virtue of Article [21 TFEU] and Directive 90/364, is lawfully resident in the territory of another Member State […] from relying during that residence on the fundamental principle of equal treatment enshrined in the first paragraph of Article [18 TFEU]."[22]

This argument is curious. The relevant legislation allowed Member States to refuse maintenance aid to foreign students, but as these students may derive a right of lawful residence from other sources of EU law, they can nonetheless claim equal treatment. Even more curiously, Directive 90/364 also requires EU citizens to have sufficient financial resources to avoid becoming a burden on the social assistance system of the host state. However, while citizens enjoying lawful residence in the host state can claim equal treatment, Member States could restrict the granting of benefits "to students who have demonstrated a certain degree of integration into

16 Those moving in search for employment 'qualify for equal treatment only as regards access to employment'. Judgment of 18 June 1987, *Case C-316/85, Lebon*, ECLI:EU:C:1987:302, para. 26; Judgment of 12 September 1996, *Case C-278/94, Commission v Belgium*, ECLI:EU:C:1996:321, para. 17.

17 Judgment of 23 March 2004, *Case C-138/02, Collins*, ECLI:EU:C:2004:172, para. 60.

18 Id. para. 67.

19 Id. para. 70.

20 Article 3 of Directive 93/96; Judgment of 21 June 1988, *Case C-39/86, Lair*, ECLI:EU:C:1988:322; Judgment of 21 June 1988, *Case C-197/86, Brown*, ECLI:EU:C:1988:323.

21 Judgment of 15 March 2005, *Case C-209/03, Bidar*, ECLI:EU:C:2005:169, para. 44.

22 Id. para. 46.

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the society of that State",[23] which may be "established by a finding that the student in question has resided in the host Member State for a certain length of time".[24]

Even though these judgments circumscribed the scope of earlier ones, all judgments discussed so far circumvented the legislative provisions governing EU citizens' right to claim social assistance. In this context, the *Baumbast* judgment is relevant as well. There, the CJEU established the general rule that limitations to the right to be free from discrimination on grounds of nationality must be interpreted in accordance with general principles of EU law, especially the proportionality principle. According to Directive 90/364, Member States can require nationals of other Member States who wish to enjoy the right to reside within their territory to be covered by sickness insurance in respect of all risks in the host Member State. It was not in dispute that Mr Baumbast had sufficient resources. He had worked and lawfully resided in the UK for several years without ever becoming a burden on the UK's public finances. However, he had comprehensive sickness insurance not in the UK but in another Member State: *i.e.*, he did not satisfy the conditions laid down in secondary legislation. Nevertheless, the CJEU ruled that refusing Mr Baumbast in those circumstances

> "to exercise the right of residence […] on the ground that his sickness insurance does not cover the emergency treatment given in the host Member State would amount to a disproportionate interference with the exercise of that right".[25]

3. The Right to Receive Social Assistance After Directive 2004/38

In 2004, the secondary legislation governing the right of EU citizens to move and reside freely was amended. Until then, the situation of mobile Union citizens was regulated by several different legal acts. This changed with the adoption of the Citizenship Directive, which amended Regulation 1612/68 and repealed all other legislative acts mentioned above. The intention was to simplify and strengthen the right to free movement.[26] Regulation 1612/68 has since also been repealed and replaced by Regulation 492/2011 on freedom of movement for workers.

Just as before, Regulation 492/2011 provides that workers enjoy the same social and tax advantages as national workers. Article 7(3) of the Citizenship Directive lists the circumstances in which EU citizens who used to be, but are no longer employed or self-employed person shall retain the status of worker or self-employed: when the citizen is *(i)* temporarily unable to work as the result of an illness or accident; *(ii)* is in duly recorded involuntary unemployment after having been employed for more than one year; *(iii)* is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office; *(iv)*

23 Id. para. 57.
24 Id. para. 59.
25 Judgment of 17 September 2002, *Case C-413/99, Baumbast*, ECLI:EU:C:2002:493, paras. 88-93.
26 Recitals 3 and 4 of Directive 2004/38.

doi: 10.5553/HYIEL/266627012023011001003

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embarks on vocational training. In the case of *(iii)*, the status of worker shall be retained for no less than six months.

Article 24 of the Citizenship Directive is the most important provision as far as the right to claim equal treatment in respect of social assistance is concerned. Article 24(1) provides that "all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State". However, Article 24(2) states that,

> "By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families."

Article 14(4)(b) provides that no expulsion measures may be adopted against Union citizens who

> "entered the territory of the host Member State in order to seek employment. [They] may not be expelled for as long as [they] can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged".

In other words, jobseekers who satisfy these conditions enjoy a right to reside but not a right to claim social assistance.

In the previous section, we saw that the conditions set out in secondary legislation were often flouted in the first era of social assistance case law. In so doing, the CJEU ignored the provision in Article 21 TFEU that the right to move and reside freely is subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect. The question, therefore, was whether, following the introduction of the Citizenship Directive, this would change. Would the CJEU this time be willing to defer to the legislature and respect its choices? Overall, as I shall explain, it has been prepared to do so. On occasion, however, it has nevertheless disregarded the applicable legislative provisions. The remainder of this section discusses the relevant judgments.

The decision in the *Förster* case provided the first indication that the CJEU was prepared to take secondary legislation more seriously than before. As we saw earlier, it decided in *Bidar* that the awarding of student benefits may be made conditional upon students having "demonstrated a certain degree of integration into the society of that State". The Netherlands had interpreted this decision rather restrictively by introducing a five-year residence requirement. Mrs Förster's application for a maintenance grant was rejected on the ground that she did not meet this requirement. Despite the fact that a five-year residence requirement is a crude measure for determining whether citizens have demonstrated a degree of

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integration, the CJEU decided that the Dutch rule was appropriate as well as proportionate for that purpose.[27] In connection to the argument that the measure was proportionate, the CJEU mentioned Article 24(2) of the Citizenship Directive, which, although not applicable to the facts of the *Förster* case, also requires of students that they have resided legally for a continuous period of five years before they can claim social assistance.[28]

The *Förster* judgment is sometimes seen as the judgment in which the CJEU bid farewell to the first era of its social assistance case law.[29] However, the five-year residence rule, while amounting to a strict interpretation of *Bidar*, did not directly contradict earlier case law. The real test case proved to be *Vatsouras and Koupatantze*, in which the CJEU showed that it was initially unwilling to accept that the legislature could overturn established case law. In *Collins*, it had decided that citizens can claim equal treatment when they have "for a reasonable period, in fact genuinely sought work in the Member State in question". The Citizenship Directive was less generous in this respect. Article 24(2) read together with Article 14(4)(b) of the Directive laid down a general derogation from the principle of equal treatment as regards social assistance for jobseekers. In view of this contradiction, the referring court in *Vatsouras and Koupatantze* asked whether Article 24(2) was valid given earlier judgments and their interpretation of EU primary law on the rights to non-discrimination on grounds of nationality and free movement of workers. The CJEU did not directly address the validity of the contested provision but decided to interpret the Directive contrary to its intended meaning, with the aim of affirming earlier case law. It read Article 24(2) in accordance with Article 45(2) TFEU, thereby excluding jobseeker benefits from the scope of the concept of social assistance. As the CJEU put it, benefits "intended to facilitate access to the labor market cannot be regarded as constituting 'social assistance' within the meaning of Article 24(2) of Directive 2004/38".[30] In so ruling, earlier case law on the right of jobseekers to claim social benefits was affirmed at the expense of the Citizenship Directive.

As of 2014, however, the CJEU changed course in its interpretation of the Directive in response to three references for preliminary rulings submitted by German courts. The references were submitted with a view to clarifying the conditions under which mobile citizens can claim social assistance in the host state. The applicant in *Dano* had never worked or sought work. The applicants in *Alimanovic* had worked for 11 months, one month short of the one-year period that gives involuntarily unemployed persons the right to retain their status as workers and remain eligible for social assistance under Article 7(3)(b) of the Directive. Finally, the applicant in *García-Nieto* had applied for assistance during the first

27 Judgment of 18 November 2008, *Case C-158/07, Förster*, ECLI:EU:C:2008:630, paras. 52-60.

28 Id. para. 55.

29 Moritz Jesse & Daniel William Carter, 'Life after the "Dano-Trilogy": Legal Certainty, Choices and Limitations in EU Citizenship Case Law', *in* Nathan Cambien *et al*. (eds.), *European Citizenship under Stress: Social Justice, Brexit, and other Challenges*. Koninklijke Brill NV, Leiden, Boston, 2020, pp. 135-169.

30 Judgment of 4 June 2009, *Joined cases C-22/08 and C-23/08, Vatsouras and Koupatantze*, ECLI:EU:C:2009:344, para. 45.

doi: 10.5553/HYIEL/266627012023011001003

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three months of their stay, which, under Article 24(2) of the Directive, need not be granted during that period. The German authorities had rejected the applications for social assistance by the applicants, in conformity with the rules laid down in the Citizenship Directive but contrary to settled case law including *Vatsouras and Koupatantze*. Nevertheless, the CJEU upheld the decisions of the German authorities and enforced the provisions laid down in the Citizenship Directive.[31]

These judgments have been subject to extensive debate,[32] but while it seems clear that the CJEU changed course, it is not always clear in what respects it departed from earlier case law – it does not help that the CJEU failed to clarify this. In my reading, it changed course in three respects.

(i) First, it reversed the decision of *Vatsouras and Koupatantze* to place jobseeker allowances outside the scope of social assistance under Article 24(2) of the Directive. As in *Vatsouras and Koupatantze*, the benefit at issue in the three cases was a subsistence benefit for jobseekers under Book II of the German Social Code. In *Dano* and *Alimanovic*, the CJEU defined the concept of social assistance as "assistance schemes established by the public authorities [...] to which recourse may be had by an individual who does not have resources sufficient to meet his own basic needs".[33] Further to this, and contrary to *Vatsouras and Koupatantze*, it decided that also benefits meant to facilitate access to the employment market must be classified as social assistance if they have these characteristics.

(ii) Second, Member States need no longer assess whether there is a genuine link between an applicant for social assistance and the employment market. The Citizenship Directive does not require such an assessment, and the CJEU has accepted this in the three cases discussed here. It is perhaps understandable that it did not examine in *Dano* whether there was a genuine link with the employment market: Ms Dano has never had a job in Germany, nor ever looked for one. It is also understandable that it did not undertake such an assessment in *García-Nieto*: the dispute concerned the granting of social assistance during the first three months of residence, that is, a period which is arguably too short to establish any genuine links. However, the applicants in *Alimanovic* had genuine links with the German employment market: they had been employed for a period of 11 months. Moreover, the mother had lived in Germany before, since her children were born there. And yet, the CJEU did not consider these links in its decision. Had it attached as much weight to the genuine links with the employment market as in *Vatsouras and Koupatantze*, it should have reached a different judgment in *Alimanovic*. Instead, it

31 Judgment of 11 November 2014, *Case C-333/13, Dano*, ECLI:EU:C:2014:2358; Judgment of 15 September 2015, *Case C-67/14, Alimanovic*, ECLI:EU:C:2015:597; Judgment of 25 February 2016, *Case C-299/14, García-Nieto*, ECLI:EU:C:2016:114.

32 *See e.g.* Niamh Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship', *Common Market Law Review*, Vol. 52 Issue 4, 2015, pp. 889-934; Daniel Thym, 'When Union Citizens Turn Into Illegal Migrants: The Dano Case', *European Law Review*, Vol. 40, Issue 2, 2015, pp. 249-262; 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.

33 *Case C-333/13, Dano*, para. 63; *Case C-67/14, Alimanovic*, para. 44.

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reversed the requirement to make the award of social assistance to jobseekers conditional upon there being a genuine link with the labor market.

(iii) Third, the CJEU no longer interprets the Citizenship Directive in accordance with primary law. Or rather, it accepts that secondary legislation can define the scope of primary law, in this case, the right to non-discrimination as laid down in Article 18 TFEU. In *Dano*, it stated that,

> "the principle of non-discrimination, laid down generally in Article 18 TFEU, *is given more specific expression* in Article 24 of Directive 2004/38 in relation to Union citizens who, like the applicants in the main proceedings, exercise their right to move and reside within the territory of the Member States. That principle is also given more specific expression in Article 4 of Regulation No 883/2004 in relation to Union citizens, such as the applicants in the main proceedings, who invoke in the host Member State the benefits referred to in Article 70(2) of the regulation."[34]

On this ground, it decided that the regulatory constraints laid down in the Citizenship Directive apply and need not be amended in the light of the Treaties or be made subject to a proportionality test. That said, it is not entirely clear if the Court has decided to disapply the principle of proportionality entirely. In *Alimanovic*, it justified its decision to respect the Directive's rules by stating that these comply with the principle of proportionality. This was so, since the Directive,

> "by establishing a gradual system as regards the retention of the status of 'worker' [...] itself takes into consideration various factors characterizing the individual situation of each applicant for social assistance and, in particular, the duration of the exercise of any economic activity".[35]

However, this argument is implausible. Contrary to what the CJEU suggests, the Directive only takes into account the duration of the exercise of an economic activity and no other factors that characterize the situation of individual applicants; it does not lay down the kind of individually tailored assessments that a proportionality assessment typically requires. The only logical conclusion is thus that the CJEU departed from earlier case law. It no longer requires national authorities to consider the individual circumstances of the applicants and instead decided to settle disputes over the right to claim social assistance in accordance with the relatively precise rules laid down in the Citizenship Directive.

The approach taken by the CJEU since *Dano* has been applied fairly consistent over the next years. In *Tarola*, for example, the question of whether an EU citizen who had worked for two weeks is entitled to retain the status of worker for no less than six months was answered in accordance with the letter of the Citizenship

34 *Case C-333/13, Dano*, para. 61 (emphasis added). *See also* Judgment of 15 July 2021, *Case C-709/20, CG*, ECLI:EU:C:2021:602, para. 66.

35 *Case C-67/14, Alimanovic*, paras. 60-61.

doi: 10.5553/HYIEL/266627012023011001003

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Directive.[36] In view of Article 7(3)(c), according to which citizens retain the status of worker for a period of six months if they are in duly recorded involuntary unemployment after having become involuntarily unemployed during the first twelve months, the unsurprising answer was that this is indeed the case. Similarly, the decision in *Gusa* that self-employed persons could retain that status after they cease working after about four years was compatible with the Directive, even though the text of the relevant provisions was not entirely clear on this point and the different language versions were inconsistent.[37] Finally, although the CJEU ruled in *Jobcenter Krefeld* that jobseekers may derive a right of residence from sources of EU law other than the Citizenship Directive (in this case Regulation No 492/2011) and on that basis claim equal treatment in terms of social assistance, even if the Citizenship Directive does not allow that, the judgment confirmed the overall validity of the post-*Dano* jurisprudence.[38] So, by the end of the last decade, it seemed that the CJEU had decided to consistently resolve disputes over the right of economically inactive citizens in accordance with provisions of secondary legislation and in particular those of the Citizenship Directive.

4. Evaluating the Social Assistance Case Law

What are we to make of these changes? How should we evaluate the fact that the CJEU has begun to accept the conditions passed by the legislature and settle social assistance disputes in accordance with them? One might think this should have been uncontroversial and even encouraged. Isn't it normal that the judiciary affords great deference to the law produced by the legislative branch? Surprisingly, most scholars who commented on these rulings have taken a different view. While early social assistance case law was often met with high praise – the CJEU was 'writing the future' of EU citizenship[39] – the changes since *Dano* have mostly been critically received. This is partly because the changes were not properly motivated, but the criticism cannot be separated from the way citizenship scholars perceive the subject of their studies. Their criticism is largely driven by their views on what the concept of EU citizenship ought to become. As such, their criticism is almost entirely outcome-oriented, conditioned by whether CJEU case law corresponds to their normative conception of EU citizenship. In this section I will highlight the shortcomings of such outcome-oriented thinking and justify the choice to decide social assistance disputes in accordance with the rules established by the legislature.

At first sight, my claim that the dominant frame for evaluating EU citizenship case law is output-related may seem misleading. After all, much of the criticism of the second era of social assistance jurisprudence advances what may seem to be a strictly legal claim, namely that the CJEU failed to observe the hierarchy of legal sources in EU law. As demonstrated above, the CJEU managed to extend the

36 Judgment of 11 April 2019, *Case C-483/17, Tarola*, ECLI:EU:C:2019:309.
37 Judgment of 20 December 2017, *Case C-442/16, Gusa*, ECLI:EU:C:2017:1004.
38 Judgment of 6 October 2020, *Case C-181/19, Jobcenter Krefeld*, ECLI:EU:C:2020:794.
39 Dora Kostakopoulou, 'European Union Citizenship: Writing the Future', *European Law Journal*, Vol. 13, Issue 5, 2007, pp. 623-646.

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boundaries of social inclusion in the first era of its case law by interpreting secondary legislation in accordance with principles of primary law, including the free movement of workers, the right to non-discrimination on grounds of nationality, and the principle of proportionality. By contrast, since *Dano*, primary law is not applied in addition to legislation anymore. It is now the legislature that gives 'more specific expression' to primary law.[40] For many commentators, this sits uneasily with the hierarchy of sources between primary and secondary law. The case law was said to be "a (dangerous) reversal of the institutional balance for rulemaking in the European Union",[41] which resulted from the CJEU rescinding on "its duty of scrutiny over secondary law".[42]

Contrary to appearances, however, this is not a strictly legal argument. For one thing, one rarely hears it when scholars agree with the outcome reached in a particular case. For example, in *Tarola*, the CJEU ruled that an EU citizen who had worked for a period of two weeks retained the status of worker for no less than six months and was entitled to social assistance during this period. This was consistent with the Citizenship Directive. Had the Court examined, instead, whether the applicant had established genuine links with the labor market, as it did in earlier rulings on jobseekers such as *Collins*, it might have ruled against the applicant (as two weeks of employment seems insufficient to establish a genuine connection with the labor market). But while the *Dano* and *Alimanovic* judgments were criticized for not assessing the individual circumstances of the applicants to ascertain whether they had a genuine connection with the labor market,[43] no such criticism is likely to be levelled against the *Tarola* ruling. This would evidently be because the absence of such an assessment, that is, a strict application of the Citizenship Directive's rules, was to the advantage of the applicant in *Tarola* and not those in *Dano* and *Alimanovic*. Indeed, it is likely that the view of many scholars on whether the Directive should be supplemented by primary law, and hence by an individualized assessment of the applicant's genuine links with the host state, depends on the outcome achieved in doing so.

But more fundamentally, the argument that the CJEU, from *Dano* onwards, reversed the EU's institutional balance for rulemaking by not interpreting the Citizenship Directive in the light of primary law is both empirically and politically flawed. The CJEU's attitude was anything but exceptional: as Eadaoin Ní Chaoimh has shown, cases are normally decided under a 'legislative priority rule' according to which "secondary legislation enjoys a general presumption of constitutionality".[44] That is, legislation typically displaces primary free movement law, which is exactly what happened in *Dano*. In other words, the institutional balance for rulemaking was affirmed, rather than reversed. Moreover, there is nothing wrong with this

40 *Case C-333/13, Dano*, para. 61.

41 Daniel Sarmiento & Eleanor Sharpston, 'European Citizenship and Its Union: Time to Move On?', *in* Dimitry Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights*, Cambridge University Press, Cambridge, 2017, p. 237.

42 Nic Shuibhne 2015, p. 910.

43 Id. p. 913.

44 Eadaoin Ní Chaoimh, *The Legislative Priority Rule and the EU Internal Market for Goods: A Constitutional Approach*. Oxford University Press, Oxford, 2022, 71.

doi: 10.5553/HYIEL/266627012023011001003

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under the Treaties. The notion that the hierarchy between primary and secondary law entails a hierarchy between the EU judiciary and legislature is persistent, but patently false. Since most Treaty provisions are open-ended, the key question is what discretionary powers the legislature ought to have within the scope of primary law. This is not a legal question about the correct interaction of legal sources, but a political one, about the proper allocation of EU authority. It is not the interaction of legal sources that structures the allocation of authority between the judiciary and legislature, but the other way around: the allocation of political authority structures the interaction of legal sources.[45] And so, in deciding whether to respect the legislature's choices, in the social assistance case law specifically, but also more generally, the CJEU is required to exercise not legal, but political judgment.[46]

The question then is according to what criteria the CJEU should exercise its political judgment. It is at this point that the outcome thinking of EU citizenship scholars emerges most clearly. Even though the social assistance case law from *Dano* onwards was consistent with the conditions laid down in legislation, critics argued that the CJEU should have decided differently as a matter of social justice.[47] Such criticism implicitly suggests that it is legitimate for the CJEU to ignore, and indeed it should ignore, the legislature's choices when these generate unjust results. Moreover, such outcome-dependent reasons have been invoked not just to criticize the CJEU for affording extensive deference to the Citizenship Directive in the second era of social assistance case law, but also to justify its more activist attitude in the first era of social assistance case law. In cases such as *Martínez Sala* and *Grzelczyk*, the CJEU put "flesh on the bones of EU citizenship",[48] taking the first steps in developing a 'real European citizenship'.[49] The implicit argument, in other words, is that the CJEU's attitude in that period was justified, as it was consistent with what the substantive content of EU citizenship ought to be.

The problem with such outcome-oriented conceptions of proper judicial behavior, however, is that they underestimate the disagreement that exists in our societies about what constitutes desirable output, *i.e.* what justice requires.[50] The

45 I explore this in more detail in Martijn van den Brink, *Political Judgment: Legislative Authority and Interpretation in the European Union*, Oxford University Press, Oxford, 2024, forthcoming, Introduction.

46 Martin Loughlin, *Political Jurisprudence*, Oxford University Press, Oxford, 2017, p. 6.

47 Päivi Johanna Neuvonen, *Equal Citizenship and Its Limits in EU Law: We The Burden*, Hart Publishing, Oxford, 2016; Charlotte O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK*, Hart Publishing, Oxford, 2017. To be sure, *Alimanovic* has been criticized on other grounds too, including, most importantly, for not clarifying how it is to be reconciled with precedent. *See e.g.* Nic Shuibhne 2015, p. 916.

48 Siofra O'Leary, 'Putting Flesh on the Bones of European Union Citizenship', *European Law Review*, Vol. 24, Issue 1, 1999, pp. 68-79.

49 Dimitry Kochenov, 'A Real European Citizenship; A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe', *Columbia Journal of European Law*, Vol. 18, Issue 1, 2011, pp. 56-109. For criticism, *see* Daniel Thym, 'Toward "Real" Citizenship? The Judicial Construction of Union Citizenship and Its Limits', *in* Maurice Adams *et al.* (eds.), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice*, Hart Publishing, Oxford, 2013, pp. 155-174.

50 I elaborate this argument extensively in Martijn van den Brink, 'The European Union's Democratic Legislature', *International Journal of Constitutional Law*, Vol. 19, Issue 3, 2021, pp. 914-942. *See also* van den Brink 2024, Chapter 1.

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right of mobile EU citizens to receive social assistance illustrates this well. Some will think that it is required by principles of justice to grant mobile EU citizens full and immediate access to social assistance, while others will insist that EU citizens who never exercised an economic activity in the host state can be denied assistance without any injustice being done to them. In the face of disagreement, it is implausible to argue that the European standards on the right to social assistance, or EU rules more generally, should be set by the institution that can do so justly, especially since such disagreement happens in an environment where it seems practically impossible to identify correct principles of justice.[51] EU decision-making is supposed to settle our differences on these issues, and therefore the question of how authority should be allocated between EU legislature and judiciary cannot depend on our subjective conceptions of social justice or, for that matter, any other outcome-dependent conception of political legitimacy.

Instead, the social assistance case law, and the allocation of EU legislative and judicial authority more generally, must be evaluated by looking at the institutional qualities of both actors. It is, indeed, a matter of comparative institutional analysis. Such an analysis gives us three good reasons to advocate for judicial deference to legislation in most situations, including in disputes over the entitlement of mobile Union citizens to social assistance. The first reason is simply that the legislature has greater democratic legitimacy than the judiciary, because the legislative process is better at placing EU decision-making under the shared and equal control of the national peoples.[52] The second reason is that the legislature has a greater capacity to initiate legal change.[53] By this I mean that it is a better lawmaker than the CJEU, so EU law can be trusted to be of higher quality when made by legislation than case law. This is largely due to the legislative process' epistemic qualities. The legislature has access to a wide range of information on a broad variety of issues, including the social and political conditions in the Member States, the scientific and technological matters relating to the issues to be resolved, and possible trade-offs between alternative courses of action. The CJEU, in contrast, cannot rely on

> "experts, recognized methods, advisory committees, delegated national experts, and the like. Constrained by the adversarial procedure, they usually examine the claims and evidence adduced by the parties, relinquishing their own investigatory powers."[54]

The expertise of judges lies in questions of law and is rarely adequate for taking the complex political, economic, and social choices that our political institutions are called upon to take. The legislature is therefore better placed to assess the

51 Jeremy Waldron, *Law and Disagreement*, Oxford University Press, Oxford, 1999, Chapter 8.

52 *See*, in detail, van den Brink 2024.

53 The second and third reasons are explored in depth in van den Brink 2024, Chapter 2.

54 Michal Krajewski, 'Judicial and Extra-Judicial Review: The Quest for Epistemic Certainty', *in* Merijn Chamon (ed.), *The Board of Appeal of EU Agencies: A New Paradigm of Legal Protection?*, Oxford University Press, Oxford, 2022, pp. 273-298. *See also* Hanns Peter Nehl, 'Judicial Review of Complex Socio-Economic, Technical and Scientific Assessments', *in* Joana Mendes (ed.), *EU Executive Discretion and the Limits of Law*, Oxford University Press, Oxford, 2019, pp. 157-197.

doi: 10.5553/HYIEL/266627012023011001003

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socio-economic and political implications of the provisions under consideration and adjust its decisions accordingly. The third reason is that the legislature has a greater capacity to realize social change. By this I mean that legislation is more likely to generate its intended social effects domestically: *i.e.*, the legal addressees of EU law are more likely to adjust their laws and practices in response to legislation than case law. Without going into detail, there is evidence supporting Susanne Schmidt's thesis that the "implications of European integration differ depending on whether they are caused by the impact of secondary law or by court rulings".[55] Therefore, assuming that compliance with EU law is an important good, we should normally want the CJEU to decide disputes in line with the legislature's choices where there is legislation governing the dispute.

Limitations of space prevent me from developing this argument in more detail. What I have hoped to show in this section, however, is that the social assistance case law should not be evaluated from an outcome-oriented perspective. Instead, the CJEU has three good reasons to adjudicate such disputes in accordance with the choices of the legislature. This would justify the turn the case law has taken since *Dano* and dispel the criticism of later judgments. It is correct to give priority to provisions of secondary legislation that give 'more specific expression' to the Treaty provisions governing the right to free movement of EU citizens. Not only is this consistent with the more general practice of allowing free movement legislation to displace primary law, but it is also justified by the greater institutional legitimacy and capacity of the legislature *vis-à-vis* the judiciary. Thus, the social assistance case law from *Dano* onwards should be viewed positively: the disputes were rightly rendered on the basis of the conditions laid down in the Citizenship Directive.

5. Has the Case Law Gone Off Track, Again?

If this is so, the question is whether the CJEU has gone back off track again in its very latest social assistance case law, especially in the *CG* judgment.[56] The applicant arrived in Northern Ireland with her partner in 2018. She separated from him on account of domestic violence, after which she moved to a women's shelter with her two children. She had never worked in the UK and had no resources to support herself and her children. Her application for social assistance had been refused by the local authorities because she did not meet the residency requirements to qualify for these benefits. The CJEU ruled that this decision was compatible with EU citizenship law. Referring to *Dano*, it held that

> "so far as concerns access to social assistance, a Union citizen can claim equal treatment [...] with nationals of the host Member State only if his or her

55 Susanne K. Schmidt, 'Beyond Compliance: The Europeanization of Member States through Negative Integration and Legal Uncertainty', *Journal of Comparative Policy Analysis: Research and Practice*, Vol. 10, Issue 3, 2008, p. 304.

56 *Case C-709/20, CG*.

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> residence in the territory of that Member State complies with the conditions of Directive 2004/38."[57]

It follows from these conditions that Member States have the possibility to "refuse to grant social benefits to economically inactive Union citizens who exercise their right to freedom of movement and who do not have sufficient resources to claim a right of residence under that directive".[58] So the fact that the applicant does not have sufficient resources means she cannot invoke the principle of non-discrimination on grounds of nationality.[59]

This was not the final decision, however. Applying the provisions of the Citizenship Directive would have risked depriving an already isolated and impoverished parent of the means to ensure the well-being of her children.[60] This would be contrary to the rights to dignity and family life and the children's right to the necessary care for their well-being under Articles 1, 7, and 24 of the Charter of Fundamental Rights. This is why the CJEU held that for the duration of their right of residence within the territory of the host state, citizens must be allowed to live in dignified conditions that respect their family life and are in the best interest of the child.[61] It held that

> "the competent national authorities may refuse an application for social assistance [...] only after ascertaining that that refusal does not expose the citizen concerned and the children for which he or she is responsible to [a] violation of their fundamental rights, as enshrined in Articles 1, 7 and 24 of the Charter."[62]

In other words, although the provisions of the Citizenship Directive were applied initially, they were ultimately circumvented by the application of the Charter. This has puzzled commentators, who have criticized the CJEU for delivering an inconsistent ruling. As Maria Haag argues,

> "Considering the Court's restrictive interpretation of the right to equal treatment, it is remarkable that, in the same judgment, the Court confirms the applicability of the Charter. The Court here decidedly diverges from its previous case law on the non-applicability of the Charter to economically inactive Union citizens and their right to social assistance. There is, however, a striking discrepancy in the logic of the Court regarding the right to equal treatment

57 Id. para. 75.
58 Id. para. 78.
59 Id. para. 80.
60 Advocate General Opinion of Richard De La Tour, Delivered on 24 June 2021, *Case C-709/20, CG*, ECLI:EU:C:2021:515, para. 109.
61 *Case C-709/20, CG*, paras. 88-90.
62 Id. para. 92.

doi: 10.5553/HYIEL/266627012023011001003

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> and the applicability of the Charter. It reads almost as if two separate courts had written the two contradictory sections."[63]

It may seem contradictory indeed to deny social assistance to EU citizens under a strict application of the Citizenship Directive, but then to rule that their application for social assistance may still have to be awarded in accordance with the Charter of Fundamental Rights.

Yet this is not as contradictory as it may seem at first sight. On the contrary, it is perfectly consistent and principled to hold the view that the choices of the legislature should be followed unless their application threatens to violate the fundamental rights of the individuals concerned – as might have happened had the CJEU allowed national authorities to solely consider the Citizenship Directive. It does not follow from the argument in the previous section that there are good reasons for affording extensive weight to the judgments of the legislature that disputes must always be settled exclusively according to secondary legislation. There is enough evidence to suggest that the legislature can be trusted to take fundamental rights seriously,[64] but trust need not be blind. When it has not adequately considered the fundamental rights implications of its decisions, intervention by the CJEU may be justified. Consider, by analogy, the *Saint Prix* judgment,[65] which concerned the status of pregnant women under Article 7(3) of the Citizenship Directive. This provision sets forth that citizens who are no longer employed in the host state can retain the status of worker and thus the right to claim social assistance in specific situations, such as when they are temporarily unable to work due to illness or when they are involuntarily unemployed after a period of prior employment. The legislature had not, however, made any provision for women who are temporarily out of work due to their pregnancy, putting them at risk of being without social protection at a moment of great vulnerability. That Article 7(3) did not cover such situations is most likely solely due to oversight on the part of the legislature. Still, the omission left pregnant women in a very vulnerable position and could therefore breach the principle of non-discrimination on grounds of sex under Article 23 of the Charter.[66] The CJEU did not say so in so many words,[67] but it ruled that women who must give up work "because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth retain the status of 'worker'",[68] which meant that they also retain the right to claim social protection.

63 Maria Haag, 'The Coup de Grace to the Union Citizen's Right to Equal Treatment: CG v. The Department for Communities in Northern Ireland', *Common Market Law Review*, Vol. 59, Issue 4, 2022, p. 1101.

64 Mark Dawson, 'Fundamental Rights in European Union Policy-Making: The Effects and Advantages of Institutional Diversity', *Human Rights Law Review*, Vol. 20, Issue 1, 2020, pp. 50-73.

65 Judgment of 19 June 2014, *Case C-507/12, Saint Prix*, ECLI:EU:C:2014:2007.

66 Advocate General Opinion of Nils Wahl, Delivered on 12 December 2013, *Case C-507/12, Saint Prix*, ECLI:EU:C:2013:841, para. 35.

67 For criticism, *see* Samantha Currie, 'Pregnancy-Related Employment Breaks, the Gender Dynamics of Free Movement Law and Curtailed Citizenship: Jessy Saint Prix', *Common Market Law Review*, Vol. 53, Issue 2, 2016, pp. 553-557.

68 *Case C-507/12, Saint Prix*, para. 47.

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Such rulings are hardly comparable with the first era of social assistance case law, in which primary law was used to circumvent the conditions set by the legislature on a very regular basis. It is clear from *CG* that the CJEU understands the virtues of judicial deference to legislation. The legal validity of *Dano* still stands; it was confirmed by *CG*.[69] The CJEU merely held that secondary legislation must be applied in conformity with the Charter. In so ruling, it showed that it accepts the limits of its judicial authority, but also that it understands its judicial responsibilities. It accepts that the regulation of the right to free movement of EU citizens is in principle within the province of legislation, but nonetheless reserves the right to check whether the choices of the legislature respect the fundamental rights of the affected citizens. This is not contradictory or illogical but is what principled adjudication looks like.

6. Conclusion

This article was motivated by two ambitions: to clarify in what respects the law on the right of Union citizens to claim social assistance has changed over the course of the last three decades and to develop a framework that allows us to evaluate the relevant CJEU judgments. In the first era of social assistance case law, the choices of the legislature were regularly circumvented, which the CJEU managed to do by interpreting the limitations and conditions set out in legislation narrowly and in the light of primary law. Starting with *Dano*, the CJEU has backtracked on this approach; since then, it accepts and enforces the conditions laid down in the Citizenship Directive. More precisely, it has overturned the case law from the first period in three respects: jobseeker benefits have been brought back under the scope of social assistance, Member States no longer need to apply individual assessments to measure the strength of the link between applicants for benefits and the employment market, and the Citizenship Directive has come to define the scope of primary law.

I have argued that the case law is to be evaluated not in terms of output-oriented standards, but in terms of the EU judiciary and legislature's relative institutional strengths, instead. From this point of view, the changes introduced since *Dano*, and, more generally, the CJEU's decision to settle social assistance disputes in line with the choices of the legislature, are justified. The legislature, as I explained, has superior legitimacy and capacity to set the conditions governing the right to free movement of EU citizens. It is therefore important that the CJEU stay on track with the course it set out in *Dano*, as it has done so far. In doing so, it is important to keep in mind the fundamental rights of individual citizens, as was done in the *CG* ruling, but such judgments should be the exception to the rule of judicial deference to legislation.

69 Haag 2022, pp. 1102-1103.

doi: 10.5553/HYIEL/266627012023011001003