EJSS

European Journal of Social Security
2017, Vol. 19(1) 71–82

DOI: 10.1177/1388262717699459
journals.sagepub.com/home/ejs
SAGE

Recent case before the Court of Justice of the European Union

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Economically inactive migrant union citizens: only entitled to social benefits if they enjoy a right to reside in the host state. Case C-308/14, European Commission v United Kingdom, ECLI:EU:C:2016:436 (14 June 2016).

Introduction

The judgment commented on in this article concerns, once again, a question that has been preoccupying legal and political minds for quite some time: to what extent are economically inactive mobile Union citizens entitled to social benefits in the host State? According to the first case law on this matter, economically inactive migrant Union citizens can invoke, in principle, the prohibition of discrimination on grounds of nationality[1] with regard to social assistance.[2] However, they do not have unconditional access to social benefits. In this initial case law, the Court stated, *inter alia*, that the person concerned may not constitute an unreasonable burden on the public finances,[3] must have a sufficient link with the labour market of the host country[4] or must be able to demonstrate a certain degree of integration into the host society.[5] For the Court, requiring this kind of sufficient link with the host Member State is a legitimate objective that can justify restrictions on the right of free movement.[6]

This approach can also be found in the provisions of Directive 2004/38. Economically inactive Union citizens only have a right of residence in the host Member State in the first three months if

1. See for the first time Case C-85/96, *Martinez Sala,* EU:C:1998:217. Recently this was confirmed once again by the Court in Case C-333/13, *Dano,* EU:C:2014:2359, para. 59.
2. Case C-184/99, *Grzelczyk,* EU:C:2001:458 and Case C-456/02, *Trojani*, EU:C:2004:488.
3. Case C-184/99, *Grzelczyk,* EU:C:2001:458, para. 44.
4. Case C-138/02, *Collins,* EU:C:2004:172, paras. 67-69 and Cases C-22/08 and C-23/08, *Vatsouras* and *Koupatantze,* EU:C:2009:344, paras. 38 and 39.
5. Case C-209/03 *Bidar,* EU:C:2005:169, para. 57.
6. Case C-413/99, *Baumbast,* EU:C:2002:493, para. 90; Case C-200/02, *Zhu and Chen,* EU:C:2004:639, para. 32 and Case C-408/03, *Commission v Belgium,* EU:C:2006:192, paras. 37 and 41.

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they do not constitute an unreasonable burden on the social assistance system of the host country (Article 6 *juncto* Article 14(1)). After these first three months and until they have obtained a permanent right of residence after a legal stay of five years, their right of residence depends on them having sufficient resources for themselves and their family members in order to prevent them from becoming a burden on the social assistance system of the host country (Article 7(1)b)). Moreover, Article 24(2) of this Directive states that Union citizens who are economically inactive are not entitled to social assistance in the first three months of their stay in the host Member State. An even longer period applies to jobseekers, more specifically, in the period that they continue to seek employment and have a genuine chance of finding a job and therefore a right of residence in this Member State.

Concerning these provisions, the Court of Justice later stated that these are meant to prevent Union citizens from becoming an unreasonable burden on the social assistance system of the host Member State,[7] and that they are based on the idea that the exercise of free movement and the right of residence can be made subject to the Member States' legitimate interests, notably the protection of their public funds.[8]

However, the application of these provisions and this case law kept leading to legal disputes. Recently the Court had to rule on the question as to what exactly is meant by 'unreasonable burden' (proportionality test), which benefits can be regarded as 'social assistance', and whether or not the host Member State may make the right to social assistance subject to having a right to reside in that Member State.[9]

Legal questions

In the case annotated here, this last question in particular was at the forefront, i.e. are host Member States allowed to make the right to social benefits for economically inactive Union citizens subject to the condition that the person concerned has a right of residence in that State, and under which conditions can this requirement be imposed? The Court was also asked to take a stand on the meaning of the prohibition of discrimination on grounds of nationality in Article 4 Regulation 883/2004 on the coordination of the social security systems of the Member States.

This case concerned an infringement procedure launched by the European Commission. Its principal head of claim concerned the provisions in the UK's legislation according to which economically inactive Union citizens are only entitled to certain forms of family allowances[10] if they habitually reside in that Member State.[11] To satisfy that condition it is not sufficient that the person effectively habitually resides on the territory of the Member State, but also has the right to reside there. According to the Commission this provision is contrary to the rules of conflict in Regulation 883/2004 that determine which social security law applies to economically inactive

7. Cases C-424/10 and C-425/10, *Ziolkowski and Szeja*, EU:C:2001:866, para. 40. See also Case C-333/13, *Dano,* EU:C:2014:2359, para. 74 and Case C-67/14, *Alimanovic,* EU:C:2015:597, para. 50.
8. Case C-140/12, *Brey,* EU:C:2013:565, para. 55.
9. See the abovementioned judgments in the cases of *Brey*, *Dano* and *Alimanovic* and Case C-299/14, *Garcia-Nieto,* EU:C:2016:114. See about these judgments *inter alia*, Babayev, R. (2016); Düsterhaus, D. (2015); Giubboni, S. (2016); Iliopoulou, A. (2016); Minderhoud, P. (2016); Nic Shuibhne, N. (2015); O'Brien, Ch. (2016); Thym, D. (2015); Verschueren, H. (2014) and Verschueren, H. (2015).
10. More specifically the 'Child benefit' and the 'Child tax credit'.
11. The so-called 'habitual residence test'.

migrant Union citizens in cross-border situations. Furthermore, in the Commission's view, this infringes on the right to equal treatment as guaranteed by Article 4 Regulation 883/2004 since nationals of the United Kingdom automatically satisfy the condition of having a right to reside in that Member State.

Initially, the infringement procedure of the Commission also related to the 'special non-contributory cash benefits' as meant in Article 70 of Regulation 883/2004. But these benefits can be qualified as 'social assistance' within the meaning of Article 7(1)(b) Directive 2004/38 and therefore, on the basis of earlier case law of the Court of Justice (*inter alia*, in *Brey*), can be subject to the requirement of having a right of residence in the host Member State. For that reason, the Commission restricted the action before the Court to the two family allowances that are 'classic' social security benefits.[12] Therefore, the importance of this judgment is the fact that the Court was asked to rule on the right of economically inactive migrant Union citizens to these 'classic' social security benefits from the host country.

The parties' arguments

The European Commission used two main arguments to show that the United Kingdom was in violation of Union law. First of all, the Commission argued that British legislation had added a condition to the right to social security benefits that is not included in Regulation 883/2004. In principle, on the basis of Article 11(3)(e) Regulation 883/2004, the social security legislation of the Member State where an economically inactive Union citizen has his/her residence applies. The Commission referred to the case law of the Court of Justice, according to which the habitual residence of the person concerned is the habitual centre of the citizen's interests, taking into account the actual circumstances, independent of the legal position of the person concerned in the host Member State.[13] The meaning given to the concept of 'residence' in Regulation 883/2004 is a specific meaning that can differ from the meaning this concept has in other instruments of Union law.

According to the Commission, the Member State where the Union citizen in question has his/her residence within the meaning of this regulation, is not allowed, as far as the right to social security benefits is concerned, to impose other requirements with regard to this residence than to ensure that it complies with the actual criteria used for the application of this regulation. Any additional requirement could have the result that one of the most important purposes of the regulation, namely avoiding the negative conflicts of law that would arise if the person concerned were not able to comply with the residence requirement in any of the Member States, would not be fulfilled. Indeed, this would mean that this person would not be subject to any applicable social security legislation, which, obviously, would result in a restriction of the free movement of persons. The Commission also stated that the earlier case law of the Court of Justice (*Brey; Dano)* only related to social assistance benefits within the meaning of Directive 2004/38. Because this Directive stipulates that in order to have a right of residence, economically inactive Union citizens should not be an unreasonable burden on the social assistance system of the host country, it would only be possible to impose a right of residence condition for benefits that qualify as 'social assistance'.

12. See paragraph 27 of the judgment.
13. See, *inter alia*, Case C-90/97, *Snares,* EU:C:1997:518, para. 29.

Next, the Commission invoked the prohibition of discrimination on grounds of nationality in Article 4 of Regulation 1408/71. According to the Commission, the right to reside test constitutes direct discrimination on grounds of nationality because the Member State's own nationals automatically meet this requirement. And even if this requirement were to be considered to be indirect discrimination, the Commission claimed that there are no arguments to suggest that this condition is appropriate and proportionate *vis-à-vis* the objective pursued by the national legislation concerned, notably ensuring that there is a genuine link between the person applying for benefits and the host Member State. According to the Commission, in Regulation 883/2004 the Union legislature itself set out how the link with a Member State must be determined with a view to the granting of social security benefits, in this case by looking at the actual place of residence.

The United Kingdom, for its part, referred in the first place to the *Brey* judgment, in which, in paragraph 44, the Court of Justice stated that a host Member State may subject the right to social benefits to the condition of entitlement to legal residence in the host country. Furthermore, this Member State pointed out that the rules of conflict in Regulation 883/2004, which for economically inactive persons designate the Member State of residence as the competent Member State, do not aim at laying down or harmonising the substantive conditions for a right to social benefits.

As for the claim of discrimination on grounds of nationality, the United Kingdom stated that this might concern indirect discrimination justified by the necessity to protect public funds, *inter alia*, because it concerns benefits that are not financed by contributions but rather by taxation.

The judgment of the Court of Justice

In its judgment of 14 June 2016, which is in keeping with the Opinion of Advocate General Cruz Villalón, the Court of Justice backed the United Kingdom all the way and rejected the Commission's appeal.

In the first place, the Court stated that the family allowances in question are social security benefits within the meaning of Regulation 883/2004 (paragraphs 54-61). Nonetheless, they are not part of the list of 'special non-contributory cash benefits' for which Article 70 of this Regulation provides a separate arrangement and about which the Court in its earlier case law had stated that these are social assistance benefits within the meaning of Directive 2004/38. So, for the Court, the family allowances at issue in this case are not social assistance, but instead, 'classic' social security benefits.

Subsequently, the Court confirmed that Article 11(3)(e) Regulation 883/2004 is a 'conflict rule' as a result of which the legislation of the country of residence is applicable to economically inactive migrant Union citizens. However, this provision has no influence on the substantive conditions laid down in a Member State's national legislation for entitlement to social security benefits. After all, in principle, it is up to the legal regulations of the Member State to determine these conditions.[14] By qualifying the right to reside test as a substantive condition for the granting of the benefits concerned, the Court can state that this condition does not lead to a negative conflict of law. If the person concerned were not able to claim family allowances in any Member State, this would be a consequence of the fact that he/she did not meet the substantive requirements for the right to such benefits, not even in the Member State allocated as the competent Member State

14. Para. 65 with reference to Case C-140/12, *Brey,* EU:C:2013:565, para. 41 and Case C-333/13, *Dano,* EU:C:2014:2359, para. 89.

through the rules of Regulation 883/2004. Therefore, the Member State can subject the granting of social benefits to economically inactive Union citizens to the requirement that the latter meet the condition of enjoying the right to lawful residence in the host Member State. In this matter the Court referred to its earlier case law on social assistance benefits.[15]

As for the claim that the application of a right to reside test implies discrimination on grounds of nationality, the Court of Justice admitted that this is indeed a matter of discrimination. But the Court held that it could only be regarded as indirect discrimination, since the condition in question can be more easily satisfied by British nationals than by nationals of another Member State (paragraphs 76-78). The Court continued with the classic thesis that such indirect discrimination is only justified when it is appropriate for securing the attainment of a legitimate objective and does not go beyond what is necessary to achieve that objective. However, for the Court, '*the need to protect the finances of the host Member State justifies in principle the possibility of checking whether residence is lawful when a social benefit is granted, in particular to persons from other Member States who are not economically active, as such a grant could have consequences for the overall level of assistance which may be accorded by that State*' (paragraph 80).

Furthermore, the Court pointed out that the Member State's verification of whether or not a claimant for benefits resides lawfully on its territory is a verification within the meaning of Article 14(2) Directive 2004/38 and therefore has to comply with the requirements in this provision as well as with the proportionality principle. This provision states that Union citizens and their family members retain their right of residence as long as they meet the conditions for this. The Member States can check this if there is reasonable doubt, but these checks may not take place systematically. However, the Court held the view that the file did not show that the United Kingdom's practice of verification was contrary to this provision (paragraphs 81-85).

Analysis

The right to reside test can by applied for all social benefits, not only for social assistance

This judgment is, first of all, important because the Court of Justice confirmed here that a Member State hosting economically inactive Union citizens may subject these citizens' right to social security benefits within the meaning of Regulation 883/2004 to the condition that they prove that they possess the right to reside lawfully on the territory of that Member State. This is not only the case for benefits that qualifed as social assistance in the Court's earlier judgments in which it had accepted a right to reside test, but also for 'classic' social security benefits.

However, it remains unclear what kind of lawful residence may be required from an EU citizen. In its earlier case law the Court had stated that, regarding access to social assistance, a Union citizen could only invoke Article 24(1) Directive 2004/38 to claim equal treatment with a national of the host Member State if his/her stay in the territory of that Member State met the conditions of Directive 2004/38.[16] This would mean that a Union citizen who could assert a right to reside on the basis of another provision of Union law or on the basis of the national legislation of the Member

15. Para. 68 with reference to Case C-140/12, *Brey,* EU:C:2013:565, para. 44 and Case C-333/13, *Dano,* EU:C:2014:2359, para. 83.
16. Case C-333/13, *Dano,* EU:C:2014:2359, paras. 68, 69 and 81; Case C-67/14, *Alimanovic,* EU:C:2015:597, para. 49; Case C-299/14, *Garcia-Nieto,* EU:C:2016:114, para. 38. See also Case C-233/14, *Commission v The Netherlands,* EU:C:2016:396, para. 82.

State concerned, would not be able to derive from this a right to equal treatment as regards social assistance. However, a Union citizen can also obtain a right of residence on other grounds than Directive 2004/38. For instance, other case law of the Court of Justice shows that the right of residence for the family members of migrant workers can also be based on Article 10 of Regulation 492/2011 (formerly Article 12 of Regulation 1612/68), notably if they have taken up studying and for as long as they continue to do so.[17] The right of residence can even be based directly on Article 45 TFEU, as in *Saint-Prix.*[18] Furthermore, the right of residence can also be based on the national law of the Member State concerned (as was the case in *Martinez Sala*[19] and *Trojani*[20]). But from the judgments in *Dano, Brey, Alimanovic* and '*Garcia-Nieto*'. it follows that Union citizens whose right of residence is based on these other legal grounds cannot invoke Article 24(1) of Directive 2004/38 for the right to equal treatment as regards social assistance.

Still, in the judgment commented on here, the Court did not refer to a right of residence on the basis of Directive 2004/38. In paragraph 68 the Court talked about the condition '*for possessing a right to reside lawfully in the host Member State'*. From this, it can be inferred that the lawful character of the residence is sufficient, without any distinction as regards the legal ground of the residence.[21] This is especially so when the person concerned does not invoke Article 24 of Directive 2004/38 for the right to equal treatment, but another provision of secondary Union law, as in this case, Article 4 of Regulation 883/2004.

Apart from this issue, the right to reside test is, for the Court, a substantive condition that can be part of the host country's national law. So, this can be applied on top of the conditions laid down by Union law and, more specifically, Regulation 883/2004, notably that an economically inactive Union citizen has his/her actual place of residence in the host country. It is, however, imperative for this substantive condition to be in line with Union law, notably the prohibition of discrimination on grounds of nationality.

Discrimination on grounds of nationality

According to the Court, such a right to reside test constitutes indirect discrimination on grounds of nationality, which could be an infringement of Article 4 of Regulation 883/2004, as this condition is easier to comply with by a Member State's own nationals than by nationals of other Member States (paragraphs 76-78). The Court corroborated its proposition that this is a matter of indirect discrimination on grounds of nationality with the argument that this concerns a residence condition. In paragraph 78 the Court stated: '*In the present action, the national legislation requires persons claiming the benefits at issue to possess a right to reside in the United Kingdom. Thus, that legislation gives rise to unequal treatment between United Kingdom nationals and nationals of the other Member States as such a residence condition is more easily satisfied by United Kingdom nationals, who more often than not are habitually resident in the United Kingdom, than by nationals of other Member States, whose residence, by contrast, is generally in a Member State*

17. Case C-310/08, *Ibrahim,* EU:C:2010:80; Case C-480/08, *Teixeira* EU:C:2010:83 and Case C-529/11, *Alarape and Tijani,* EU:C:2013:290.
18. Case C-507/12, *Saint-Prix,* EU:C:2014:2007.
19. Case C-85/96, *Martinez Sala,* EU:C:1998:217
20. Case C-456/02, *Trojani*, EU:C:2004:488.
21. See also paragraph 80 of the judgment. This is consistent with what the Court had stated in Case C-140/12, *Brey,* EU:C:2013:565, para. 44.

other than the United Kingdom' (underlining by the author). The Court was referring to the judgment in *Bressol*. Indeed, the latter case concerned a 'residence condition'.[22] In other cases, too, the Court qualified a residence condition as an indirectly discriminatory measure.[23]

However, the legislation of the United Kingdom does not concern a residence condition as such, but what the Court itself calls a *'right to reside test'* (paragraph 81), which is completely different. Nonetheless, in paragraph 78 the Court transformed the British right to reside test into a residence condition, and concluded on this basis that this is indirect discrimination on grounds of nationality. This is misleading. Besides, it was not disputed in this case that the United Kingdom could impose a residence condition for the grant of the family allowances at issue. Indeed, this requirement follows from Union law itself, notably Article 11(3)(e) of Regulation 883/2004. The condition that was really at stake in this case, specifically the condition to enjoy a right of residence, can, in contrast, be regarded as being directly discriminatory. As Advocate General Sharpston stated in *Bressol* regarding the concept of direct discrimination on grounds of nationality: *'the difference in treatment is based on a criterion which is either explicitly that of nationality or necessarily linked to a characteristic indissociable from nationality'*.[24] This is the case with a right to reside test, since UK citizens always possess a right to reside in the United Kingdom and therefore automatically satisfy this condition. In its earlier case law, too, the Court was of the opinion that a condition connected to the residence status of the persons concerned constitutes direct discrimination on grounds of nationality.[25]

The distinction between direct and indirect discrimination is not without importance. Indeed, the rules governing indirect discrimination are more flexible than those relating to direct discrimination. Direct discrimination can only be justified on the basis of explicitly divergent provisions in the Treaty or, possibly, in secondary Union law.[26] Article 4 of Regulation 883/2004, discussed in this case, also refers to exceptions regarding equal treatment. But this regulation does not contain any such exception with regard to entitlement to family benefits, in contrast to the exceptions provided for in Directive 2004/38 with regard to social assistance benefits.[27]

But, according to the Court, the right to reside test under UK law concerns indirect discrimination on grounds of nationality, and can therefore be more easily justified, more specifically when it serves the attainment of a legitimate objective and does not go beyond what is necessary to achieve this objective (paragraph 79). Still, the Court was rather brief in its examination of this kind of justification. For the Court, the need to protect the public funds of the host Member State justifies, in principle, the possibility of checking whether or not the persons concerned reside lawfully there at the time when the social benefit is granted. The reason for this is that it could

22. Case C-73/80, *Bressol,* EU:C:2010:181, paras. 45 *et seq*.
23. See, *inter alia*, Case C-542/09, *Commission v The Netherlands,* EU:C:2012:346, para. 38 and Case C-20/12, *Giersch*, EU:C:2013:441, para. 44.
24. Opinion of 25 June 2009 in C-73/08, *Bressol,* EU:C:2009:396, para. 53.
25. More specifically, in Case C-85/96, *Martinez Sala,* EU:C:1998:217, para. 64.
26. See *inter alia* Case C-490/04, *Commission v Germany,* EU:C:2007/430, para. 86 and the Opinion of the Advocate General in C-73/08, *Bressol,* EU:C:2009:396, para. 129, which she repeated on 13 July 2016 in her Opinion in Case C-188/15, *Bougnaoui*, EU:C:2016:553, para. 63.
27. More specifically, in its Article 24(2) for the right to social assistance during the first three months of residence (the situation in the *Garcia-Nieto* judgment*)* and for jobseekers within the meaning of Article 14(4) b) Directive 2004/38 (the situation in the *Alimanovic* judgment*)*.

influence the total amount of assistance provided by this State.[28] This is all the explanation the Court offered on this justification.

The question remains, though, as to whether the application of the right of residence criterion can only be justified if the Member State concerned explicitly demonstrates why granting the social benefit at issue to economically inactive migrant Union citizens could have a real influence on the total amount of the assistance provided by this State. The Court had already accepted before that reasons of a purely economic nature cannot constitute an overriding reason in the public interest that would justify a restriction of a fundamental freedom guaranteed by the Treaty. Nevertheless, the Court was of the opinion that a national arrangement could constitute a justified restriction of a fundamental freedom if this is dictated by reasons of an economic nature in the pursuit of an objective in the public interest, such as avoiding serious damage to the financial balance of the social security system of a Member State.[29] But the Court added that it is for the competent national authorities when adopting a measure derogating from a principle in Union law (such as the prohibition of discrimination on grounds of nationality and the right to free movement of persons), '*to show in each individual case that the measure is appropriate for securing the attainment of the objective relied upon and does not go beyond what is necessary to attain it. The reasons invoked by a Member State by way of justification must thus be accompanied by an analysis of the appropriateness and proportionality of the measures adopted by that State and by specific evidence substantiating its arguments. Such an objective, detailed analysis, supported by figures, must be capable of demonstrating, with solid and consistent data, that there are genuine risks to the balance of the social security system.*'[30]

Logically, these appropriately strict conditions should also hold for the application of a right to reside test as a form of indirect discrimination on grounds of nationality for the grant of social security benefits.

What about the proportionality test?

The Court referred to proportionality in paragraphs 81 *et seq*. Although the Court began para. 81 by referring to '*the proportionality of the right to reside test*', it is clear, *inter alia*, by reference to point 92 in the Opinion of the Advocate General, that the Court's reasoning here concerns the proportionality of the checks to verify whether or not the person concerned possesses a right to reside. For the Court this verification falls within the meaning of Article 14(2) of Directive 2004/38 and must therefore comply with the requirements laid down in this provision, and more specifically, may not be carried out systematically. According to the Court, UK legislation meets this condition because, apparently, this Member State only requires claimants to deliver proof of lawful residence in special circumstances (paragraphs 81-83).

On this issue the Advocate General had rightly added in his Opinion that when the host Member State finds that the person concerned does not possess a right to reside and, as a result, is not entitled to social security benefits either, that State still has to observe other procedural guarantees

28. Paragraph 80 of the judgment, with reference to its earlier case law on the access to social benefits in the host Member State.
29. See *inter alia* Case C-158/96, *Kohll,* EU:C:1998/171, para. 41 and very recently Case C-515/14, *Commission v Cyprus*, EU:C:2016:30, para. 53.
30. Case C-515/14, *Commission v Cyprus*, EU:C:2016:30, para. 54, with reference to Case C-254/05, *Commission v Belgium,* EU:C:2007:319, para. 36 and Case C-73/80, *Bressol,* EU:C:2010:181, para. 71.

provided for in Directive 2004/38. For the Advocate General, this involves a decision that restricts the right to free movement of the Union citizen concerned. By virtue of Article 30 of Directive 2004/38 such a decision must state clearly why this Member State is of the opinion that the person concerned does not possess or no longer possesses a right to reside. Moreover, on the basis of Article 31 of this Directive the Union citizen must have the opportunity to take administrative or legal action to challenge such a decision (paragraphs 95-96 of his Opinion).

In this judgment the Court did not appear to rule on the question as to how the proportionality test should be applied when assessing the question of whether an economically inactive Union citizen has the right to reside in the host Member State and is not an unreasonable burden on the social assistance system of that State. The significance of earlier judgments on economically inactive Union citizens regarding the application of this kind of proportionality test has not become any clearer after the judgment commented on here. Indeed, the role of the proportionality test continues to be disputed. In *Brey* the Court took the view that the fact that a Union citizen enjoys a social assistance benefit does not suffice to prove that he/she constitutes an unreasonable burden on the social assistance system of the host country. First, the Member States must make an overall assessment of the specific burden that granting the benefit would place on the social assistance system as a whole by reference to the personal circumstances characterising the situation of the person concerned, and this in accordance with the proportionality principle. For instance, the host Member State must take into account the amount and the regularity of the income of that citizen, the fact that this income has led the authorities to issue him/her with a certificate of residence, and the length of the period during which the benefit claimed will be paid to him/her. To determine the extent to which such a benefit constitutes a burden on the social assistance system, the Court held that it would also be relevant to assess what percentage of the recipients of the benefit at issue are Union citizens of another Member State.[31]

In the subsequent judgment, *Dano,* the Court no longer referred to the unreasonableness or proportionality test. It would seem that, in this case, the Court held the view that recourse to social assistance suffices to deny the person concerned the right to reside. This could perhaps be explained by the special circumstances of the case. In its judgment, the Court pointed out that Ms. Dano went to live in Germany without any intention of integrating there, for example by looking for a job or by working.[32] From these passages in the judgment one can infer that, in this case, the Court was of the opinion that the person concerned did not have a right to reside in the host Member State because it was clear from the beginning that she had no intention of integrating into the host Member State, for instance by working there. In circumstances like these, there is no need for a further proportionality or 'genuine link' test.[33]

In the *Alimanovic* judgment, on the other hand, the Court stated that for Union citizens who have become unemployed and lost the status of worker, as a result of which they can only invoke the status of jobseeker within the meaning of Article 14(4)(b) of Directive 2004/38, this proportionality is already implied in the provisions of Directive 2004/38. As a matter of fact, Article 24(2) of this Directive explicitly excludes this category of jobseekers from the right to equal treatment as regards social assistance. For the Court, this means that there is no need for an individual

31. Case C-140/12, *Brey,* EU:C:2013:565, paras. 72-78. See also Preamble no 16 of Directive 2004/38.
32. Case C-333/13, *Dano,* EU:C:2014:2359, para. 66.
33. This is also the position that Advocate General Wathelet seems to defend in paras. 88 to 92 of his Opinion in C-67/14, *Alimanovic*, EU:C:2015:210.

proportionality test. According to the Court, the gradual system of retention of the status of worker in Directive 2004/38 already takes into account the various factors characterising the individual situation of every claimant for social assistance, and especially the duration of the exercise of an economic activity. The criteria used in this Directive already comply with the proportionality principle. The abstract proportionality contained in this directive need not be complemented with a concrete and appraisal of individual proportionality.[34]

This point of view was reconfirmed in the *Garcia-Nieto* judgment and extended to the category of economically inactive Union citizens during the first three months of their stay in the host country.[35] Indeed, Article 24(2) of Directive 2004/38 provides for an explicit derogation from the right to equal treatment as regards social assistance for this category of Union citizens.

However, it not clear whether in other cases, which neither relate to the category of jobseekers in *Alimanovic* nor to the category of economically inactive Union citizens in *Garcia-Nieto*, the Court wanted to rule out an individual proportionality test. From what the Court has declared regarding this test in these two last judgments, one could conclude the opposite. In fact, in these judgments the Court added that, when appraising the burden which the grant of a benefit would mean concretely for the national social assistance system as a whole, one should consider the total of all individual applications submitted for this benefit and not only the application of an individual claimant. For the Court, the benefit granted to one claimant can hardly be regarded as an 'unreasonable burden'.[36] So, the Court pointed out how, in other circumstances, the proportionality test should be carried out.

In any case, in his Opinion in the judgment commented on here, the Advocate General pointed out that the mere fact that an economically inactive Union citizen claims social assistance in the host country is not sufficient to deny him/her a right to reside. For this, according to the Advocate General, he/she would have to constitute *an unreasonable burden* on the social assistance system of the Member State concerned. When assessing whether or not this is the case, the national authorities must, according to him, follow the guidelines laid down in the case law of the Court – in particular the requirement to take account of the circumstances of the particular case as referred to in paras. 64 *et seq*. of the *Brey* judgment. Furthermore, the Advocate General points out that, in this context, the national authorities have to take into account factors that could be representative of the existence of a genuine link between the Union citizen and the host country, such as having worked in the past, a previous contribution history, dependent children in education or the existence of close ties of a personal nature with the Member State in question.[37]

Apart from this, the Court has repeatedly stated that restrictions to the prohibition of discrimination on grounds of nationality in Article 18 TFEU are always subject to a proportionality test.[38] In addition, the Court's Grand Chamber very recently confirmed its judgment

34. Case C-67/14, *Alimanovic,* EU:C:2015:597, paras. 60-61.
35. Case C-299/14, *Garcia-Nieto,* EU:C:2016:114, paras. 47 en 48.
36. Case C-67/14, *Alimanovic,* EU:C:2015:597, para. 62 and Case C-299/14, *Garcia-Nieto,* EU:C:2016:114, para. 50.
37. Para. 97 of his Opinion (EU:C:2015:666) in which he refers to earlier judgments of the Court of Justice, more specifically: Case C-310/08, *Ibrahim,* EU:C:2010:80; Case C-503/09, *Stewart*, EU:C:2011:500, para. 100 and Case C-367/11, *Prete*, EU:C:2012:668, para. 50.
38. See *inter alia*: Case C-274/96, *Bickel and Franz,* EU:C:1998:563, para. 27; Case C-148/02, *Garcia Avello,* EU:C:2003:539, para. 31; Case C-209/03 *Bidar,* EU:C:2005:169, para. 54 and Case C-103/08, *Gottwald*, EU:C:2009:597, para. 30.

of 13 September 2016 in *Redón Marín* that limitations and conditions on the rights of citizens of the Union to reside in a Member State must be applied in accordance with the general principles of EU law, in particular the proportionality principle.[39] Moreover, denying someone social assistance without having applied a proportionality test goes against what the Union legislator laid down in and intended with Directive 2004/38.

No ruling on the conditions for a right to reside

With this judgment the Court failed to rule on the conditions to be fulfilled to give an economically inactive Union citizen a right of residence in the host Member State. The Court did not say anything about the question of whether claiming a social security benefit which is not 'social assistance' within the meaning of Directive 2004/38 could have an impact on the right of residence in the host Member State. The condition in Article 7(1)(b) of this Directive is having sufficient resources to prevent the economically inactive migrant Union citizen from becoming a burden on the social assistance system of the Member State concerned. This means that only the fact that this Union citizen claims social assistance can have consequences for his/her right to reside. In his Opinion the Advocate General confirmed this by pointing out that the question of whether someone constitutes an unreasonable burden on the public finances of a Member State only relates to social assistance benefits within the meaning of Directive 2004/38 and not to other social benefits (paragraph 97 of his Opinion). Consequently, claiming another social benefit, such as family allowances, cannot as such have an impact on the right to reside. Moreover, the result would have been that the amount of the social security benefit to which the person concerned is entitled would have had to be added to the income he/she had at his/her disposal in order to determine whether he/she has sufficient resources to obtain and retain a right of residence.

Conclusion

The judgment commented on here constitutes a further step in the development of the case law of the Court of Justice with regard to economically inactive migrant Union citizens' entitlement to social benefits in the host country. Its main importance is that the Court has now also accepted the right to reside test, which it had already accepted for the right to social assistance, for 'classic' social security benefits. The Court's position that this is a matter of indirect discrimination on grounds of nationality is based on rather unconvincing and even misleading reasoning. However, this qualification facilitates its justification and in this respect the Court seems to accept the protection of a host Member State's public funds as justification quite readily. Still, this judgment leaves a number of questions unanswered, such as the question regarding the application of a proportionality test when an economically inactive migrant Union citizen claims a social benefit in the host Member State and the question regarding the consequences of recourse to 'classic' social security benefits for the right to reside.

Obviously, this judgment must be considered in the political context in which economically inactive Union citizens claiming solidarity in a host Member State are often regarded as 'benefit tourists' who should not have access to the solidarity circle of this Member State. It is probably not

39. Case C-165/14, *Redón Marín*, EU:C: 2016: 675, paras 45 and 46. The Court explicitly referred to the condition of having sufficient resources. See, for a more detailed analysis, Nic Shuibhne, N. (2015: 897-898 and 908-914).

a coincidence that this judgment, in which the United Kingdom was a party, was passed in the week before the Brexit referendum of 23 June 2016. We now know that this referendum did not produce the result that the judges in Luxembourg probably had in mind.

Author's note

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Declaration of conflicting interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

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