The right to social assistance for economically inactive migrating Union citizens: The Court disregards the principle of proportionality and lets the Charter appease the consequences

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Abstract
In a new case on the right to social assistance for inactive migrating Union citizens, the CJEU delivered a judgment in which it confirmed its restrictive interpretation of the relevant primary and secondary Union law. At the same time, however, it invoked the EU Charter to appease the consequences of that. This case note critically analyses the Court’s restrictive application of the principle of non-discrimination of Article 18 TFEU and Article 24 Directive 2004/38/EC. It also comments on the Court’s implicit refusal to apply the principle of non-discrimination of Article 18 TFEU to a migrating Union citizen who has acquired a right of residence in the host country solely on the basis of the national law of that Member State. Further, it examines the role ascribed by the Court in this case to the Charter. The conclusion is that this judgment risks jeopardizing a number of fundamental basic principles of Union law while leaving a number of questions open.

Keywords
Union citizenship, social assistance, right to reside, Directive 2004/38/EC, EU Charter

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1. Introduction

Once again, the Court of Justice has had to decide on the question under which conditions economically inactive migrating Union citizens have access to social assistance in the host Member State.  

This debate is quite controversial, particularly because it deals with the politically sensitive question of the extent of the host State’s financial solidarity. The application of Residence Directive 2004/38/EC is pivotal in this case, specifically the application of Article 7 regarding the right of residence and Article 24 regarding the right to equal treatment.

This debate was initiated by the case law of the CJEU, which stated that, since the introduction of the European citizenship by the Maastricht Treaty, economically inactive Union citizens too can, in principle, rely on the prohibition of discrimination on grounds of nationality, including for social assistance. Still, this initial case law did not imply that economically inactive Union migrants have unconditional access to these social benefits. The CJEU required the person involved not to be an unreasonable burden on the public finances.

Since the entry into force of Residence Directive 2004/38, the Court has applied in such cases Article 24(1) which guarantees Union citizens who reside in the territory of a host country based on this directive, the right to equal treatment within the scope of the Treaty. The CJEU confirmed that the right to equal treatment of Article 24(1) Directive 2004/38 is subject to having a right of residence based on this directive. During the first five years, this residence for economically inactive Union citizens depends on the question whether or not they are an unreasonable burden on the host country’s social assistance system. In Dano, however, the Court did not perform this unreasonableness test and denied the Union citizen in question the right to equal treatment because she had never been economically active or had never sought a job in the host country. Still, very recently the Court allowed, with much less restrictions, the use of provisions on equal treatment elsewhere in Union law, such as in the law on free movement of workers, including for the right to social assistance in the host State.

This case law has generated much discussion, not to mention in legal doctrine. Some believe that the first judgments were an all too generous interpretation of Union citizenship and the host Member States’ obligation concerning solidarity. Others, however, were of the opinion that the most recent case law was too restrictive and had failed to do justice to the essence of Union

1. Case C-709/20 CG v. The Department for Communities in Northern Ireland, EU:C:2021:602.
3. See, for the first time, Case C-85/96 Martinez Sala, EU:C:1998:217.
5. Case C-184/99 Grzelczyk, para. 44.
6. Art. 7(1)(b) jucto Art. 14(3) Directive 2004/38/EC. For the first application, see Case C-140/12 Brey, EU:C:2013:565.
citizenship, which applies to economically inactive citizens too,\textsuperscript{11} or pointed out the lack of clarity surrounding the interpretation of the concepts used, such as ‘unreasonable burden’ and ‘social assistance’, and the application of the proportionality test.\textsuperscript{12} Still, certain authors consider the Court to have logically applied the choices made by the European legislator in its case law, specifically regarding Directive 2004/38/EC where the legislator made use of the discretion provided for in Article 21 TFEU to introduce ‘limitations and conditions’ to the free movement of Union citizens.\textsuperscript{13} Some believe the Court probably did not miss the political delicacy of this subject, which, to a certain extent, influenced its case law.\textsuperscript{14}

Meanwhile, a number of ambiguities remained, for instance regarding the interpretation of the concepts that are used, such as ‘unreasonable burden’, and regarding the application of the proportionality test. In the here annotated judgment, the Court confirms and even restricts its case law and interpretation of the provisions of Directive 2004/38/EC on the right to social assistance for economically inactive migrating Union citizens. At the same time, the Court refers to the EU Charter as a means for the national judge to grant social assistance after all.

2. Facts and legal questions

This case concerned a dispute between CG, who has both the Dutch and the Croatian nationality, and the Northern Irish government regarding the latter’s refusal to grant CG a subsistence benefit (Universal Credit). CG is the single mother of two young children. She declared her arrival in Northern Ireland in the course of 2018 with her partner, who has the Dutch nationality and who is the father of her children. She has never been economically active in the United Kingdom and lived there with her partner until she moved to a women’s refuge in 2020. CG has no resources to support herself or her children.

Nevertheless, on 4 June 2020 she was granted the status of a non-permanent resident (‘Pre-Settled Status’) based on the UK law regarding the right of Union citizens to reside there

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post Brexit. This gave her the right to reside in the UK for a period of five years. Under the applicable legislation of the UK, the granting of such a status is not dependent on any income requirement. So her right to reside is based solely on UK law and not on Union law. On 8 June 2020, she applied for the Universal Credit (a type of social assistance), but this was refused because, based on UK law, persons with the ‘Pre-Settled Status’ are not entitled to a benefit such as the Universal Credit, while a UK citizen in similar circumstances would be.\textsuperscript{15} Still, the application for this benefit was made during the transition period after the UK’s withdrawal from the EU, which lasted until 31 December 2020 and during which Union law remained applicable in the UK.\textsuperscript{16} Therefore, CG argued in her appeal that this refusal was contrary to the prohibition of discrimination on grounds of nationality of Article 18 TFEU. In this case, the referring court (Appeal Tribunal for Northern Ireland) asked the Court of Justice whether the UK legislation, on which the refusal was based, entails discrimination in the sense of Article 18 TFEU and whether this discrimination can be justified.

At the request of the referring court, the President of the Court of Justice decided to deal with this case under an expedited procedure, taking into account the precarious situation of CG and her children. This decision was made after the President had asked the referring court for more information and in particular to clarify whether there was a potential risk of violation of the fundamental rights of CG and her children enshrined in Articles 7 and 24 of the Charter. The President had also requested information on CG’s financial resources and on her and her children’s housing accommodation. In answer to this request, the referring court confirmed that CG has no financial resources, did not currently have access to State benefits and was living in a women’s refuge and moreover that the fundamental rights of her children were at risk of being violated.\textsuperscript{17}

Within this context, it is important to point out that, in her comments to the Court, CG referred to a judgment of the British Court of Appeal\textsuperscript{18} in a similar case in which this court had judged the provision in the UK legislation that persons with the ‘Pre-Settled Status’ cannot claim social assistance, to be contrary to Article 18 TFEU, based on the Trojani judgment of the Court of Justice.\textsuperscript{19} Action was brought against this judgment before the UK Supreme Court and this appeal was still pending at the time of the Court of Justice’s judgment in the CG case.\textsuperscript{20} Since the matter was still \textit{sub judice} in the UK, any judgment on this made by the CJEU would directly affect the pending case in the UK (see further).

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\item[16] See Articles 126 and 127 Agreement on the Withdrawal of the United Kingdom [2020] OJ L 29/7.
\item[17] See Case 709/20 CG, para. 42 and 43.
\item[19] Case C-456/02 Trojani, in which the CJEU judged that a Union citizen who has a right of residence based on a Member State’s national law, can invoke the prohibition of discrimination on grounds of nationality of Article 18 TFEU (then Article 12 EC).
\item[20] For more, see Opinion of Advocate General Richard de la Tour in Case C-709/20 CG, footnote 26.
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3. The judgment

First, the Court confirms in its judgment that CG’s situation does fall within the scope of the Treaties, specifically within the scope of Articles 21(1) and 18 TFEU (para. 57 and 58). However, the Court points out that Article 18 TFEU can only be applied autonomously if the TFEU does not provide a specific prohibition of discrimination (para. 65). For Union citizens who exercise their right to free movement, the principle of non-discrimination is given specific expression in Article 24 Directive 2004/38/EC (para. 66). The Court further states that as regards the right to social assistance, a Union citizen can only invoke Article 24 of the directive if he/she meets the conditions set out in the directive to reside in the host country. For economically inactive Union citizens, pursuant to Article 7(1)(b), the right to reside for more than three months depends on having sufficient means of subsistence to prevent them from becoming a burden on the social assistance system during their stay. The Court hereby refers to recital 10 of the directive, which speaks of ‘unreasonable’ burden (para. 76). It follows for the Court that a Member State can refuse social assistance to economically inactive Union citizens who do not have sufficient means of subsistence in order to have a right of residence in accordance with the directive (para. 78). From the answer given by the referring court to the President’s question, the Court deduces that CG does not have sufficient resources and that is enough for the Court to decide that CG is likely to become an unreasonable burden on the UK social assistance system and therefore that she cannot invoke the principle of non-discrimination of Article 24(1) of the directive (para 79–80).

The fact that CG has a right of residence based solely on the law of the UK, does not take away from that. It is not a right of residence ‘on the basis of the directive’ (para. 81–83). However, the Court confirms that since CG has made use of her fundamental freedom to move and reside within the territory of the Member States, conferred by Article 21(1) TFEU, her situation falls within the scope of EU law, even though her right of residence derives from the national law of a Member State only. Consequently, the Court considers the Charter to be applicable (para. 85–88). The Court refers to Article 1 on the respect for human dignity, Article 7 on the respect for family life and Article 24(2) on the protection of the best interests of the child. Based on that, the Court argues that the authorities of a Member State have to assure that the refusal of a benefit does not expose the Union citizen in question as well as her children to an actual and current risk of violation of the fundamental rights (para. 92).

4. Comments

This judgment, delivered in Grand Chamber, is remarkable for a number of reasons. We shall discuss three issues in further detail. First, we will deal with the Court’s restrictive application of the principle of non-discrimination of Article 18 TFEU and Article 24 Directive 2004/38/EC. Next, we will look into the Court’s implicit refusal to apply the principle of non-discrimination of Article 18 TFEU to a migrating Union citizen who has acquired a right of residence in the host country solely on the basis of the national legislation of that Member State. Finally, we shall examine the role that was ascribed by the Court in this case to the Charter.

A. Application and interpretation of the principle of non-discrimination of Article 18 TFEU and Article 24 of Directive 2004/38/EC

1. Problematic relation between Article 18 TFEU and Article 24 Directive 2004/38/EC. First and foremost, it is important that the Court confirms that CG does fall within the scope of the Treaties,
purely because she has made use of the right to free movement as laid down in Articles 20 and 21 TFEU. That is the reason why the prohibition of discrimination on grounds of nationality set out in Article 18 TFEU applies in principle. However, the Court repeats that when a person falls within the scope of another Treaty provision on non-discrimination, Article 18 TFEU does not apply autonomously and this person can only rely on the other rule.\(^{21}\) Notably, though, the Court does not make any further references in its judgment in the CG case to any other provisions in the Treaty, which it has done, for instance, in the *Jobcenter Krefeld* case to which Article 45 TFEU applied. The Court immediately diverts to the application of a non-discrimination rule of secondary Union law, i.e. Article 24 Directive 2004/38/EC.\(^{22}\) The Court only refers to Articles 20 and 21 TFEU, which state that the right to free movement within the Union is subject to limitations and conditions laid down in the Treaties and by the measures adopted to give them effect, but these provisions concern the right of residence and not the right to equal treatment. This remains a peculiar leap in the Court’s reasoning, one that amounts to a Treaty provision being sidelined by a provision of secondary Union law. This is all the more notable because it appears that the Court did not make this direct leap to Article 24 of the directive in all cases pertaining to the application of the principle of non-discrimination. In the recent *TopFit and Biffi* judgment, for instance, the Court indeed directly applied Article 18 TFEU, including the *rule of reason*, to a Union citizen legally residing in a host Member State.\(^{23}\)

The case law of the Court of Justice uses various terms to describe the relation between Article 18 TFEU and Article 24 Directive 2004/38/EC. In the *Dano* judgment, the Court stated that the principle of non-discrimination ‘is given more specific expression’ in Article 24 Directive 2004/38/EC (para. 61); in the *Jobcenter Krefeld* judgment, the Court stated that Article 24 ‘is merely a specific expression’ of Article 18 TFEU (para. 60); in the *A* judgment of 15 July 2021, the Court uses the expression ‘specified’ (para. 40)\(^{24}\) and the term ‘mirrors’ in the *BJ* judgment of 11 November 2021 (para. 68).\(^{25}\) In the *CG* judgment, the Court uses the phrase ‘given specific expression’ (para. 66).

The pivotal question is whether or not the limitations that are included in the non-discrimination rule of the applicable secondary Union law should be assessed in the light of the treaty provision. In the *Jobcenter Krefeld* judgment of 6 October 2020, the Court stated that every limitation to the right to equal treatment ‘must be interpreted strictly, and in accordance with the provisions of the Treaty, including those relating to Union citizenship’ and that, inter alia, the provisions on non-discrimination of Article 7(2) Regulation 492/2011 and Article 45 TFEU ‘must be accorded the same interpretation’.\(^{26}\) However, in its recent case law on the social rights of economically inactive Union citizens, the Court does not refer to the principles of Article 18 TFEU, i.e. that derogations from the principle of non-discrimination are subject to the *rule of reason*, including the proportionality test.

So, in the Court’s view, the question whether or not CG is discriminated against, should only be assessed on the basis of Article 24(1) Directive 2004/38/EC. Yet, for the Court, this provision can

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21. Case C-709/20 CG, para. 31–33. See also Case C-581/18 *RR*, EU:C:2020:453, para. 31–33; Case C-181/19 *Jobcenter Krefeld*, para. 78.
22. Case C-709/20 CG, para. 66.
26. Case C-181/19 *Jobcenter Krefeld*, para. 60 and para. 44. Also see C-140/12 Brey, para. 70.
only be invoked by Union citizens who have a right of residence based on Directive 2004/38/EC. This means that if the person involved cannot invoke a right of residence, he/she cannot invoke the prohibition of discrimination either, including the prohibition of discrimination of Article 18 TFEU. Thus, the question of whether or not the difference in treatment is justified, is not even up for discussion.

For economically inactive Union citizens, after a first period of three months up until the acquisition of a permanent right of residence, the right of residence is dependent on whether or not they have sufficient means of subsistence in order to prevent them from becoming a burden on the social assistance system of the host country during their stay. They are also required to have comprehensive sickness insurance cover in the host country (Article 7(1)(b) Directive 2004/38/EC). Recital 10 of the directive clarifies that these conditions were intended to prevent these persons from becoming ‘an unreasonable burden on the social assistance system of the host Member State’. This objective is reiterated in para. 76 of the CG judgment.

The CJEU does specify that if the right to equal treatment for social assistance would not be dependent on having sufficient resources for economically inactive migrating Union citizens, these citizens would be able to rely on these benefits to fund their means of subsistence and thus to acquire a right of residence. The Court emphasizes that this requirement is necessary to avoid Union citizens from using the host country’s welfare system to fund their means of subsistence.

2. What about the proportionality test? Now, what exactly does the term ‘unreasonable burden’ mean? First, the Court mentioned in the Brey judgment that it is apparent from the phrasing of the directive and the principle of proportionality that a general assessment should be made of the specific burden which granting that benefit would place on the national social assistance system as a whole, based on the subject’s personal situation. More specifically, the amount and the frequency of that citizen’s income could be taken into account, as well as the duration of the period during which that benefit would be paid. However, in the Dano judgment, the Court did not refer to this obligation at all and ruled that, in Ms Dano’s situation, her claim on the host country’s social assistance was unreasonable. In the Alimanovic and Garcia Nieto judgments, the Court was of the opinion that no individual assessments were needed, since the persons in question fell under the explicit exception to the right to social assistance laid down in Article 24(2), i.e. persons who have been residing in the host country for less than three months and persons who have a right of residence to seek employment on the ground of Article 14(4) Directive 2004/38/EC. The Court assumed that when the legislator phrased the exception in Article 24(2), he had already implicitly applied a proportionality test. In these judgments, the Court also specified how an individual assessment should be made in order to determine whether the granting of the benefit would put an ‘unreasonable burden’ on the national welfare system. Not only the burden of an individual claim on the

27. Case C-709/20 CG, para. 75. Also see Case C-333/13 Dano, para. 68–69.
28. With regard to the condition of having sickness insurance, see Case C-535/19, A.
29. See previously: Case C-424/10 Ziolkowski and Szeja, EU:C:2011:866, para. 40; Case C-333/13 Dano, para. 71; Case C-67/14 Alimanovic, EU:C:2015:597, para. 50; Case 299/14 Garcia Nieto, EU:C:2016:114, para. 39. Also see Case C-32/19 AT, EU:C:2020:25, para. 35 in which the Court explicitly mentions that recital 10 also covers the right of residence for periods of residence longer than three months.
30. Case C-709/20 CG, para. 77 with reference to Case C-333/13 Dano, para. 74, 76 and 77.
31. Case C-140/12 Brey, para. 77–79.
social assistance system of a Member State should be taken into account for these assessments, but all individual claims should.\(^{32}\)

It remained unclear, however, if and to what extent the Member States were still obliged to assess whether the burden would be ‘unreasonable’ and to carry out a proportionality test when applying the subsistence requirement, apart from situations that fall within the scope of Article 24(2) of the directive. Indeed, the restrictive interpretation in *Dano* was implicitly motivated by the proposition that the person in question had come to the host country without having sought employment or that she had entered the host country without the intention of working (para. 66) and that it concerned an economically inactive Union citizen who had exercised the right to free movement with the sole purpose of obtaining social assistance from another Member State (para. 78). The Court recently repeated this assessment regarding Ms Dano in the *Jobcenter Krefeld* judgment of 6 October 2020, by posing that Ms Dano had used the right to free movement ‘with the sole aim of receiving social assistance from another Member State’.\(^{33}\) The *Dano* judgment could be interpreted in such a way that the situation of the Union citizen in question was so specific, i.e. it actually concerned so-called ‘benefit tourism’, that a proportionality test regarding the unreasonableness of the burden on the social assistance system was not required. Advocate General Saugmansgaard Øe upheld this very same interpretation of the *Dano* judgment in his conclusion of 11 February 2021 in the *A* case.\(^{34}\)

In the *CG* judgment, para. 79, the Court emphasizes that the financial situation of each person concerned should be specifically examined, without taking into account the social benefits that are being claimed. In para. 80, however, the referring court’s answer to the request for information made by the Court, that *CG* does not have sufficient resources, seems adequate for the Court to conclude, not that the person involved is an unreasonable burden on the UK’s social assistance system, but that such a person *is likely to become* an unreasonable burden.\(^{35}\) For that reason, she cannot invoke the principle of non-discrimination laid down in Article 24 of the directive. The likelihood of a person becoming an unreasonable burden now appears to be sufficient for the Court to decide that this person is not entitled to a right of residence on the ground of this directive and, therefore, he/she cannot invoke Article 24. Yet in previous case law, the Court has stated that the risk of a Union citizen becoming a burden on the host country’s welfare system in future is not a reason to refuse them the right of residence.\(^{36}\)

In the *CG* judgment, the Court does not apply the proportionality test. The Court is even more strict than in the *Dano* judgment, since the likelihood of an unreasonable burden in the *CG* judgment appears to be sufficient to conclude that there is no right of residence, irrespective of the specific situation of the person involved. *CG*’s situation is not even mentioned in para. 78 to 81 of the *CG* judgment. Admittedly, *CG*’s financial situation was extremely precarious, which could lead one to deduce that she would probably become dependent on social assistance for quite some time. However, the Court does not mention that in this part of the judgment. Still, *CG*’s situation and the reason why she travelled to Northern Ireland, i.e. to follow her partner, the father of her children, were very different from Ms Dano’s, as the Advocate General argued.\(^{37}\) One cannot say, for

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32. Case C-67/14 Alimanovic, para. 62 and Case C-299/14 Garcia Nieto, para. 50.
33. Case C-181/19 Jobcenter Krefeld, para. 68.
34. Opinion in Case C-535/19 A, para. 107 and para. 112.
35. The French version reads: ‘est susceptible de devenir’.
instance, that she moved to Northern Ireland ‘with the sole aim of receiving social assistance from another Member State’. However, it is apparent from the phrasing of the judgment that any reference to the specific circumstances, other than not having sufficient resources, is no longer required to conclude that the person in question does not have a right of residence, nor, consequently, a right to equal treatment on the ground of Article 24(1) Directive 2004/38/EC.

With this, the Court seems to disregard other provisions of Directive 2004/38/EC. On the right to reside after the initial period of three months during which the right to reside is not subject to any condition, Article 8(4) Directive 2004/38/EC, states: ‘Member States may not lay down a fixed amount which they regard as ‘sufficient resources’ but they must take into account the personal situation of the person concerned’. According to recital 10 the burden must be ‘unreasonable’. This means that when assessing the right to reside of an economically inactive migrating Union citizen right after the initial period of three months, the Member States should already take into account the personal situation of the person concerned. This is all the more the case if the right to reside is assessed at a later stage. As far as the personal situation of CG was concerned, it was apparent from the data available to the Court that she was living in Northern-Ireland with her partner during the first period of her stay (since 2018). Consequently, it would seem that, initially, up until the beginning of 2020 when she permanently moved to the women’s refuge, she did meet the conditions for a right of residence within the meaning of the directive through her partner’s economic activity or income, which of course would be for the national court to verify. Furthermore, she did not apply for social assistance until after she left her partner.

In addition, the question whether she still met the conditions afterwards should have been assessed taking into account Article 14(3), which says: ‘an expulsion measure shall not be the automatic consequence of a Union citizen’s or his or her family member’s recourse to the social assistance system of the host Member State’. This provisions is further clarified in recital 16 of the directive as follows: ‘As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion.’ The fact that, in the CG judgment, the Court refers to this recital in the list of applicable provisions of Union law (in para. 21 to be precise), but fails to do so in the substantial part of the judgment, is quite remarkable.

Recital 16 makes it very clear that before an expulsion measure can be taken for a person who initially had a right to reside, but who applied at a later stage for social assistance, a proportionality test should be applied. We can assume that if, on the basis of this proportionality test, no expulsion measure can be taken against a Union citizen, this person maintains a right of residence, as indicated by the title of Article 14: ‘retention of the right of residence’. Incidentally, the Court has explicitly acknowledged in the Alimanovic judgment that this article confers a right of residence on someone. So, it concerns a right of residence on grounds of the directive, as a result of which the requirement of Article 24(1) is met regarding the application of the right to equal treatment.

38. See Article 6 Directive 2004/38/EC.
39. Case C-67/4 Alimanovic, para 52. This judgment dealt with Article 14(4), which prevents Member States from taking expulsion measures against the job-seeker who falls under this provision. Also see Case C-710/19 G.M.A., EU: C:2020:1037, para. 33. In the same vein: F. Wollenschläger, ‘An EU Fundamental Right to Social Assistance in the
Disregarding these provisions is striking because the Member States have already adopted the tenor of recital 16 in their legislation and practices. For instance, Article 42a of the Belgian Aliens Act determines that, when applying an expulsion measure to an economically inactive Union citizen for not having sufficient resources, the national authorities have to take into account the duration of the residence in Belgium, the personal circumstances, the amount of aid granted and whether it is a case of temporary difficulties, in order to establish whether the Union citizen is an unreasonable burden on the social assistance system. In Dutch legislation, a sliding scale was introduced through Article 8.16 Aliens Act and para. B10/2.3 of the Circular on Aliens which takes into account the personal circumstances of the person involved.40

The Court’s position is also in contrast with the Advocate General’s opinion, who, in referral to the Brey judgment, said that a proportionality test should be carried out when assessing the lawfulness of residence in the light of Article 24 of the directive.41 The Advocate General also pointed out that when applying the proportionality test, the right to respect for family life and the best interests of the child should be taken into account (Article 7 and 24(2) Charter).

However, the Court apparently assumes that every application for social assistance by economically inactive migrating Union citizens is ‘unreasonable’. This is a very peculiar view on social assistance. The proportionality test for the application of Articles 7(1)(b), 14(3) and Article 24 Directive 2004/38/EC is thus completely disregarded.42 Not once is the word proportionality used in the judgment.

In my view, not applying the proportionality test runs counter to what is considered by the Union legislator as ‘unreasonable’ in recitals 10 and 16 of the directive. If not having sufficient resources would automatically mean, for an economically inactive Union citizen, that he/she does not have a right of residence in the host country, without the need to apply an ‘unreasonableness test’, then this judgment contravenes the Union legislator’s will. This is all the more remarkable since the Court explicitly stated in the judgment in A, ruled on the same day as the judgment in CG that when applying Article 7(1)(b) Directive 2004/38/EC it is ‘for the host Member State to ensure that the principle of proportionality is observed’.43 The term ‘unreasonable’ as such already indicates that a difference can be made between an unreasonable and a reasonable burden and that a reasonable burden can occur, taking into consideration the specific circumstances.44

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40. For an analysis of the application of this proportionality test through a sliding scale in Dutch legislation, see: S. Mantu, P. Minderhoud and C. Grütters, ‘Legal Approaches to “Unwanted” EU Citizens in the Netherlands’, Central and Eastern European Migration Review (2021), p. 39–44. For an analysis of similar factors that are of importance to decide whether someone ‘deserves’ to receive financial support from the host country, see: G. Davies, ‘Has the Court Changed, or Have the Cases? The Deservingness of Litigants as an Element in Court of Justice Citizenship Adjudication’, 25 Journal of European Public Policy (2018), p. 1447–1449.

41. Opinion of Advocate General Richard de la Tour in Case C-709/20 CG, para. 97–101. The Advocate General argues that when an application for social assistance is assessed, the family situation with respect to the conditions in which he or she moved to that Member State should be taken into account, as well as the duration of his/her residence on the territory of that Member State in so far as it reveals a definite degree of integration, and also the period over which the benefit applied for is likely to be paid, in particular whether the difficulties which the beneficiary of the right of residence is facing are likely to be temporary.

42. For a similar critical analysis, see: F. Wollenschläger, 24 European Journal of Migration and Law (2022), p. 156–163.

43. Case C-535/19 A, para. 59.

44. For an application of this, see Case C-535/19 A.
Not applying the proportionality test also goes against the idea that the non-discrimination provision of Article 24 Directive 2004/38/EC is a ‘mere specific expression’ or a ‘mirror’ of the principle of non-discrimination laid down in Article 18 TFEU. Even if one accepts that, for the application of Article 24 Directive 2004/38/EC, the person in question needs to have a right of residence on grounds of the directive, one cannot, when assessing the application, disregard the principle of proportionality laid down in Article 18 TFEU. Indeed, the Court has repeatedly pointed out that limitations to the prohibition of discrimination on the ground of nationality as set out in Article 18 TFEU are invariably subject to a proportionality test. Furthermore, in 2020 the Court reiterated in the judgment in Jobcenter Krefeld that every derogation from Article 18 TFEU should be interpreted strictly and in accordance with the provisions on Union citizenship (para. 60). In the Rendón Marin judgment, the Court confirmed that the limitations and conditions to the right to free movement should be applied with due regard for the limitations set by Union law and in accordance with the general principles of Union law, particularly the principle of proportionality, and that this also goes for the application of the subsistence requirement of Article 7(1)(b) Directive 2004/38/EC.46

In the case of CG, it is possible that the Court was of the opinion that the living conditions of CG and her children were such that it was plausible that they would be dependent on social assistance from the UK for a longer period of time. However, the Court did not motivate its judgment in this sense. The general terms which describe the lack of sufficient resources and the likelihood of a Union citizen becoming a burden on the social assistance system as enough to deny a Union citizen a right of residence and therefore, a right to equal treatment, seem to indicate that the Court no longer deems it necessary to apply the principle of proportionality when implementing the provisions concerned of Directive 2004/38/EC.

B. The inapplicability of the EU principle of non-discrimination to a residence that is based on national law only

Another remarkable aspect of this judgment is the Court’s implicit assertion that the principle of non-discrimination of Article 18 TFEU does not apply to a migrating Union citizen whose right of residence in the host country is based solely on the national law of that Member State. In the Court’s view, this right of residence falls under Article 37 Directive 2004/38/EC on the ground of which Member States can provide more favourable rules than those laid down in the directive.47 The Court does acknowledge that a Union citizen who has a right of residence in the host country based on the national law of that Member State only, falls within the scope of Union law since he/she made use of the right of free movement of Article 21(1) TFEU.48 This should also imply that this person can invoke the principle of non-discrimination of Article 18 TFEU. At least, that is what the Court stated in its judgment in Trojani in 2004, with reference to the principle of proportionality.49

45. See, for instance, 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; Case C-103/08 Gottwald, EU:C:2009:597, para. 30.
46. Case C-165/14 Rendón Marin, EU:C:2016:675, para. 45. See earlier Case C-456/02 Trojani, para. 46.
47. Case C-709/29 CG, EU:C:2016:675, para. 45. See earlier Case C-456/02 Trojani, para. 46.
48. Ibid., para. 57 and para. 84.
49. Case C-456/02 Trojani, para. 43–46.
However, in the judgment in *CG* nothing can be found on the question whether CG is able to rely on Article 18 TFEU despite the referring court’s question on the matter. Also, CG and the Advocate General had pointed out the pending appeal in the UK before the Supreme Court against a judgment by the Court of Appeal that was based on the application of Article 18 TFEU in the judgment in *Trojani* concerning the right to social assistance for a Union citizen with the Pre-Settled Status (see above). Moreover, the Advocate General had stated in his opinion that the EU principle of non-discrimination also applies to a Union citizen who has a right of residence in the host country based solely on the national law of that Member State.\(^{50}\) So the Court was certainly aware of this question. It is, therefore, striking that it does not consider this matter in the *CG* judgment.

Elsewhere, the President of the Court has explained that the case law in *Trojani* is no longer applicable because, at the time, Directive 2004/38/EC had not yet come into effect and no specific provision on non-discrimination was available for economically inactive Union citizens.\(^{51}\) In his view, now that Article 24 of the directive applies to such matters, EU citizens can no longer invoke Article 18 TFEU.\(^{52}\) However, this departure from the judgment in *Trojani* cannot be found in the *CG* judgment in so many words.

One can only implicitly deduct from the statement in para. 67 of the judgment, which says that CG falls within the scope of Directive 2004/38/EC, that even if the right of residence is based solely on national law (in accordance with the possibility provided thereto in Article 37 of the directive) the provision on non-discrimination of Article 24 should be applied, including the set limitations, namely that this provision only applies to Union citizens who have a right of residence by virtue of this directive. From that, it can be implicitly deduced that this Union citizen cannot invoke the principle of non-discrimination of Article 18 TFEU either.\(^{53}\) This would mean that a Union citizen who has a right of residence based on national law only cannot, under any circumstances, invoke the EU principle of equality since Article 24 of the directive restricts the application of that principle to those who have a right of residence based on the directive.

If this is the case, then this judgment once again ignores the fact that the principle of non-discrimination is a general principle of Union law, as is the principle of equality. This is a radical conclusion, all the more since the Court explicitly confirms in para. 84 of the judgment that even if CG’s right of residence is based on national law alone, this person still falls within the scope of Union law. The Court only concludes that the national authorities are to respect the Charter (see section 4.C) but fails to mention the principle of non-discrimination of Article 18 TFEU, nor does it explain why. In any case, the judgment in *CG* led the English Supreme Court on 1 December 2021 to dismiss the Court of Appeal’s statement that a Union citizen who has acquired the Pre-Settled Status based on UK law can rely on the principle of non-discrimination of Article 18 TFEU.\(^{54}\) This is apparent, for the Supreme Court, from the Court of Justice’s judgment in *CG*.

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50. Opinion of Advocate General Richard de la Tour in Case 709/20 CG, para. 78.
51. The right of residence of economically inactive Union citizens was based on Directive 90/364/EEC and this directive did not contain a specific provision regarding the right to equal treatment.
C. The role of the Charter

A third remarkable aspect of this judgment is the reference to the Charter. The restrictive interpretation given by the Court to the principle of non-discrimination of Article 18 TFEU and Article 24 Directive 2004/38/EC is softened by the fact that CG can rely, in the Court’s view, on the Charter. The Court assumes that when a Member State grants a migrating Union citizen a right of residence by virtue of its domestic law, this Member State still implements the provisions in the TFEU on the status of citizen of the Union and therefore it needs to observe the provisions of the Charter. With this, the Court has tied EU law consequences to a Member State’s autonomous decision.

The Court primarily refers to Article 1 of the Charter, which states that the human dignity should be protected and respected. In the Court’s view, this means that the host Member State has to ensure that Union citizens who are in a vulnerable position can live in dignified circumstances. The Court also refers to Article 7 on the right to respect for private and family life and combines this with Article 24(2), which requires that the best interests of the child are taken into account. From these provisions, the Court deducts the obligation of the host Member States to ensure that children can live in dignified circumstances with the parent (or parents) responsible for them. Consequently, the Court decides that a request for social assistance can only be dismissed once the national authorities have ascertained that this refusal will not expose the persons in question to an actual and current risk of violation of these fundamental rights. To this end, the authorities need to take into consideration all means of assistance provided for by national law.

Obviously, this is a significant differentiation to the restrictive interpretation given earlier in the judgment to the non-discrimination obligation of Article 24 Directive 2004/38/EC. This is all the more noteworthy because, previously, in the Dano judgment, the Court had ruled that the Member States are not implementing Union law when determining the conditions for the allowance of a social assistance benefit, and therefore the Charter does not apply. In that judgment, the Court argued that Union law does not contain any harmonization of the material conditions for the right to such a benefit and as a result, the Member States are free to determine those conditions. This reasoning of the Court was quite debatable, especially because the condition in this case was specifically applicable to non-nationals and therefore made a distinction on grounds of nationality. Without referring to the judgment in Dano, and thus without explicitly distancing itself from that judgment, the Court decided in the CG judgment that when a Member State grants a right of residence to a Union citizen by virtue of its own national law, this Member State is implementing Union law and as a consequence, the Charter should be respected, even when it concerns the allocation of social assistance. The right to social assistance would automatically follow from these Charter provisions, even if the provisions in the Treaty or secondary Union law would not provide in any right to social assistance for the persons involved. When applied to Ms Dano, who had been granted a right of residence under German law, she would now be able to rely on the Charter. Furthermore, she had an underage dependent child in her care.

In any case, the Court’s message to the Member States is that once a Member State has granted a Union citizen a right of residence, this Member State needs to take on the obligation to avoid this citizen from ending up in an inhumane situation. Union citizenship obliges the Member States to ensure that, in the event of a refusal to grant social assistance, the best interests of the children

56. Ibid., para. 92.
are protected. Undeniably, this is an important message. It is not clear, however, how far this obligation goes and when the circumstances are such that they are no longer in accordance with human dignity or the best interests of children as vulnerable persons.\(^{58}\) Does it concern only minimum support, a safety net that should prevent the worst deprivation, or does this mean that the Universal Credit, which the Court itself stated in para. 69 of the judgment is a subsistence benefit that is necessary to live a dignified life, should be granted anyway? The Court does not provide any further explanation on the matter.

Apart from that, it is surprising that the Court did not refer to Article 34 of the Charter, more specifically to Article 34(2), which states that everyone who resides legally in the Union is entitled to social security benefits and social advantages and Article 34(3), which states that, in order to combat social exclusion and poverty, the Union recognizes and respects the right to social assistance in order to ensure a decent existence.\(^{59}\) Nor is it clear why the Court did not refer to the prohibition of discrimination on grounds of nationality in Article 21(2) of the Charter. As per the explanations to the Charter of Fundamental Rights\(^{60}\) this provision corresponds to Article 18 TFEU and should be applied in compliance with it.\(^{61}\) This would mean that if CG cannot invoke Article 18 TFEU directly, she cannot invoke Article 21(2) of the Charter either. However, a Union citizen who cannot invoke Article 21(2) of the Charter may possibly rely on the principle of equality of Article 20. The Court has already indicated that this latter provision can be invoked by third-country nationals who fall within the scope of Union law.\(^{62}\) Therefore, this should also apply to a Union citizen who cannot invoke Article 21(2) of the Charter.

In addition, it is striking that the Court seems to think that the Charter was not relevant with regard to the application and interpretation of the provisions of Directive 2004/38/EC. The Court completely failed to mention the Charter in the parts of the judgment relating to the directive, although the Court had confirmed that CG falls within the scope of the provisions of the directive and of Article 21 TFEU. In para. 86, the Court even states that in such cases the fundamental rights have to be safeguarded. It is unclear why the Court did not refer to the obligations that follow from the Charter when applying these provisions. Thus, the question whether the Charter could be invoked when the national authorities apply Article 24 Directive 2004/38/EC and refuse a benefit on that ground remains unanswered. In the event of a refusal of social assistance, should the national authorities of the host Member State not examine whether the person in question ends up in a situation which threatens his/her human dignity and the best interests of the children? That is indeed what the Advocate General had suggested in his opinion, namely that these obligations from the Charter should be included in the application of the proportionality test required by Directive 2004/38/EC.\(^{63}\) In its judgment in CG, the Court itself does not consider the possible role

\(^{58}\) Also see C. O’Brien, European Law Review (2021), p. 814.

\(^{59}\) In contrast, the Advocate General did refer to this provision in footnote 89 of his opinion. Previously, the Court had used the Charter and its Article 34 to interpret an exception to the right to equal treatment for social benefits for third-country nationals in Directive 2003/109/EC: Case C-571/10 Kamberaj, EU:C:2012:233. More recently, the Court also relied on this provision in the judgment made in full court on 30 September 2021 in the case European Court of Auditors v. Mr Pinxten. In this case, the Court limited the dissolution of Mr. Pinxten’s pension for reasons of very serious irregularities during the execution of his function at the Court of Auditors to two thirds of this right, based on, inter alia, Article 34 of the Charter: Case C-130/19 European Court of Auditors v. Mr Pinxten, EU:C:2021:782, para. 888–891 and para. 905.

\(^{60}\) [2007] OJ C 303/17.

\(^{61}\) Case C-930/19 X v. Belgian State, EU:C:2021:657, para. 50.

\(^{62}\) Ibid., para. 54–55.

\(^{63}\) Opinion of Advocate General Richard de la Tour in Case 709/20 CG, para. 108–110.
of the Charter in the application of Article 24 Directive 2004/38/EC and the reason for that remains unclear. One could assume that Article 52(2) of the Charter determines that the Treaty rights are exercised under the conditions and limitations set by those Treaties and that the limitations to the right to equal treatment of Directive 2004/38/EC are implementations of what is provided for in Article 21 TFEU. Even so, Article 52(1) of the Charter determines that ‘subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union’.

Moreover, one could defend the reasoning that if a migrating Union citizen has a right of residence in the host Member State by virtue of Directive 2004/38/EC or another provision of Union law, this citizen could also rely on the Charter in situations in which a deviation from the right to equal treatment is provided for by the directive. This would be the case, for instance, for job-seekers who have a right of residence in the host country on grounds of Article 14(4) Directive 2004/38/EC. However, Article 24(2) Directive 2004/38/EC excludes them from the right to social assistance. In case of a refusal of social assistance, the application of the Charter would oblige the Member State involved to ensure that the person in question and his/her children, if any, can lead a dignified life.64 In Alimanovic, this would have resulted in a different outcome altogether. In that judgment, the Court had stated that the function of the benefit claimed by Ms Alimanovic was to cover the minimum subsistence requirements necessary to lead a life in keeping with human dignity.65 Furthermore, Ms Alimanovic was a single mother with underage children.

The same could apply to situations in which a migrating Union citizen does not have a right of residence on grounds of Union law or a host Member State’s national law, but in spite of this, the Member State does not take expulsion measures so the person in question is in fact tolerated on the territory of this Member State.66 Still, the message to the Member States should be that when they allow a migrating Union citizen to reside on their territory, whether or not legally, they have to ensure that this citizen does not end up in inhumane conditions.

5. Conclusion

The CG judgment is significant for three reasons: firstly, because the Court has given a very restrictive interpretation to the requirement of having sufficient resources, which applies to the right of residence of Directive 2004/38/EC for economically inactive migrating Union citizens and the application of the principle of equal treatment. In my opinion, this restrictive interpretation is in conflict with the will of the Union legislator and with the general principles of Union law, particularly with the principle of equal treatment and the proportionality principle. The judgment does not correspond to what the Court had recognized elsewhere as the objective of Directive 2004/38/EC, i.e. that it strives to facilitate the exercise of the fundamental and personal right to move and reside

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65. Case C-67/14 Alimanovic, para. 45.
freely within the territory of the Member States, which was granted directly to all Union citizens by Article 21(1) TFEU and to strengthen that right.\footnote{67}{See, inter alia, Case C-93/18 Bajratari, para. 31.} Ergo, one can question whether the right balance has been found between the rights of Union citizens and the financial interests of the Member States.

Secondly, this judgment is important because it implicitly indicates that if a Union citizen has acquired a right of residence in another Member State on grounds of national law only, this citizen cannot invoke the Union principle of non-discrimination. This follows only implicitly from the judgment since it was not discussed or substantiated by the Court.

Thirdly, the Court does temper the consequences of this, by posing that this Union citizen can invoke the Charter in order to prevent him/her from ending up in a situation in which his/her human dignity is at risk. Still, many questions remain, including what this actually means and whether the Charter can also be invoked in situations to which Directive 2004/38/EC applies.

Despite the Court throwing a lifeline in the form of the Charter, it still risks jeopardizing a number of fundamental basic principles of Union law with this judgment and this to prevent, as indicated by the Court itself, Union citizens from using the Member States’ welfare systems to obtain a right of residence.\footnote{68}{Case 709/20 CG, para. 77.} The Court seems to assume that an economically inactive migrating Union citizen who does not have sufficient resources, made use of the right of free movement with a view to receiving social assistance in another Member State. This is a presupposition, or should we say a prejudice, that is unfounded and not based on the specific circumstances of this case.

Furthermore, recent research has shown that this so-called ‘benefit tourism’ is not that common. Union citizens who migrate within the EU do not seem to do this primarily to ‘take advantage’ of the host Member States’ generous social systems, but to improve their own standard of living through economic activities.\footnote{69}{P. de Jong and H. de Valk, ‘Intra-European Migration Decisions and Welfare Systems: The Missing Life Course Link’, 46 Journal of Ethnic and Migration Studies (2020), p. 1773.} Moreover, it is shown that migrating Union citizens do not make more use of the welfare provisions in the host country than the nationals of that country, even less so.\footnote{70}{See, inter alia, D.S. Martinsen and B. Werner, ‘No Welfare Magnets – Free Movement and Cross-border Welfare in Germany and Denmark Compared’, 26 Journal of European of Public Policy (2019), p. 637.}

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