

Brexit and EU Citizen's Social Rights – the Commission v. United Kingdom [UK child benefit or child tax credit] and the CJEU case law on social rights

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Abstract

Since its creation, the concept of EU citizenship, as well as the rights and duties it entails, have evolved greatly, notably in the area of social rights. The CJEU case-law broadened non-national EU citizens' rights to claim social benefits while narrowing Member States' scope to restrict their access to national welfare systems. However, the recent *Dano*, *Alimanovic*, and *García-Nieto* judgments present a striking shift in relation to the previous case-law, establishing limits on the right of EU citizens to social assistance in host Member States. The UK child benefit or child tax credit case provides proof that this evolution of the CJEU case-law is emerging as a general trend leading to possible changes in EU law but, especially, to the emergence of a restrictive view of the social dimension of EU citizenship. The right to reside in another Member State appears to be made dependent on the worker status of the citizen, in order to avoid becoming 'an unreasonable burden on the social system of the host Member State'. Several questions remain. Were these decisions an attempt to address the debate on 'welfare tourism' namely during the Brexit referendum? What will be left of the previous jurisprudence?

I. Introduction: the current debate on non-national EU citizens social rights in a host State

In the European Union (EU) a growing tension between a strong centralized enforcement of EU citizen's rights, enshrined both in the Treaties and in the Charter of Fundamental Rights, and a more decentralized approach, concerned with Member States autonomy can be observed and is central to Jirí Zemánek's text «*The Future of the Protection of Fundamental Rights after Brexit*».

One of the most important areas in that debate, which was also of great importance in the Brexit debate, is the freedom of movement and of resi-

dence within the Member States of the EU by Union citizens. In fact, EU citizenship, which is additional to national citizenship of a Member State and affords a set of rights, is at a crossroads. This is especially felt in terms of its implementation by the Member States and its relation to fundamental rights, namely social rights, and the principle of non-discrimination.

The concept of citizenship of the EU, which is a novel experiment¹ established by the Maastricht Treaty, and recognised in the Treaty of the EU (TEU) and the Treaty on the Functioning of the EU (TFEU), as well as the rights and duties it entails, have evolved greatly, much due to the case-law of the Court of Justice of the European Union's (CJEU). The rights of freedom of movement and of residence of EU citizens, as developed by the CJEU case law, are closely connected with the development of EU integration.

The development of Union citizenship by the CJEU case-law was especially notable in the area of the free movement and residence of EU citizens and their access to social benefits. The Court's case-law has been central for the guarantee of an effective freedom of movement of citizens within the territory of the Member States, recognised in the TEU as one of the fundamental freedoms on which the Union is based, especially when interpreted together with the principle of prohibition of discrimination on grounds of nationality (Article 18 TFEU).² According to Article 3(2) TEU, *'The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured'*. The right of every citizen of the Union *'to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'* is also recognised (Ar-

1 E Gild / C Gortázar Rotaache / D Kostakopoulou, *The reconceptualization of European Union citizenship* (Leiden, M. Nijhoff, 2014).

2 On the expansive interpretation by the Court of the EU citizenship in relation to the principle of equality, v., v.g., C Barnard, 'EU citizenship and the principle of solidarity' in M Dougan / E Spaventa (eds.), *Social welfare and EU law* (Oxford, Hart Publishing, 2005) 157–180; G Davies, 'The humiliation of the state as a constitutional tactic' in F. Amtenbrink / P.A.J. van den Berg (eds.), *The Constitutional Integrity of the European Union* (The Hague, Asser Press, 2010) 147; M Dougan / E Spaventa, 'Wish you weren't here...: new models of social solidarity in the European Union', in M Dougan / E Spaventa (eds.), *Social welfare and EU law* (Oxford, Hart Publishing, 2005) 181–218; S Giubonni, 'Free movement of Persons and European solidarity' (2007) 13 3 *European Law Journal* 360–379; C O'Brien, 'Real links, abstract rights and false alarms: the relationship between ECJ's 'real link' case law and national solidarity', (2008) 33 5 *European Law Review* 643–665.

ticle 21 TFEU).³ The relation between freedom of movement, freedom of residence, and the prohibition of discrimination is implemented by the Citizens' Directive.⁴⁵

In the *Grzelczyk* case, the Court established one of the cornerstones of the EU citizenship case-law: that '*Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for*'.⁶

The CJEU recognised the direct effect of the right of residence of Union citizens⁷ and has consistently extended the prohibition of discrimination and the principle of equality, while interpreting Articles 18, 20 and 21 TFEU, namely to EU citizens who reside lawfully in a Member State but are economically inactive.⁸ The Court was especially important in the building of a notion of EU citizenship which was not connected with the need to have an economic link to a certain Member State and which granted access to a wider range of rights.⁹ It developed its case-law according to

3 J Cunha Rodrigues, 'Liberdade de Circulação e Permanência' in A. Silveira / M. Canotilho (eds) *Carta dos Direitos Fundamentais da União Europeia Comentada* (Coimbra, Almedina, 2013) 522–523; *Idem*, 'A propos Europeancitizenship: theright to move and reside freely' in P Gordanell/ A Rosas / N Wahl (eds) *Constitutionalisingthe EU judicial system: essays in honourofPernillaLindb* (Oxford, HartPublishing, 2012) 206.

4 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158.

5 For a comprehensible analysis, v. E Guild / S Peers / J Tomkin, *The EU citizenship directive: a commentary* (Oxford, Oxford University Press, 2014).

6 Case C-184/99 *Grzelczyk* ECLI:EU:C:2001:458, para. 31.

7 *V.*, v.g., Case C-413/99 *Baumbast* ECLI:EU:C:2002:493, para. 84, and Case C-456/02 *Trojani* ECLI:EU:C:2004:488, para. 32.

8 *V.*, v.g., Case C-85/96 *Martínez Sala* ECLI:EU:C:1998:217, paras. 61–62.

9 *V.*, v.g., Case C-85/96 *Martínez Sala* ECLI:EU:C:1998:217, paras. 61–62, Case C-184/99 *Grzelczyk*

ECLI:EU:C:2001:458, para. 44, Case C-60/00 *Carpenter* ECLI:EU:C:2002:434, para 38, Case C-413/99 *Baumbast* ECLI:EU:C:2002:493, para. 84, Case C-109/01 *Akrich* ECLI:EU:C:2003:491, paras 57–58, Case C-148/02 *García Avello* ECLI:EU:C:2003:539, para 24, Case C-456/02 *Trojani* ECLI:EU:C:2004:488, para. 32, Case C-209/03 *Bidar* ECLI:EU:C:2005:169, para 31, Case C-22/08 and C-23/08 *Vatsouras* ECLI:EU:C:2009:344, paras 38–39, and Case C-34/09 *Ruiz Zambrano* ECLI:EU:C:2011:124, paras 42–44.

which Article 20 TFEU, ‘precludes national measures that have effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by the virtue of their status as citizens of the union’.¹⁰ The EU citizenship should make a difference and involves a break from merely economic categories, such as ‘worker’, which were predominant in the EEC.¹¹

However, this case-law was sometimes criticised, namely by some of the Member States, including the United Kingdom of Great Britain and Northern Ireland (UK), for being too broad in recognising the access to benefits while interpreting the Citizens’ Directive too extensively.¹² In this debate, at least some of the Member States reject intrusions in their autonomy while the European Commission defends the freedom of movement of persons.¹³ The broad interpretation of these rights could interfere with

10 Case C-34/09 *Ruiz Zambrano* ECLI:EU:C:2011:124, para 42, quoting Case C-135/08 *Rottmann* ECLI:EU:C:2010:104, para 42.

11 V., v.g., E Spaventa, ‘From Gebhard to Carpenter: Towards a (non-)economic European constitution’ (2004) 41 (3) *Common Market Law Review* 743–773; N NShuibhne, ‘The Resilience of EU Market Citizenship’ (2010) 47 (6) *Common Market Law Review* 1597–1628, pp 1605–1609; S Kadelbach, ‘Union citizenship’ in A von Bogdandy / Bast (ed.) *Principles of European Constitutional Law*, 2nd ed. (Oxford, Hart, 2009) 443–478, pp 445–448; C. O’Brien, ‘I trade, therefore I am: legal personhood in the European Union’ (2013) 50 *Common Market Law Review* 1643–1684.

12 V., v.g., N Caicedo Camacho, ‘La Directiva 2004/38/CE y la jurisprudenciadel TJCE sobre el disfrute de las prestaciones sociales: ¿freno al avance en materia social o adecuación a los intereses de los estados?’ (2014) 19 *Revista d’estudis autonòmicsi federals* 96–143; Davies, ‘The humiliation of the state as a constitutional tactic’, 147–174; Giubonni, ‘Free movement of persons and European solidarity’, 360–379; *Idem*, ‘A Certain Degree of Solidarity? Free Movement of Persons and Access to Social Protection in the Case Law of the European Court of Justice’, in M Ross / Y Borgmann-Prebil (eds) *Promoting Solidarity in the European Union* (Oxford, Oxford University Press, 2010) 191–193; I. Lirola Delgado, ‘Derecho de residencia de los ciudadanos de la Unión y prestaciones sociales en tiempos de crisis’ (2014) 18 (49) *Revista de Derecho Comunitario Europeo* 761–762; F Wollenschläger, ‘A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration’ (2011) 17 *European Law Journal* 1–34.

13 For an overview, v. M Morsa, ‘Les migrations internes à l’Union européenne sont-elles motivées par un accès à des prestations sociales? Citoyenneté européenne, liberté de circulation et de séjour des inactifs et droits sociaux. La relation entre la coordination européenne et la directive 2004/38’ (2014) 1190 *Journal des tribunaux du travail* 245–246; H Verschuere, ‘Free Movement or Benefit Tourism: The Unreasonable Burden of Brey’ (2014) 16 *European Journal of Migration and Law* 147–179.

the Member States' political choices or the national solidarity on the basis of their welfare systems.¹⁴

There is a direct relation of this matter with the current debates on access by non-national EU citizens to social security in host Member States, characterised sometimes as 'welfare migration'¹⁵, 'benefit tourism'¹⁶ or 'social tourism'.¹⁷ These are terms used in the context of the perceived threat that a number of economically inactive EU citizens move to a given Member State to benefit from its social welfare system rather than to work. The debate has grown in intensity because of the perceived need to implement budget-cuts on national benefits during the global economic crisis.¹⁸

The access by non-national EU citizens to social security in host Member States was one of the central questions in the debate of the prospective withdrawal of the UK from the EU. In fact, when then Prime-Minister Cameron called for 'a new settlement for the United Kingdom in a reformed European Union' in his letter of 10 November 2015 one of the main areas of concern pointed out was immigration and specifically that the UK was not able to 'cope with all the pressures that free movement can bring – on our schools, our hospitals and our public services' and that it was necessary 'to crack

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- 14 V., v.g., M Dougan, 'The constitutional dimension to the case law on Union citizenship' (2006) 31 *European Law Review*, 613–641, 623; AJ Menéndez, 'European Citizenship after Martínez Sala and Baumbast: Has European Law Become More Human but Less Social?' in M Poiars Maduro / L Azoulaï (eds) *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford, Hart, 2010), 391–392.
- 15 V., v.g., P Larkin, 'The Limits to European Social Citizenship in the United Kingdom' (2005) 68 *Modern Law Review*, 435–447, pp. 440–442; S Mantu / P Minderhoud, 'Exploring the limits of social solidarity: welfare tourism and EU citizenship' (2016) 2(2) *UNIO – EU Law Journal*, 4–19.
- 16 H Verschueren, 'Preventing "benefit tourism" in the EU: A narrow or broad interpretation of the possibilities offered by the ECJ in Dano?' (2015) 52(2) *Common Market Law Review* 363–390
- 17 Term used by Advocate General Geelhoed, and described as "moving to a Member State with a more congenial social security environment" (Case C-456/02 *Trojani* ECLI:EU:C:2004:112, Opinion of AG Geelhoed, para 18).
- 18 V. Editorial Comments, 'The free movement of persons in the European Union: Salvaging the dream while explaining the nightmare' (2014) 51 *Common Market Law Review*, 729–740; J. Shaw, 'Between law and political truth? Member States preferences, EU free movement rules and national immigration law', *Conference paper, UACES 44th Annual Conference*, Cork, 1–3 September 2014, at <http://www.uaces.org>; I. Lirola Delgado, 'Derecho de residencia de los ciudadanos de la Unión y prestaciones sociales en tiempos de crisis. ¿Hacia un planteamiento casuístico y ambiguo de la solidaridad entre los Estados miembros?' (2015) 49 *Revista de DerechoComunitarioEuropeo*, 733–766, 734–742.

down on the abuse of free movement'.¹⁹ The letter, thus, asked for a limitation of the rights of European citizens who were migrants to receive social benefits in host Member States. This was one of the issues discussed in the negotiation of the package of changes to the UK's terms of membership to the EU and changes to EU rules that came to a conclusion during the European Council meeting on 18 and 19 February 2016.²⁰ The set of arrangements agreed by the President of the European Council Donald Tusk, and approved by EU leaders of all 27 other Member States in the European Council meeting on 18th and 19th February were spelled out in its Conclusions.²¹

The agreement included as response to the concerns of the UK in these matters is in three declarations of the European Commission as annexes V, VI and VII. In these annexes the Commission agreed to i) '*make a proposal to amend Regulation (EC) No 883/2004 of the European Parliament and of the Council on the coordination of social security systems in order to give Member States, with regard to the exportation of child benefits to a Member State other than that where the worker resides, an option to index such benefits to the conditions of the Member State where the child resides*' (annex V); ii) '*table a proposal to amend Regulation 492/2011 on freedom of movement for workers within the Union to provide for a safeguard mechanism with the understanding that it can and will be used and therefore will act as a solution to the United Kingdom's concerns about the exceptional inflow of workers from elsewhere in the European Union*' (annex VI); and iii) '*adopt a proposal to complement Directive 2004/38 on free movement of Union citizens*' in matters of persons who marry a

19 David Cameron, 'A new settlement for the United Kingdom in a reformed European Union', 10th November 2015, at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/475679/Donald_Tusk_letter.pdf

20 The negotiations only began following the outcome of the UK General Election in the summer of 2015.

21 V. General Secretariat of the Council (2016–02–19). 'European Council meeting (18 and 19 February 2016) – Conclusions', EUCO 1/16.

Union citizen,²² abuse of free movement rights²³ and other clarifications²⁴ (annex VII). The changes were intended to become effective on the date the Government of the UK informed the Secretary-General of the Council that the UK has decided to remain a member of the EU, following a vote in the UK's referendum. Due to the result of the referendum, the changes were never implemented.

The subject of immigration and of access of non-national EU citizens to welfare benefits was also one of the most discussed subjects in the UK 'Remain/Leave' referendum campaign. It was during this campaign that the CJEU issued its decision on the *UK child benefit or child tax credit* case.²⁵ This decision must be read in the context of a recent change in the CJEU case-law on this subject, that could have profound consequences in the way EU citizen's rights and the freedom of movement are interpreted and implemented.

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- 22 The change would be 'in order to exclude, from the scope of free movement rights, third country nationals who had no prior lawful residence in a Member State before marrying a Union citizen or who marry a Union citizen only after the Union citizen has established residence in the host Member State' and clarifying that "the concept of marriage of convenience – which is not protected under Union law – also covers a marriage which is maintained for the purpose of enjoying a right of residence by a family member who is not a national of a Member State'.
- 23 The change would be to clarify that 'Member States can address specific cases of abuse of free movement rights by Union citizens returning to their Member State of nationality with a non-EU family member where residence in the host Member State has not been sufficiently genuine to create or strengthen family life and had the purpose of evading the application of national immigration rules'.
- 24 'The Commission will also clarify that Member States may take into account past conduct of an individual in the determination of whether a Union citizen's conduct poses a 'present' threat to public policy or security. They may act on grounds of public policy or public security even in the absence of a previous criminal conviction on preventative grounds but specific to the individual concerned. The Commission will also clarify the notions of "serious grounds of public policy or public security" and "imperative grounds of public security". Moreover, on the occasion of a future revision of Directive 2004/38 on free movement of Union citizens, the Commission will examine the thresholds to which these notions are connected'.
- 25 Case C-308/14 *Commission v United Kingdom [UK child benefit or child tax credit case]* ECLI:EU:C:2016:436. See also D. Berlin, 'La Cour invite dans le débat sur le Brexit?' (2016) 26 *La Semaine Juridique – édition générale*, 1310.

II. *The Recent Evolution in CJEU Case-law on Access to Social Assistance Granted to Non-national EU Citizens*

Against this background, a number of recent CJEU judgments present a striking shift in relation to the previous case-law, clarifying the limits of the right to access to social assistance granted to non-national Union citizens in host Member States under EU Law.

In fact, it has been up to the CJEU to largely develop the legal framework and the principles applicable to the connection between the freedom of movement and the non-national EU citizens' access to social rights, and specifically to social benefits, in the host State. The Court developed an approach which was centred on the individual at issue and its subjective case and established that the right of residence and of establishment and the equal treatment principle should not be precluded by lack of resources. For instance, the principle of equality was declared applicable to the rights to maintenance aid for students who are exercising their right of residence, despite the exception established in Article 24 (2) of the Citizens' Directive.²⁶

The prohibition of discrimination on the grounds of nationality and the establishment of the EU citizenship were seen by the CJEU as precluding the entitlement to a non-contributory social benefit from being made conditional to non-national legally residing EU citizens being considered as workers when no such conditions would apply to nationals of the Member State. In Judgments such as *Martínez Sala*, *Grzelczyk*, *Trojani*, or *Bidar*, for instance, the CJEU developed a case-law which incrementally broadened non-national EU citizens' rights to claim social benefits while narrowing Member States' scope to regulate or restrict their access to national welfare systems, notably in the case of non-contributory benefits. The Court recognised and accepted that this involved the need for a certain degree of financial solidarity between Member States.²⁷ However, the Court accepted that in certain cases it was legitimate for a Member State to grant such a benefit only after it has been possible to establish a 'real link' between the jobseeker and the labour market of that State²⁸, or a 'certain degree of integration

26 V., v.g., Case C-224/98 *D'Hoop* ECLI:EU:C:2002:432, paras 30–32; Case C-209/03 *Bidar* ECLI:EU:C:2005:169, para 31.

27 V., v.g., Case C-184/99 *Grzelczyk* ECLI:EU:C:2001:458, para. 44, Case C-209/03 *Bidar* ECLI:EU:C:2005:169, para 56.

28 V., v.g., Case C-22/08 and C-23/08 *Vatsouras* ECLI:EU:C:2009:344, paras 38–39, and Case C-138/02 *Collins* ECLI:EU:C:2004:172, paras 67–69.

into the society of the host State' was demonstrated.²⁹ Finally, in any case, the Court recognised that the applicant should not become 'an unreasonable burden' on the public finances of the Member State.³⁰

In the *Brey* judgment of September 2013³¹ the CJEU stated that the Citizen's Directive 'allows the host Member State to impose legitimate restrictions in connection with the grant of [social security] benefits to Union citizens who do not or no longer have worker status, so that those citizens do not become an unreasonable burden on the social assistance system of that Member State'.³² This objective to avoid that a citizen becomes an 'unreasonable burden' was already stated in recital 10 in the preamble to the Directive.³³

However, the Court interpreted the Directive in light of the Treaty and of general principles of EU law. The result was that 'since the right to freedom of movement is – as a fundamental principle of EU law – the general rule, the conditions laid down in Article 7(1)(b) of Directive 2004/38 must be construed narrowly (see, by analogy, *Kamberaj*, paragraph 86, and *Chakroun*, paragraph 43) and in compliance with the limits imposed by EU law and the principle of proportionality (see *Baumbast and R*, paragraph 91; *Zhu and Chen*, paragraph 32; and *Commission v Belgium*, paragraph 39)'. This meant that EU

29 V., v.g., Case C-209/03 *Bidar* ECLI:EU:C:2005:169, para 57; Case C-258/04 *Ioannidis* ECLI:EU:C:2005:559, paras 30 *et seq.*; Case C-158/07 *Förster* ECLI:EU:C:2008:63, para 54; Case C-103/08 *Gottwald* ECLI:EU:C:2009:597, paras 32 *et seq.*

30 V., v.g., Case C-184/99 *Grzelczyk* ECLI:EU:C:2001:458, para. 44; and Case C-75/11 *Commission v Austria [reduced fares on public transport granted to students]* ECLI:EU:C:2012:605, para 60.

31 Case C-140/12 *Brey* ECLI:EU:C:2013:565. Mr Brey and his wife were both German nationals with no other income or assets other than a low sum of pension and benefit payments received in Germany. After moving to Austria in 2011, Mr Brey applied for a compensatory supplement. However, the Austrian authorities refused this because the aforementioned low amounts of pension payments from Germany supposedly did not constitute sufficient resources to establish his lawful residence in Austria.

32 Case C-140/12 *Brey* ECLI:EU:C:2013:565, para 57. For an analysis of the *Brey* case, v., v.g., B Spiegel, 'Anspruch auf Leistungen der sozialen Sicherheit von nichtaktiven Personen – wer fürchtet sich vor 'Sozialtourismus'? Neue EuGH Fälle: C-140/12, *Brey*, und C-333/13, *Dano*', (2014) 15 *ERA Forum*, 339–340; D Thym, 'Sozialleistungen für und Aufenthalt von nichterwerbstätigen Unionbürgern' (2014) 23 *Neue Zeitschrift für Sozialrecht*, 81–120; H Verschueren, 'Free Movement or Benefit Tourism' 147–179; A.P. van der Mei, 'Overview of Recent Cases before the Court of Justice of the European Union (October-December 2014)' (2014) 17(1) *European Journal of Social Security*, 102–122.

33 Case C-140/12 *Brey* ECLI:EU:C:2013:565, para 54. It was already stated in the Case C-424/10 and C-425/10 *Ziolkowski and Szeja* ECLI:EU:C:2011:866, para 40.

law precluded the automatic exclusion of an economically inactive citizen of another Member State from receiving a particular social benefit because that exclusion does not enable the competent authorities of the host Member State to ‘carry out – in accordance with the requirements under, *inter alia*, Articles 7(1)(b) and 8(4) of that directive and the principle of proportionality – an overall assessment of the specific burden which granting that benefit would place on the social assistance system as a whole by reference to the personal circumstances characterising the individual situation of the person concerned’.³⁴

The *Brey* test was construed in such a way that the Member State’s authorities can only claim that a citizen is an unreasonable burden to their social security system after considering his/her individual personal situation.

Only a year later, in November 2014, the *Dano* case³⁵ represents the beginning of a different methodology of analysis of the relation between the right to reside and the access to social benefits.³⁶ In the *Dano* decision, the CJEU made clear that Member States may reject claims to social assistance by EU citizens who have no intention to work and cannot support themselves. It was followed by the *Alimanovic* case³⁷, which confirmed the new trend and gave the Court the opportunity to clarify the application of this principle.

34 Case C-140/12 *Brey* ECLI:EU:C:2013:565, para 77.

35 Case C-333/13 *Dano* ECLI:EU:C:2014:2358. Ms Dano and her son, Romanian nationals, claimed an entitlement to unemployment benefits at the Leipzig Social Court, after being denied by the Jobcenter Leipzig. Ms Dano is currently staying with her son in Germany. She was not seeking employment, nor has she been trained in a profession and, to date, she has never worked in Germany or Romania. They lived with Ms Dano’s sister, who provided for them.

36 For an analysis of the *Dano* case, v., v.g., D Guimarães, ‘The Right of Free Movement and the Access To Social Protection in the EU: The Economical Dimension. Notes on the Case Elisabeta Dano v Jobcenter Leipzig, C-333/13’ (2015) 1(1) *UNIO – EU Law Journal* 110–120; D Thym, ‘The Elusive limits of solidarity: Residence rights of and social benefits for economically inactive Union citizens’ (2015) 52 *Common Market Law Review* 17–20; *Id.*, ‘When Union Citizens turn into illegal migrants: the *Dano* case’ (2015) 40 *European Law Review* 249 ff, 260; AP van der Mei, ‘Overview of Recent Cases before the Court of Justice of the European Union (January-June 2015)’, 481–496; H Verschuere, ‘Preventing ‘Benefit Tourism’ in the EU’ 363–364; F Wollenschläger, ‘Keine Sozialleistungen für nichterwerbstätige Unionsbürger?’ (2014) 24 *NVwZ* 1628–1632; and, very critically of the CJEU’s new approach: N N Shuibne, ‘Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship’ (2015) 52 *Common Market Law Review* 889–937.

37 Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597.

At the beginning of the reasoning of the *Dano* decision, the Court repeats the *Grzelczyk* statement that ‘*the status of citizen of the Union is destined to be the fundamental status of nationals of the Member States*’.³⁸ However, the CJEU subsequently answered the questions by reference to the Citizens’ Directive and Regulation No 883/2004³⁹, as ‘*more specific expressions*’ of the prohibition of discrimination on grounds of nationality of Article 18 TFEU, and said that ‘*so far as concerns access to social benefits, such as those at issue in the main proceedings, a Union citizen can claim equal treatment with nationals of the host Member State only if his residence in the territory of the host Member State complies with the conditions of Directive 2004/38*’.⁴⁰ In doing so, the Court does a literal interpretation of the text of the Directive without reference to the Treaties – especially to the provisions on EU citizenship and the freedom of movement and of residence.

Adopting this methodology allows the CJEU to state that ‘*any unequal treatment between Union citizens who have made use of their freedom of movement and residence and nationals of the host Member State with regard to the grant of social benefits is an inevitable consequence of Directive 2004/38*’⁴¹ without having to equate this statement with the general principles of EU law and with the Treaties’ rules.

According to the Citizens’ Directive, the right of residence for periods longer than three months is subject to the conditions set out in Article 7(1) which distinguishes between (i) persons who are working and (ii) those who are not. The first group of citizens have the right of residence in the host Member State without having to fulfil any other condition (Article 7(1)(a) of Directive). Persons who are economically inactive are required by Article 7(1)(b) of the Directive to meet the condition that they have sufficient resources of their own. From these provisions, the Court concludes that each ‘*Member State must therefore have the possibility, pursuant to Article 7 of Directive 2004/38, of refusing to grant social benefits to economically inac-*

38 Case C-333/13 *Dano* ECLI:EU:C:2014:2358, para 58.

39 Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166.

40 Case C-333/13 *Dano* ECLI:EU:C:2014:2358, para 69. The Advocate General Wathelet also concluded that EU law did not preclude the national legislature from choosing to exclude nationals of other Member States from entitlement to a special non-contributory cash benefit on the basis of a general criterion, such as the reason for entering the territory of the host Member State, but used the capability of demonstrating the absence of a genuine link with that State, in order to prevent an unreasonable burden on its social assistance system (v. Case C-333/13 *Dano* ECLI:EU:C:2014:341, Opinion AG Wathelet, para 139).

41 Case C-333/13 *Dano* ECLI:EU:C:2014:2358, para 77.

tive Union citizens who exercise their right to freedom of movement solely in order to obtain another Member State's social assistance although they do not have sufficient resources to claim a right of residence'.⁴²

No reference to the individual situation of Ms. Dano was made other than that '*in the main proceedings, according to the findings of the referring court the applicants do not have sufficient resources and thus cannot claim a right of residence in the host Member State*'.⁴³ This, in itself, signified a departure from the *Brey* test described *supra*.

One of the questions referred to the Court were on the application of the Charter of Fundamental Rights to the case. The CJEU, however, stated that it did not have jurisdiction. Its reasoning was that, since the conditions creating the right to the benefits did result neither from Regulation No 883/2004 nor from Directive 2004/38 or other secondary EU legislation, it was thus for the legislature of each Member State to lay down those conditions. According to the Court, while doing so, the Member States are not implementing EU law for the effect of triggering the application of the Charter under its Article 51 (1).⁴⁴ In the *Alimanovic* case,⁴⁵ one year later, the Court used the *Dano* line of reasoning, confirming that a new paradigm of access of non-national EU citizens to the host State's social benefits had emerged.⁴⁶

42 Case C-333/13 *Dano* ECLI:EU:C:2014:2358, para 78.

43 Case C-333/13 *Dano* ECLI:EU:C:2014:2358, para 81.

44 Case C-333/13 *Dano* ECLI:EU:C:2014:2358, paras 87–92.

45 Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597. The case concerns the access of Nazifa Alimanovic and her three German-born children, all possessing the Swedish nationality, to German social welfare benefits. These welfare benefits include *Arbeitslosengeld II*, Germany's subsistence allowance for the long-termed unemployed, and social allowances for beneficiaries unfit to work. In contrast with the *Dano* case, in which the EU citizen in question had never worked and was not seeking work, mother Alimanovic and her oldest daughter did have temporary jobs between June 2010 and May 2011 in Germany. As a result, they received social benefits from 1 December 2011 to 31 May 2012, after which the 'Job Center', the responsible German authority, withdrew their grant. For an analysis of the *Alimanovic* case, v., v.g., A Iliopoulou-Penot, 'Deconstructing the former edifice of Union citizenship? The Alimanovic judgment' (2016) 53 *Common Market Law Review* 1007–1035; AP van der Mei, 'Overview of Recent Cases before the Court of Justice of the European Union (July-December 2015)', 74–84.

46 This meant not following the Advocate General's opinion. Advocate General Wathelet considered that it was '*contrary to EU law, and more precisely, to the principle of equal treatment affirmed in Article 18 TFEU and clarified in Article 4 of Regulation No 883/2004 and Article 24 of Directive 2004/38, for the legislation of a Member State, such as that at issue in the main proceedings, automatically to exclude a citizen of the Union from entitlement to a special non-contributory cash benefit within the mean-*

The question before the CJEU was if Member States could exclude nationals of other Member States who are jobseekers in the host Member State from entitlement to certain ‘*special non-contributory cash benefits*’ within the meaning of Article 70(2) of Regulation No 883/2004, which also constitute ‘social assistance’ within the meaning of Article 24(2) of the Citizens’ Directive, although those benefits were granted to nationals of the Member State concerned who are in the same situation.⁴⁷ The Court reiterated the *Dano* assessment that ‘*a Union citizen can claim equal treatment with nationals of the host Member State under Article 24(1) of Directive 2004/38 only if his residence in the territory of the host Member State complies with the conditions of Directive 2004/38*’.⁴⁸ Only Article 7(3)(c) and Article 14(4)(b) of the Citizens’ Directive were considered as able to confer a right of residence on jobseekers in the situation of Ms Alimanovic and her

ing of Regulation No 883/2004 (a benefit which, moreover, constitutes social assistance within the meaning of Directive 2004/38) beyond a period of involuntary unemployment of six months after working for less than a year, without allowing that citizen to demonstrate the existence of a genuine link with the host Member State” (v. Case C-67/14 *Alimanovic* ECLI:EU:C:2015:210, Opinion of AG Wathelet, para 110). The Advocate General also stated that in circumstances such as those of the main proceedings, the children of a national of a Member State who works or has worked in the host Member State and the parent who is their primary carer may claim a right of residence there on the sole basis of Article 10 of Regulation (EU) No 492/2011 on freedom of movement for workers within the Union, without such a right being conditional on their having sufficient resources and comprehensive sickness insurance cover in that State (v. Case C-67/14 *Alimanovic* ECLI:EU:C:2015:210, Opinion of AG Wathelet, paras 117–122).

47 In this decision, as in the *Dano* case, the benefits at issue were characterised as ‘special non-contributory cash benefits’ within the meaning of Article 70(2) of Regulation No 883/2004, *i.e.* benefits which were intended to cover subsistence costs for persons who cannot cover them themselves and that are not financed through contributions, but through tax revenue. The Court considered that, from its case-law, those benefits were also covered by the concept of ‘social assistance’ within the meaning of Article 24(2) of Directive 2004/38, which refers to all assistance schemes established by the public authorities to which recourse may be had by an individual who does not have resources sufficient to meet his own basic needs and those of his family and who by reason of that fact may, during his period of residence, become a burden on the public finances of the host Member State which could have consequences for the overall level of assistance which may be granted by that State. V. Case C-333/13 *Dano* ECLI:EU:C:2014:2358, para 63, and Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597, paras 43–44.

48 Case C-333/13 *Dano* ECLI:EU:C:2014:2358, para 69, and Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597, para 49.

daughter. The first provision (Article 7(3)(c))⁴⁹ only conferred worker status during 6 months after their last employment had ended, a period which had already expired when they were refused entitlement to the benefits at issue. Article 14(4)(b) can be relied upon to establish a right of residence even after the expiry of the period referred to in Article 7(3)(c) of the Citizens' Directive, entitling Ms. Alimanovic and her daughter to equal treatment with the nationals of the host Member State so far as access to social assistance is concerned.⁵⁰ However, in that case, the host Member State may rely on the derogation in Article 24(2) of that Directive in order not to grant that citizen the social assistance sought.

The Court addressed the *Brey* case, stating that '*although the Court has held that Directive 2004/38 requires a Member State to take account of the individual situation of the person concerned before it adopts an expulsion measure or finds that the residence of that person is placing an unreasonable burden on its social assistance system (judgment in Brey, C-140/12, EU:C:2013:565, paragraphs 64, 69 and 78)*', no such individual assessment is necessary '*in circumstances such as those at issue in the main proceedings*'.⁵¹ The reason for this conclusion begins with stating that the Citizens' Directive '*itself takes into consideration various factors characterising the individual situation of each applicant for social assistance and, in particular, the duration of the exercise of any economic activity*'. Besides, the Directive does '*guarantee a significant level of legal certainty and transparency in the context of the award of social assistance by way of basic provision, while complying with the principle of proportionality*'. Finally, '*while an individual claim might not place the Member State concerned*

49 This provision establishes that if the worker is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first 12 months and has registered as a jobseeker with the relevant employment office, he retains the status of worker for no less than six months. During that period, the Union citizen concerned retains his right of residence in the host Member State under Article 7 of the Citizens' Directive. Article 7(3)(b) provides in principle for the unlimited retention of the worker status after employment for more than a year, but in that case the worker would have to have completed an employment contract longer than a year.

50 Article 14(4)(b) stipulates that Union citizens who have entered the territory of the host Member State in order to seek employment may not be expelled for as long as they can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.

51 Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597, para 59.

under an unreasonable burden, the accumulation of all the individual claims which would be submitted to it would be bound to do so'.⁵²

Any prospect that these cases did not represent the adoption of a broad new approach of the CJEU to the question of access to social benefits by non-national EU citizens was proven unfounded by the subsequent case that adopts the same methodology.

In the *García-Nieto* case⁵³ the Court once again addressed the access to 'special non-contributory cash benefits' within the meaning of Article 70(2) of Regulation No 883/2004, which also constitute 'social assistance' within the meaning of Article 24(2) of the Citizens' Directive, by quoting the *Dano* and *Alimanovic* cases – 'a Union citizen can claim equal treatment with nationals of the host Member State (...) only if his residence in the territory of the host Member State complies with the conditions' of the Citizens' Directive.⁵⁴ The Court followed the same kind of reasoning, limiting itself to the interpretation of the provisions of the Citizens' Directive. Article 6(1) of the Directive provides that EU citizens have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport. However, in such a case, the host Member State may rely on the derogation in Article 24(2) in order to refuse to grant that citizen the social assistance sought.⁵⁵ Hence, the host Member States can exclude economically inactive non-national EU citizens from access to 'social assistance' as long as they are residing for a period shorter than three

52 Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597, paras 60–62.

53 Case C-299/14 *García-Nieto* ECLI:EU:C:2016:114. The unmarried Spanish couple García-Nieto and Peña Cuevas, had lived together in Spain for several years and had a common child. The father also had a son from an earlier relationship. Mother García-Nieto and their common child moved to Germany in April 2012, where she moved in with her mother, registered as a jobseeker and started working in June 2012. The father and his other son joined the family in Germany in June 2012. Until November 2012, the family's living expenses were met from the mother García-Nieto's income. From that moment onwards, the father also started to work in short-term jobs. The case concerned the request for social assistance benefits that the father made for himself and his son in July 2012. The German authorities denied them these benefits for August and September as they had resided for a period shorter than three months in Germany and, during that time, were neither working nor self-employed.

54 Case C-299/14 *García-Nieto* ECLI:EU:C:2016:114, para 38, quoting Case C-333/13 *Dano* ECLI:EU:C:2014:2358, para 69, and Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597, para 49.

55 Case C-299/14 *García-Nieto* ECLI:EU:C:2016:114, paras 42–43, quoting Case C-333/13 *Dano* ECLI:EU:C:2014:2358, para 70.

months. No reference to the special status of EU citizen or to the Treaties is made. No consideration is given to the family status of those involved.

The individual personal situation test put forward in *Brey* was replaced by the objective test used in the *Alimanovic* case. In *Alimanovic*, the Court stated that the Citizens' Directive, 'establishing a gradual system as regards the retention of the status of 'worker' which seeks to safeguard the right of residence and access to social assistance, itself takes into consideration various factors characterising the individual situation of each applicant for social assistance and, in particular, the duration of the exercise of any economic activity'.⁵⁶ This reasoning is taken a step further by the Court in the *García-Nieto* case, stating that 'if such an assessment is not necessary in the case of a citizen seeking employment who no longer has the status of 'worker', the same applies a fortiori to persons who are in a situation such as that (...) in the main proceedings'.⁵⁷

This delivers the *coup de grace* on the *Brey* doctrine – no individual personal situation test is needed; the Court merely applies the Citizens' Directive to the case. However, the Court does so without the admission of abandoning that doctrine, and without a specific reasoning on that subject: it is as if the Court is presenting a mere exception to previous case-law.

III. The evolution of the case-law: the UK child benefit or child tax credit case

This evolution of the CJEU case-law emerged in cases dealing with 'special non-contributory cash benefits'⁵⁸, which were the benefits at issue in the *Dano*, *Alimanovic* and *García-Nieto* cases. However, it appears to be emerging as a general change in the Courts doctrine in the matter of access to

56 Case C-299/14 *García-Nieto* ECLI:EU:C:2016:114, para47, quoting Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597, para 60.

57 Case C-299/14 *García-Nieto* ECLI:EU:C:2016:114, para 48.

58 On this subject, v. T. Guerrero Padrón, 'The scope and instrumentation of the principle of equal treatment regarding social assistance benefits' (2016) I (1) e-Revista Internacional de la Protección Social 87, 89–90.

social benefits, with consequences outside of that field⁵⁹ – the *UK child benefit or child tax credit* case provides proof of this change.⁶⁰

In this case the question brought before the CJEU was the implementation of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, and not the Citizens' Directive. This Regulation lays down a series of common principles to be observed by the legislation of the Member States in that sphere so that the various national systems do not place at a disadvantage person who exercise their right of freedom of movement and of residence within the EU. One of the common principles that the Member States must observe is the principle of equality which, in the field of social security, takes the form of prohibiting any discrimination on grounds of nationality.

The UK was requiring a person claiming some social benefits (child benefit and child tax credit) to satisfy the right to reside test in order to be treated as habitually resident in that Member State. Since the Commission took the view that the UK legislation does not comply with the Regulation, because it has added a condition that does not appear in Regulation No 883/2004, it brought an action for failure to fulfil obligations against the UK. According to the Commission, that condition deprives persons

59 E.g., Case C-233/14 *Commission v the Netherlands* [financial support for travel costs awarded to national students] ECLI:EU:C:2016:396. This case is about the restricting of access to fares at preferential rates on public transport for students who pursue their studies in the Netherlands to Netherlands students who are registered with a private or public educational establishment in the Netherlands and to students from other Member States who, in the Netherlands, are economically active or have obtained the right of permanent residence.

60 For an analysis of the *UK child benefit or child tax credit* case, v., v.g., C O'Brien, 'The ECJ sacrifices EU citizenship in vain: Commission v. United Kingdom' (2016) 54 *Common Market Law Review* 209–243; *Idem*, 'A failed Faustian pact: Case C-308/14 Commission v UK and the sacrifice of EU citizenship' (2016) 4 *Quaderni costituzionali* 824–827; M D Bollo Arocena, 'Salvaguarda de las finanzas públicas, derecho de residencia y obtención de prestaciones de seguridad social en el Estado miembro de acogida. Comentario a la Sentenciadel TJUE (Sala Primera), de 14 de junio de 2016. Asunto C-308/14' (2016) 8–9 *Revista Aranzadi Unión Europea*, 95–102; NN Shuibhne, "WHAT I TELL YOU THREE TIMES IS TRUE" Lawful Residence and Equal Treatment after Dano', (2016) *Maastricht Journal of European and Comparative Law* 908–936. See also C O'Brien, 'Don't think of the children! CJEU approves automatic exclusions from family benefits in Case C-308/14 Commission v UK' in *EU Law Analysis Blog*, 16 June 2016, available at <http://eulawanalysis.blogspot.com/2016/06/dont-think-of-children-cjeu-approves.html>.

who do not meet it or cover under the social security legislation of one of the Member States, cover which that regulation is intended to ensure. The condition was, thusly, considered discriminatory and contrary to the spirit of the Regulation since it had regard only to the claimant's habitual residence.⁶¹

In response to those arguments, the UK, which relied on the *Brey* decision, maintained that the host State may lawfully require that social benefits be granted only to Union citizens who fulfil the conditions for possessing a right to reside in its territory, conditions which are, essentially, laid down in the Citizens' Directive. Furthermore, while acknowledging that the conditions conferring entitlement to the social benefits at issue are more easily satisfied by its own nationals (as they have, by definition, a right of residence), the UK maintains that in each case the condition requiring a right of residence is a proportionate measure for ensuring that the benefits are paid to persons sufficiently integrated in the UK.⁶²

In its decision, the Court found, first of all, that the benefits at issue were social security benefits and therefore fell within the Regulation's scope.⁶³ However, the CJEU, following the Opinion of the AG Cruz Villalón,⁶⁴ rejected the Commission's arguments, and concluded that the action was to be dismissed in its entirety.

Firstly, the CJEU addressed the Commission's main argument that the UK legislation imposes a condition supplementing that of habitual residence contained in the Regulation. The Court pointed out that the criterion of habitual residence, within the meaning of the Regulation, was not a condition that must be met to qualify for benefits, but a 'conflict rule' which was intended to prevent the concurrent application of a number of national legislative systems and to ensure that persons who have exercised their right of freedom of movement were not left without cover. According to the Court, the Regulation does not set up a common scheme of social security, but allows different national social security schemes to exist. It thus does not lay down the conditions creating the right to benefits, because it is in principle for the legislation of each Member State to lay down those conditions.⁶⁵

61 Case C-308/14 *Commission v United Kingdom* ECLI:EU:C:2016:436, para 28.

62 Case C-308/14 *Commission v United Kingdom* ECLI:EU:C:2016:436, paras 38–39.

63 Case C-308/14 *Commission v United Kingdom* ECLI:EU:C:2016:436, para 61.

64 V. Case C-308/14 *Commission v United Kingdom* [UK child benefit or child tax credit case] ECLI:EU:C:2015:666, Opinion of AG Cruz Villalón.

65 Case C-308/14 *Commission v United Kingdom* ECLI:EU:C:2016:436, paras 62–67.

This approach to Regulation No 883/2004 seems to ignore that it also establishes some aspects of eligibility, and the principle of equal treatment between persons subject to the Regulation (Article 4). This means that the Regulation does establish some substantive general rules applicable to the different national social security schemes – which could be of importance in this case.⁶⁶

The Court also quotes as the basis for this assessment the *Brey* and the *Dano* cases, stating that ‘it is clear from the Court’s case-law that there is nothing to prevent, in principle, the grant of social benefits to Union citizens who are not economically active being made subject to the requirement that those citizens fulfil the conditions for possessing a right to reside lawfully in the host Member State’.⁶⁷ However, those cases address special non-contributory benefits, whereas the social benefits at issue in this case are ‘social security benefits’, as referred to in Article 3(1)(j) of Regulation No 883/2004, read in conjunction with Article 1(z) thereof.⁶⁸ Hence, despite the fact that the Court’s analysis is consistent with the recent trend in case-law (i.e. *Dano*) which has found that Member States retain the competence to refuse to grant social assistance benefits to EU migrants who are not exercising Treaty rights within a host Member State, it extends this approach to family benefits.

In both the *Brey* and the *Dano* cases, the classification of the benefits at issue in the proceedings as ‘special non-contributory cash benefits’ is analysed and bears consequences for the regime applicable⁶⁹. In *Brey*, the Court said that ‘the nature of that benefit, which is the subject of the referring court’s question, must be examined in the context of analysing this issue’ – which was the ‘right to reside’.⁷⁰ However, in the *UK child benefit or child tax credit* case, the Court does not concern itself with this classification – despite the fact that family benefits, as the ones at issue in the case, are social security bene-

66 O’Brien, ‘The ECJ sacrifices EU citizenship in vain’, 209–243; *Idem*, ‘A failed Faustian pact’ 824–827.

67 Case C-308/14 *Commission v United Kingdom* ECLI:EU:C:2016:436, para 68.

68 Case C-308/14 *Commission v United Kingdom* ECLI:EU:C:2016:436, para 61.

69 Case C-140/12 *Brey* ECLI:EU:C:2013:565, paras 33–45, and Case C-333/13 *Dano* ECLI:EU:C:2014:2358, paras 46–55.

70 Case C-140/12 *Brey* ECLI:EU:C:2013:565, para 30. V. ‘whether a Member State may refuse to grant the compensatory supplement to nationals of other Member States on the grounds that (...) they do not, despite having been issued with a certificate of residence, meet the necessary requirements for obtaining the legal right to reside on the territory of that Member State for a period of longer than three months, since, in order to obtain that right, the person concerned must have sufficient resources not to apply for, inter alia, the compensatory supplement.’

fits and do not fall within the ‘social assistance’ exclusions of Citizens’ Directive, as is the case of ‘special non-contributory cash benefits’. One can also see that there is some incongruity in applying a limitation to the equal treatment provision in Regulation No 883/2004 which was developed within the context of the Citizens’ Directive, which has a specific scope (the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States), to a different legal act, the Regulation No 883/2004, which has a different scope. In fact, the personal scope of the Regulation is broader, including anyone who are or have been subject to the legislation of one or more Member States on matters of social security, independently of the exercise of the right to move, and including non-economically active persons⁷¹. The scope of the benefits included in both the Citizens’ Directive and Regulation No 883/2004 is also different.⁷²

The *Brey* test is apparently extended to all benefits, irrespective of their classification allowing for the application of the discriminatory ‘right to reside’ condition without any specific provision in the Treaty or secondary law excluding Union citizens from equal treatment in this case.

Alternatively, the Commission contended that the introduction of the right to reside test in the national legislation inevitably results in direct, or at least indirect, discrimination, prohibited by Article 4 of Regulation No 883/2004. The CJEU admitted that the condition requiring a right to reside in the UK gave rise to unequal treatment because UK nationals could satisfy it more easily than nationals of the other Member States, which constituted indirect discrimination.⁷³ In order for this discrimination to be justified, according to the Court’s case law, it must be appropriate for securing the attainment of a legitimate objective and cannot go beyond what is necessary to attain that objective. The Court states that 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 grant could have consequences for the overall level of assistance which may be accorded by that State’.⁷⁴ In this regard, the Court found that the UK authorities verified whether residence is lawful in accordance with the conditions laid down in the Citizens’ Directive. Thus, this verification was considered to

71 V. Recital 42 of the Regulation No 883/2004.

72 O’Brien, ‘The ECJ sacrifices EU citizenship in vain’ 209–243; *Id*, ‘A failed Faustian pact’ 824–827.

73 Case C-308/14 *Commission v United Kingdom* ECLI:EU:C:2016:436, paras 76–78.

74 Case C-308/14 *Commission v United Kingdom* ECLI:EU:C:2016:436, para 80.

not be carried out systematically by the UK authorities for each claim, but only in the event of doubt. It followed that the condition does not go beyond what is necessary to attain the legitimate objective pursued by the UK, namely the need to protect its finances.

Furthermore, the Court considered that the Commission did not provide evidence or arguments showing that the measure does not satisfy the conditions of proportionality, that it is not appropriate for securing the attainment of the objective of protecting public finances or that it goes beyond what is necessary to attain that objective,⁷⁵ and concluded that the UK can require recipients of child benefit and child tax credit to have a right to reside in the UK.

One can say, however, that this reasoning is moot, because the condition is directly discriminatory. According to the *Grzelczyk* decision, the application of a condition to legally resident non-nationals when no such condition applies to nationals of the host Member State was recognized as being directly discriminatory and violating the provisions of EU citizenship. In the *UK child benefit or child tax credit* case the legislation at hand whilst the right to reside in the UK – which was conditional to be entitled to certain social benefits – is conferred on all UK nationals, in the circumstances prescribed in the Citizens' Directive, nationals of other Member States are not considered to have a right to reside. This means, to all effect, that only non-national EU citizens residing in the UK must provide evidence of a right to reside.⁷⁶

Besides that, the Court accepted as legitimate the UK's Government justification of the '*need to protect the finances of the host Member State*' without requiring evidence of a threat to public finances posed by the granting of social benefits to persons from other Member States who are not economically active. The Court did not question if the condition imposed was in itself appropriate or proportional, only the verification procedures.

Finally, in cases where discrimination was found to result from a legal regime, the burden to demonstrate that their actions were justified lied usually with the potential infringer. It was up to the Member State, not the Commission, to prove that they are pursuing a legitimate aim, that the means are proportionate and appropriate, and do not go beyond what is necessary.⁷⁷

75 Case C-308/14 *Commission v United Kingdom* ECLI:EU:C:2016:436, para 85.

76 O'Brien, 'The ECJ sacrifices EU citizenship in vain' 209–243; *Id.*, 'A failed Faustian pact' 824–827.

77 V., v.g., Case C-237/94 *O'Flynn* ECLI:EU:C:1996:206, paras 15 and 26, and Case C-379/87 *Groener* ECLI:EU:C:1989:599, paras 15–18.

The *UK child benefit or child tax credit* case will probably never be considered one of the greatest decisions of the CJEU.⁷⁸ The Court does not give full weight, in its reasoning, to Article 18 TFEU or Article 4 of Regulation 883/2004, the appropriateness and proportionality of the right to reside test (even in the context of *Brey*), or the consequences to EU citizenship. It was broadly criticised by legal experts⁷⁹ and, despite its timing, appears to have failed to convince a substantial number of UK voters to vote to remain in the EU. It can be seen as deeply connected with the Brexit procedure and with the discussion on the ‘financial effects’ of ‘benefit tourism’ – representing a further step in the road started with the *Dano/Alimanovic* case law which can have widespread ramifications on the social rights of EU citizens and the freedom to move.

IV. *The evolution of the case-law after the UK child benefit or child tax credit case*

In the *Gusa* case⁸⁰ the Court decided on the status of self-employed non-national EU citizens who became involuntary unemployed, namely if they maintain their status if they have worked for more than a year in their host

78 J Paju, ‘On the Lack of Legal Reasoning in Case C-308/14, European Commission v United Kingdom’ (2019) 48(1) *Industrial LawJournal*, 117–136.

79 O’Brien, ‘The ECJ sacrifices EU citizenship in vain’ 209–243; *Id*, ‘A failed Faustian pact’ 824–827.

80 Case C-442/16 *Gusa* ECLI:EU:C:2017:1004. The case concerned Mr Gusa, a Romanian national who moved to Ireland in October 2007. From October 2008 until October 2012, he worked as a self-employed plasterer and, on that basis, paid taxes in Ireland, as well as pay-related social insurance. In October 2012, due to an absence of work caused by the economic downturn in Ireland, he had to cease work and register as a jobseeker and applied for a jobseeker’s allowance in November 2014. His application for jobseeker’s allowance was refused on the basis that the provision for retaining worker status under Article 7(3)(b) of Directive 2004/38 only applied to employed persons and excludes those who have worked as self-employed persons. According to the Irish authorities, Mr Gusa no longer had a right to reside in Ireland because he had ceased his activities as a ‘self-employed’ person and could therefore not rely on the same protection awarded to regularly ‘employed’ persons on the basis of Article 7(3)(b) of the Citizens’ Directive. The right to retain worker status after having worked for more than one year – granting the right to reside and equal treatment –, as interpreted by the Irish authorities was reserved exclusively for EU citizens working under an employment contract.

Member State, thereby retaining a right to reside and access to social benefits.

Article 7(3) of the Citizens Directive addresses both workers and self-employed persons when granting the right to retain their status in various circumstances. This includes the situation 'when he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job seeker with the relevant employment office' (Article 7(3)(b) of the Citizens' Directive). The question was, therefore, whether the phrase '*after having been employed*' only applied to employed persons and excludes those who have worked as self-employed persons.⁸¹

The Court provides a broad interpretation of '*involuntary unemployment*', stating that this should not be limited to a dismissal of an employee, but also refers to a situation in which the occupational activity – whether employed or self-employed – has ceased 'due to an absence of work for reasons beyond the control of the person concerned, such as an economic recession'.⁸² The CJEU continues, stating that, although the phrase 'after having been employed' was used in the English language version of Article 7(3)(b), other language versions were formulated in more neutral terms, relating to a person who had been in an 'occupational activity'; and that the Directive drew a distinction between economically active citizens and inactive citizens and students (Article 7(1) but it did not draw a distinction between '*workers and self-employed persons*'. The structure of Article 7(3) is meant to grant both categories of persons the right to retain their status in the four listed situations.⁸³ A different interpretation would run counter to the Directive's objective to remedy the '*piecemeal approach*' that characterized the earlier legislation and would introduce an unjustified difference in the treatment between employed and self-employed persons.⁸⁴

In this case, then, the Court did decide in favour of a broader interpretation of the Citizens' Directive than the Member States' in question proposed, which can be seen as opposed to the *Dano*, *Alimanovic*, and *Garcia-Nieto* cases. However, the judgment is still in line with this previous case law.⁸⁵ The Court once again emphasises the importance of economic activity, stating that the '*difference in treatment*' in this case '*would be particularly*

81 Case C-442/16 *Gusa* ECLI:EU:C:2017:1004, paras 26–29.

82 Case C-442/16 *Gusa* ECLI:EU:C:2017:1004, para 31.

83 Case C-442/16 *Gusa* ECLI:EU:C:2017:1004, paras. 32–38.

84 Case C-442/16 *Gusa* ECLI:EU:C:2017:1004, paras. 41–44.

85 AG Wathelet expressly rejected a connection between the cases stating that whereas the *Dano*, *Alimanovic*, and *Garcia-Nieto* cases "were primarily concerned not with-

unjustified in so far as it would lead to a person who has been self-employed for more than one year in the host Member State, and who has contributed to that Member State's social security and tax system by paying taxes, rates and other charges on his income, being treated in the same way as a first time jobseeker in that Member State who has never carried on an economic activity in that State and has never contributed to that system'.⁸⁶ The question here is, once again, the economic status of the citizens and, specially, if they 'earned' their social rights by paying their way into their host welfare system.⁸⁷ No reference to Union citizenship as a 'fundamental status' is made.

In the following year the Court decided a case on the ability of accession State nationals to access social welfare rights during the accession period established in the 2003 Act of Accession⁸⁸ – it was the *Prefeta* case.⁸⁹ The Court held that Chapter 2 of Annex XII to the referred Act had to be interpreted as permitting, during the transitional period, the United Kingdom to exclude a Polish national such as Mr *Prefeta* from the benefits of Article

the issue of the right of residence but with the specific question of the right to receive social benefits in the host State", in the *Gusa* case "the question referred to the Court relates first and foremost to the legality of residence". Case C-442/16 *Gusa* ECLI:EU:C:2017:607, Opinion of AG Wathelet, paras. 54–56.

86 Case C-442/16 *Gusa* ECLI:EU:C:2017:1004, para 44.

87 D Kramer, 'A Right to Reside for the Unemployed Self-Employed: The Case *Gusa* (C-442/16)' in europeanlawblog.eu/2018/01/10/a-right-to-reside-for-the-unemployed-self-employed-the-case-gusa-c-44216/. V. also J-Y Carlier / G Renaudière, 'Libre circulation des personnes dans l'Union européenne' (2018) *Journal de droit européen* 141–151.

88 The Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236).

89 Case C-618/16 *Prefeta* ECLI:EU:C:2018:719. Rafal *Prefeta* is a Polish national who was resident and employed in the United Kingdom during the transitional period, and the extension to that period, following the accession of Poland to the EU. He was legally required under domestic transitional provisions made under the Accession Treaty to register his employment. Under the 2003 Act of Accession, Member States were entitled to restrict access to rights under Articles 1–6 of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1) to Polish workers who had not been admitted to the labour market for 12 months. Mr *Prefeta* completed more than 12 months' employment, but only approximately two months of it were registered. After he was injured at work and became involuntarily unemployed, the question arose whether he could rely on retained rights under Article 7(3) of the Citizens Directive to access social advantages under Article 7(2) of the Regulation.

7(3) of the Citizens Directive when that person did not satisfy the requirement imposed by national law of having completed an uninterrupted 12-month period of registered work in the UK. The UK's exclusion of such individuals from the benefits of Article 7(3) of the Citizens Directive was, thus, considered lawful.⁹⁰ The Court, in this case, affirmed that the retention of the right of residence '*covers situations in which the EU citizen's re-entry on the labour market of the host Member State is foreseeable within a reasonable period*'.⁹¹ The connexion between the right of residence and economic status of the person is once again central to the case.

Finally, the CJEU ruling in *Tarola*,⁹² responding to a preliminary reference from the Irish Court of Appeal, interprets Article 7(3)(c) of the Citizens Directive. The question was, in the words of the AG Szpunar: '*Where a citizen of the Union exercises his right of free movement and residence in accordance with [the Citizens Directive] and works in a Member State other than his own for a period of two weeks, and becomes involuntarily unemployed, does that citizen retain the status of worker and, therefore, the corresponding right of residence?*'⁹³

Article 7(3)(c) of the Citizens Directive provides for the status of worker, whether employed or self-employed, to be retained, for no less than six months, in two situations: *i*) '*the worker was employed under a fixed-term employment contract of less than a year and became involuntarily unemployed at the end of that contract*'; or *ii*) '*after having become involuntarily unemployed during the first twelve months and has registered as a job seeker with the relevant employment office*'. The Court considered that this

90 S Cazet, 'Le retour du „plombier polonais“: l'acte d'adhésion de 2003 permet bien au Royaume-Uni d'imposer des restrictions aux travailleurs polonais', (2018) 11 Europe 17–18.

91 Case C-618/16 *Prefeta* ECLI:EU:C:2018:719, para 39.

92 Case C-483/17 *Tarola* ECLI:EU:C:2019:309. Mr. Tarola is a Romanian national who first arrived in Ireland in May 2007 where he was employed for periods of time in 2007, 2013 and 2014. He also worked as a self-employed subcontractor during a period of time in 2014. In 2013 and 2014 he applied to the Irish Minister for Social Protection for jobseeker's and supplementary welfare allowances. Both applications were refused on the ground that he had failed to produce evidence of his habitual residence in Ireland or means of support. On 6 November 2014, Mr. Tarola submitted a second application for jobseeker's allowance, which was again refused on the grounds that, since coming to Ireland, he had not worked for more than a year and the evidence produced was insufficient to establish Ireland as his habitual residence. Mr. Tarola argued that he had the right to reside in Ireland for the six months following a two-week period of employment in July 2014 under Article 7(3)(c) of the Citizens Directive.

93 Case C-483/17 *Tarola* ECLI:EU:C:2018:919, Opinion of AG Szpunar, para 1.

‘provision does not specify whether it applies to employed or self-employed persons or to both categories of worker or whether it concerns fixed-term contracts of more than a year, contracts of indefinite duration or any type of contract or activity, or, lastly, whether the 12 months to which it refers relate to the period of residence or the period of employment of the worker concerned in the host Member State’.⁹⁴

Hence, in interpreting that provision, the CJEU resorted ‘not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part’, as well as its ‘origins’.⁹⁵

With regard to context, the Court analysed Article 7 and concluded that while the Citizens Directive ‘*establishes a gradation with regard to the duration of the right of all Union citizens to reside in the host Member State, by providing, between the right of residence for up to three months referred to in Article 6 thereof and the right of permanent residence referred to in Article 16 thereof, for a right of residence for more than three months, which is governed by the provisions of Article 7*’ (3) of this provision also establishes a gradation with regard to the conditions for retaining their status of worker and, consequently, their right to reside in the host Member State. That gradation is made by reference to,

‘first, the reason for the citizen’s inability to work, in the case in point depending on whether he is unable to work because of illness or accident, involuntary unemployment or vocational training, and, second, the initial duration of his period of activity in the host Member State, that is, depending on whether that is longer or shorter than one year’.

An EU citizen ‘*who has pursued an activity in an employed or self-employed capacity in the host Member State for a period of less than one year retains his status of worker only for a period of time which that Member State may determine, provided it is no less than six months*’.⁹⁶

The Court’s conclusion was that the provision allows retention of the status for workers ‘in all situations in which a worker has been obliged, for reasons beyond his control, to stop working in the host Member State be-

94 Case C-483/17*Tarola* ECLI:EU:C:2019:309, para 35.

95 Case C-483/17*Tarola* ECLI:EU:C:2019:309, para 37.

96 Case C-483/17*Tarola* ECLI:EU:C:2019:309, paras 41–43, 45, quoting Case C-483/17*Tarola* ECLI:EU:C:2018:919, Opinion of AG Szpunar, para 33.

fore one year has elapsed, regardless of the nature of the activity or the type of employment contract entered into for that purpose'.⁹⁷

This interpretation was considered consistent with '*the principal objective pursued by*' the Citizens Directive: '*to strengthen the right of free movement and residence of all Union citizens, and with the objective specifically pursued by Article 7(3) thereof, which is to safeguard, by the retention of the status of worker, the right of residence of persons who have ceased their occupational activity because of an absence of work due to circumstances beyond their control*',⁹⁸ while, at the same time, not undermining '*the achievement of one of the other objectives pursued (...) striking a fair balance between safeguarding the free movement of workers, on the one hand, and ensuring that the social security systems of the host Member State are not placed under an unreasonable burden, on the other*'.⁹⁹

In terms of origins, the Court examined the *travaux préparatoires* of the Citizens Directive, concluding that the '*intention of the EU legislature to extend the benefit of retention of the status of worker, limited, as the case may be, to six months, to persons in involuntary unemployment after having worked for less than a year otherwise than under a fixed-term employment contract*'.¹⁰⁰

In the final part of the decision, the CJEU states that '*all Union citizens residing on the basis of that directive in the territory of the host Member State, including those retaining their status of worker or self-employed person under Article 7(3)(c) of that directive, enjoy equal treatment with the nationals of that Member State within the scope of the FEU Treaty, subject to such specific provisions as are expressly provided for in the Treaty and secondary law*'. However, following the Opinion of the AG, the Court also states that '*where national law excludes persons who have worked in an employed or self-employed capacity only for a short period of time from the entitlement to social benefits, that exclusion applies in the same way to workers from other Member States who have exercised their right of free movement*'.¹⁰¹

The Court, in its last *dictum*, draws a boundary between right to equal treatment, which is derived from the right to residence, and entitlement to social assistance. The fact that a non-national EU citizen retains the status

97 Case C-483/17*Tarola* ECLI:EU:C:2019:309, para 48.

98 Case C-483/17*Tarola* ECLI:EU:C:2019:309, para 49, quoting Case C-67/14 *Alimanovic* EU:C:2015:597, para 60; Case C-299/14 *García-Nieto* EU:C:2016:114, para 47; Case C-442/16 *Gusa* EU:C:2017:1004, para 42.

99 Case C-483/17*Tarola* ECLI:EU:C:2019:309, para 50.

100 Case C-483/17*Tarola* ECLI:EU:C:2019:309, para 53.

101 Case C-483/17*Tarola* ECLI:EU:C:2019:309, paras 55–56, quoting Case C-483/17 *Tarola* ECLI:EU:C:2018:919, Opinion of AG Szpunar, para 55.

of worker, and the corresponding right to reside, means that he/she should be treated by the host State as a national. Member States remain free to exclude from benefits, the workers that have worked for less time, as long as the scope of the exclusion encompasses national as well as non-national EU citizens. As in the *Gusa* case, despite the fact that the outcome appears to be favourable to the worker's access to benefits, there is an underlying concern with the objective to ensure that the Member States' social security and social assistance systems are not placed under an undue burden.¹⁰² Once again, no reference to Union citizenship as a '*fundamental status*' is made.

V. Critical Analysis

The *Dano*, *Alimanovic*, *García-Nieto*, and *UK child benefit or child tax credit* string of decisions seems to represent a significant change in the CJEU earlier jurisprudence on non-national EU citizens' access to social benefits in host Member States. This seems not to have changed in more recent cases *Gusa*, *Prefeta*, and *Tarola*.

In the pre-*Dano* case-law, the reasoning of judgments on Union citizenship had their starting point in the Treaty, bore in mind the proportionality principle and imposed an individual assessment of the person at issue. The Citizens' Directive (and other secondary legislation) was interpreted in that light. This changed with the *Dano-Alimanovic* methodology, which is based on the assertion that '*a Union citizen may claim equal treatment with nationals of the host Member State under Article 24(1) of Directive 2004/38 only if his residence in the territory of that State complies with the conditions of that directive*'.¹⁰³ Hence, in the post-*Dano* case-law, the CJEU appears to have replaced its previous focus on the interpretation of the Treaties, with a literal (even an *ad pedem litterae*) interpretation of the Citizens' Directive.

102 F Strumia, 'Unemployment, residence rights, social benefits at three crossroads in the Tarola ruling', in *EU Law Analysis Blog*, 13 April 2019, available at eulaw-analysis.blogspot.com/2019/04/unemployment-residence-rights-social.html.

103 Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597, para 49. See A. Farahat, 'Solidarität und Inklusion. Umstrittene Dimensionen der Unionsbürgerschaft' (2016) 45 *Die Öffentliche Verwaltung* 45–55; C. O'Brien, 'Civis capitalist sum: Class as the new guiding principle of EU free movement rights' (2016) 53 *Common Market Law Review* 937, 943 ff, 961 ff., 973 ff.; E Spaventa, 'Earned Citizenship: Understanding Union Citizenship Through Its Scope', in D Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017); D Thym, 'The Elusive limits of solidarity' 25.

The previous focus on strengthening the right of free movement and residence of all EU citizens as the main objective of the Citizen Directive has been replaced by the Court with the need to strike 'a fair balance between safeguarding the free movement of workers, on the one hand, and ensuring that the social security systems of the host Member State are not placed under an unreasonable burden on the other'.¹⁰⁴

The change seems to have its roots in the discussions on the power of Member States to limit the possibility of non-national EU citizens to claim benefits in a host Member State, especially in the case of the non-economically active citizens, which has also framed the Brexit debate.¹⁰⁵ The discussion is posed in terms of 'benefit tourism' and presented as a phenomenon linked to east-west migration within the EU, which is also read as the movement of poor EU citizens to the more affluent Member States.¹⁰⁶ It can also be seen as the vindication of the push back of Member States against the CJEU's initially generous interpretation of EU citizenship rights in the field of social benefits. The CJEU has entered was has been interpreted as a 'reactionary' phase in its citizenship case law in the context of the European economic crisis in the late 2000s.¹⁰⁷ The explanation for that can be found on the responsiveness of the Judges to the political preferences of Member State governments but also on the broader EU political context, with this issue having become increasingly politicized, public opinion and political concerns are reflected in the Court's case law.¹⁰⁸

104 Case C-483/17 *Tarola* ECLI:EU:C:2019:309, para 50.

105 V., v.g., G Davies, 'Migrant Union Citizens and Social Assistance: Trying to Be Reasonable About Self-Sufficiency' (2016) 2 *Research Paper in Law*, European Legal Studies, College of Europe; A Hofmann, 'Resistance against the Court of Justice of the European Union' (2018) 14 *International Journal of Law in Context*, 258–274. On the responsiveness of the CJEU to criticism of its case-law by academics and also of media and governments as a part of a dialogic character of jurisprudence, v. I Pernice, 'CJEU Jurisprudence and the Audience: Making Law in a Public Discourse – Ten Years after CJEU Case C-144/04 *Mangold v Helm*', in J Czuczai and F Naert (eds) *The EU as a Global Actor – Bridging Legal Theory and Practice, Liber Amicorum in honour of Ricardo Gosalbo Bono* (Leiden, Brill | Nijhoff, 2017), 111–144.

106 S Mantu/P Minderhoud, 'EU citizenship and social solidarity' (2017) 24(5) *Maas-tricht Journal of European and Comparative Law*, 703–720, 719.

107 A Hofmann, 'Resistance against the Court of Justice of the European Union' 269; E. Spaventa, 'Earned Citizenship'.

108 M Blauberger/A Heindlmaier/D Kramer/ DS Martinsen/JMS Thierry/S Angelika/B Werner, 'ECJ judges read the morning papers. Explaining the turn around of European citizenship jurisprudence', (2018) 25 (10) *Journal of European Public Policy*, 1422–1441.

However, the change – and, especially, the *UK child benefit or child tax credit* case – seems to have been in vain in terms of influencing the Brexit referendum outcome.¹⁰⁹

Despite the apparent change in the approach of the Court to such cases, some deny its existence. In his Opinion in the *Gusa* case, AG Wathelet states that there was no ‘*about-turn in the approach to understanding Directive 2004/38*’ in the *Dano* case. According to him, the importance that is attached in that case ‘*to the secondary objective pursued by Directive 2004/38*’, is due to ‘*the subject matter of the request for a preliminary ruling which had been submitted to it*’. After all, the cases which gave rise to the three judgments cited in the previous point in this Opinion [*Dano, Alimanovic, García-Nieto*] were primarily concerned not with the issue of the right of residence but with the specific question of the right to receive social benefits in the host State. This was therefore a question which had arisen at a point in time subsequent to the exercise of freedom of movement but was nonetheless indissociable from the legality of residence.¹¹⁰ However, this approach by the AG seems somewhat contradictory because if the cases are different, there would be no need to sustain that there was any change in the case-law. At the same time, if one admits that the question of the right to receive social benefits in the host State was, in those cases, ‘*indissociable from the legality of residence*’, one must see that there is a connection with the previous line of judicial reasoning and a new importance that is being given to ‘*preventing Union citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system of the host Member State*’.¹¹¹

Others sustain that the explanation for the change in case-law lies in the changing characteristics of the litigants themselves, that recent claims for social assistance are based on less meritorious facts.¹¹² However, that conclusion does not seem to hold if the same methodology is applied in similar cases before and after the perceived change in the jurisprudence of the CJEU – as is the case with the *Commission v Austria*¹¹³ and *Commission v the*

109 O’Brien, ‘The ECJ sacrifices EU citizenship in vain’, 209–243.

110 Case C-442/16 *Gusa* ECLI:EU:C:2017:607, Opinion of AG Wathelet, paras. 54–56.

111 Case C-333/13 *Dano* ECLI:EU:C:2014:2358, para 74.

112 G Davies, ‘Has the Court changed, or have the cases? The deservingness of litigants as an element in Court of Justice citizenship adjudication’ (2018) 25 (10) *Journal of European Public Policy*, 1442–1460.

113 Case C-75/11 *Commission v Austria* [reduced fares on public transport granted to students] ECLI:EU:C:2012:605.

*Netherlands*¹¹⁴ cases. Both these judgements deal with financial support for travel costs awarded to students and had different results, which means that the same benefit with a similar hypothetical user base was awarded a different legal treatment in the space of a few years. To claim that the Court has been consistent and there has been merely a change in the characteristics of the claimants does not seem to be supported by sufficient evidence.¹¹⁵

Finally, it has also been sustained that *Dano* and *Alimanovic* are not revolutionary cases but, instead, the result of a natural evolution of the case law following the introduction of the Citizens Directive and that the reasoning and outcomes of the decisions, despite some minor details are on the whole convincing.¹¹⁶ This is more a criticism of the presentation of the cases as entirely surprising, than of the fact that such evolution occurred. By presenting the CJEU as merely accepting the political choices made by the EU legislature, and applying such rules as laid down in secondary legislation, it forgets the place of the Court as the ‘*Constitutional Court*’ of the EU, in charge of checking the legality of such choices.

Despite this position, there is empirical evidence that the recent case law of the CJEU in *Brey*, *Dano*, *Alimanovic*, *Garcia-Nieto* and *UK child benefit or child tax credit* cases has drastically changed the landscape concerning access to social assistance benefits for inactive EU citizens.¹¹⁷

There is also an abandonment of the *Brey* decision in the *Dano* case law. In this decision the Court found that EU law precluded the automatic barring of economically inactive persons from entitlement to benefits without assessment of their individual circumstances, including the duration of residence, amount of income, amount and duration of benefit claimed and other relevant circumstances. A proportionality approach was adopted, which allowed for some differentiation between the possible wide range of claims of varying degrees of reasonableness. In the mentioned recent cases no proportionality test, case-by-case assessment, or individual assessment of

114 Case C-233/14 *Commission v the Netherlands* [financial support for travel costs awarded to national students] ECLI:EU:C:2016:396.

115 A Hoogenboom, ‘CJEU case law on EU citizenship: normatively consistent? Unlikely! – A response to Davies’ ‘Has the Court changed, or have the cases?’, in *EU Law Analysis Blog*, 13 November 2018, at eulawanalysis.blogspot.com/2018/11/cjeu-case-law-on-eu-citizenship.html.

116 D Carter / M Jesse, ‘The “Dano Evolution”: Assessing Legal Integration and Access to Social Benefits for EU Citizens’ (2018) 3(3) *European Papers*, 1179–1208.

117 P Minderhoud, ‘Social Assistance for Economically Inactive EU Citizens in the Member States’ (2018) 3 *Nijmegen Migration Law Working Papers Series*, 28.

personal circumstances was made. This is especially notable in the *Alimanovic* case, where a bold contradiction of the *Brey* test can be found. The Court did not use the *Grzelczyk* characterisation of the European citizenship as ‘*the fundamental status of nationals*’; did not engage with the doctrine of EU citizenship; and made no reference to Article 20 TEU. The Citizens’ Directive seems to be viewed by the CJEU as already creating a system of individual assessment taking into consideration various factors characterising the individual situation. The Court also made no mention to the fact that Ms. Alimanovic is the primary carer of minor children, in contradiction with previous case law.¹¹⁸

The *UK child benefit or child tax credit* case provides proof that this evolution of the CJEU case law is emerging as a general trend.¹¹⁹ In this decision, the CJEU did not engage with the *Brey* test, seemingly accepting that automatic exclusion was lawful: ‘*As the United Kingdom submitted at the hearing, legality of the claimant’s residence in its territory is a substantive condition which economically inactive persons must meet in order to be eligible for the social benefits at issue*’.¹²⁰ This is especially striking because it seems to represent a departure from the proportionality test usually associated with the ‘real link’ case law. *Martinez Sala, Grzelczyk, Trojani, Bidar* and *Förster*, all cited in the *Brey* case,¹²¹ precluded the use of automatic exclusion rules, requiring some assessment of circumstances of the case.¹²² It is impressive that the *UK child benefit or child tax credit* decision at the same time is based on and directly contradicts the *Brey* decision.

There are positive aspects to this new line of reasoning by the Court. The *Dano/Alimanovic* case law represents a noteworthy shift of emphasis, accentuating the protection of Member States’ interests and a new-found respect to national legislatures.¹²³ Member States should be free to determine the material conditions and levels of benefit of their social security systems as part of the non-harmonisation principle¹²⁴. It also bears in mind

118 Case C-310/08 *Ibrahim* ECLI:EU:C:2010:80, and Case C-480/08 *Teixeira* ECLI:EU:C:2010:83.

119 Paju, ‘On the Lack of Legal Reasoning in Case C-308/14, European Commission v United Kingdom’, 117–136; Carter / Jesse, ‘The “Dano Evolution”’, 1205.

120 Case C-308/14 *Commission v United Kingdom* ECLI:EU:C:2016:436, para 72.

121 Case C-140/12 *Brey* ECLI:EU:C:2013:565, para 44.

122 O’Brien, ‘The ECJ sacrifices EU citizenship in vain’ 209–243; *Idem*, ‘A failed Faustian pact’ 824–827.

123 D Thym, ‘The Elusive limits of solidarity’ 25.

124 F Pennings, EU citizenship: access to social benefits in other EU member states, *International Journal of Comparative Labour Law and Industrial Relations* 28 (2012), 307–334.

the financial soundness and sustainability of the Member State's social security systems, which are commonly based on principles of solidarity within national borders. The previous case-law was criticised for undermining the national social policy compromises and imposing unsustainable burdens on the welfare systems of Member States.¹²⁵

Moreover, the Court refuses to read the Citizens' Directive extensively or creatively, respecting the will of the EU legislature. This is extremely important: it should be the democratically legitimised EU legislator rather than the CJEU to take the main responsibility in balancing the individual rights of EU citizens against the financial-political interests of the Member States to maintain social assistance systems.¹²⁶ The new line of case law also establishes clear criteria to access to benefits, providing legal certainty. The Member States and the EU citizens can now trust that the Court will follow a literal interpretation of the Directive instead of performing an individual assessment test of the case, which lead to results considered unpredictable and uncertain.¹²⁷

Despite these positive aspects, formal and substantive criticisms can be made of this new trend in the CJEU case-law. As for the formal criticism, one can challenge the method used by the Court in overruling its previous judgments. Usually, this is done by means of evolutive interpretation. Arguably, in this case we have an instance of evolution of interpretation which lowers rather than heightens human rights protection. Although this is not unprecedented in the Court's history, one can argue that the Court needs serious reasons to depart from its own case-law not only in cases of 'progressive' evolution but especially in opposite cases. On more than one occasion the Court itself has pointed out that evolutive interpretation should be justified by particularly strong reasons. However, the Court changed its methodology without admitting the reversal of the earli-

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- 125 V., v.g. K Hailbronner, 'Union citizens and access to social benefits' (2005) 42 *Common Market Law Review*, p. 1245; AJ Menéndez, 'European Citizenship after Martinez Sala and Baumbast: Has European Law Become More Human but Less Social?' in M Piores Maduro / L Azoulai (eds), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford, Hart, 2010) p 391; M Blauberger/ SK Schmidt, 'Welfare migration? Free movement of EU citizens and access to social benefits' (2014) 1 *Research and Politics*, 1–7.
- 126 AP van der Mei, 'Overview of Recent Cases before the Court of Justice of the European Union (July-December 2015)' 77.
- 127 S.O'leary, 'Developing an Ever Closer Union Between the Peoples of Europe? A reappraisal of the case-law of the Court of Justice on the free movement of persons and EU citizenship' (2008) *Yearbook of European Law* 182.

er doctrine and once again without a specific reasoning justifying the change.

Besides, the new case law states that, in terms of access to social assistance, EU citizens can only claim equal treatment if their residence in the territory of the host State complies with the conditions to lawfully reside there, established in the Citizens Directive. This focus on the provisions of the Citizens' Directive means that the claim of equal treatment, which is established in the Treaties, is dependent on conditions set in secondary law. Restrictions to the right to reside established in Article 21 TFEU can also result from secondary legislation. In these cases, fundamental freedoms, recognised in the Treaties, are restricted by secondary legislation without the Court's reviewing the conformity of these restrictions with the Treaties – which are the parameters of the EU's rule of law – for instance, through a proportionality test. The right to equal treatment between European citizens (Article 18 TFEU) can be questioned on the basis of secondary legislation without any control.

The positive aspect of the shift of emphasis of the Court with the *Dano/Alimanovic* case law, accentuating Member State interests, could represent also the abandonment of countervailing constitutional arguments that could have justified a different outcome¹²⁸. The idea of solidarity between Member States and an emphatic defence of the right to move and to reside could be examples of arguments sacrificed.

Nobody denies that the Treaties and the Citizens' Directive trust the CJUE to define and control the limits of free movement. But the Court should be careful not to ignore implications for social cohesion in the internal market and the constitutional and sociological foundations of social policy and the importance of the freedom of movement of citizens (independently of being economically active or not) to the notion of EU citizenship. The Court's approach runs the risk of downplaying the risks of this reduction, in effect, of the scope of the freedom of movement to encompass merely economically active citizens.

The assessment of individual cases, burdensome as it was, served the wider objective 'to ensure that the grant of assistance (...) [did] not become an unreasonable burden which could have consequences for the overall level of assistance'.¹²⁹ The 'exclusive focus on the Directive' is problematic 'due to the lack

128 D.Thym, 'The Elusive limits of solidarity' 25.

129 D.Thym, 'The Elusive limits of solidarity' 32.

of individualised proportionality assessments, as well as an increasing range of social benefits that can be subjected to residence tests'.¹³⁰

The change in the CJEU case-law can be especially criticised because it appears to have not been needed. The Court could have used criteria established in earlier judgments to exclude access to benefits in these cases.¹³¹

For example, in the *Dano* case, Advocate General Wathelet defended that the questions raised should be answered '*in the light of the principle of proportionality*' and of the case-law of the CJEU on the existence of a '*genuine link*' between Union citizens and the host Member State.¹³² The Advocate General refers, more specifically, to the case law on the grant of assistance to students and social benefits for job seekers, from which he infers that the entitlement of economically inactive Union citizens to social assistance benefits '*is, in general, dependent on a certain degree of integration into the host Member State*'.¹³³ Also in the *Dano* case, the Court could have resorted to '*the excessive burden to the social security system of the host State*' criteria but, instead, chose as the reason to refuse access to benefits the non-fulfilment of residence requisites established in the Citizens' Directive.¹³⁴

So, the CJEU could have made an evaluation of the national legislation in the light of the established jurisprudence, while arriving at the same conclusion (that the national legislation was compatible with the Treaties), but following a path which was coherent with its previous case law and with less erosion of the rights to move and to reside.

Additionally, the recent case law can also be criticised because of the absence of analysis of the cases in light of the EU Charter of Fundamental Rights. As was referred *supra*, the EU Charter of Fundamental Rights was deemed non-applicable in the *Dano* case. In fact, despite the clear statement, in the *Åkerberg Fransson* case, that the Charter was applicable in all

130 D Carter / M Jesse, 'The "Dano Evolution"', 1182.

131 H Verschueren, 'Preventing "Benefit Tourism" in the EU' 363–390, p. 374.

132 Case C-333/13 *Dano* ECLI:EU:C:2014:341, Opinion AG Wathelet, para 126.

133 Case C-333/13 *Dano* ECLI:EU:C:2014:341, Opinion AG Wathelet, para 127–129. The Advocate General refers to this effect to the Case C-209/03 *Bidar* ECLI:EU:C:2005:169, para 56 and 57; Case C-158/07 *Förster* ECLI:EU:C:2008:63, paras 48 and 49; Case C-138/02 *Collins* ECLI:EU:C:2004:172, para 67; Case C-22/08 and C-23/08 *Vatsouras* ECLI:EU:C:2009:344, para 38; Case C-523/11 e C-585/11 *Prinz and Seeberger* ECLI:EU:C:2013:524, para 36; and Case C-220/12 *Thiele Meneses*, ECLI:EU:C:2013:683, para 35.

134 P Jiménez Blanco, 'Derecho de residencia en la Unión Europea y turismo social' (2015) 22 *La Ley Unión Europea* 11.

situations governed by European Union law¹³⁵, in the social rights area this clarity of purpose has eluded the Court.¹³⁶

Also, the connection between fundamental rights and EU citizenship, established in decisions such as the *Rottmann*¹³⁷ or the *Ruiz Zambrano*¹³⁸ cases, has been read in a much more restrictive manner in the *Cholakova*¹³⁹ or *Ymeraga*¹⁴⁰ cases.¹⁴¹ The convergence of these tendencies with the *Dano* case-law results in a deficit of protection of non-economically active Union citizens who seek access to social benefits.

The CJEU's judgments in *Dano*, *Alimanovic*, *García-Nieto* and *UK child benefit or child tax credit* introduced a level of ambiguity at the EU citizens' right to free movement and freedom to reside.

The right of an EU citizen to reside in a Member State other than its national State is made dependent on his/her ability to support themselves and their family in order to avoid becoming an unreasonable burden on the social security system of the host State. There is an implied duty to have sufficient resources and the economically inactive citizens can apparently see their right of movement restricted. In fact, the only relevant circumstance after *Alimanovic* is the duration of economic activity – not the existence of genuine link to the Member State or the family status. The *UK child benefit or child tax credit* decision extended this reasoning to all welfare benefits. EU citizenship is, therefore, once again related with worker status. That approach is maintained in the *Gusa* and *Tarola* cases. The result is

135 Case C-617/10 *ÅkerbergFransson* ECLI:EU:C:2013:105, para 19.

136 V., v.g., Case C-265/13 *Torralbo Marcos* ECLI:EU:C:2014:187, paras 29–30, and 43; Case C-198/13 *Julian Hernández* ECLI:EU:C:2014:2055, paras 32–34, 37, and 48; Case C-117/14 *Ariza Toledano* ECLI:EU:C:2015:60, paras 28–29, and 42. In all these cases the Charter was considered not applicable. – For an analysis of the more recent decisions F Fontanelli, 'The implementation of European Union law by Member States under Article 51(1) of the Charter of Fundamental Rights' (2014) 20 (3) *The Columbia Journal of European Law*, 193–247; J Genberg, 'The scope of application of the Charter of Fundamental Rights of the European Union: quo vadimus?' (2014) 8 (1) *Helsinki Law Review* 31–60; F Wollenschläger, 'The EU Charter of Fundamental Rights and its Applicability to the Member States: A Step towards Unitarisation or Federalisation?' (2015) 13 *Ritsumeikan International Affairs* 1–12, 9–10.

137 Case C-135/08 *Rottman*, ECLI:EU:C:2010:104.

138 Case C-34/09 *Ruiz Zambrano* ECLI:EU:C:2011:124.

139 Case C-14/13 *Cholakova* ECLI:EU:C:2013:374, paras 28–29, 31.

140 Case C-87/12 *Ymeraga* ECLI:EU:C:2013:291, paras 40 and 43.

141 S Iglesias Sánchez, 'Fundamental Rights and Citizenship of the Union at a Crossroads. A Promising Alliance or a Dangerous Liaison' (2014) 20 (4) *European Law Journal*, 466–467.

that the notion of the EU citizenship as a fundamental and political status with no link with market economy is being dismantled. It also leads to the idea that EU citizenship ‘*virtually never protects the weak and the needy*’ based on their human needs alone, merely informs the ‘*dogmatic ideal of a good market citizen*’.¹⁴²

The *Dano* and *UK child benefit or child tax credit* line of cases can be seen as confirming that the CJEU now takes a back seat when it comes to protecting the legal status of economically inactive EU citizens.¹⁴³ The Court’s analysis of the meaning of the Citizens Directive could be interpreted to the effect that Member States are allowed to refuse to pay any social benefits, including social security benefits, to economically inactive Union citizens who do not have the right to reside under that Directive, namely because they do not possess sufficient resources of their own.¹⁴⁴ It is solely up to the EU legislator, through the Citizens Directive to define the legal status of EU citizens. The CJEU no longer refers to EU citizenship as the ‘*fundamental status*’ of citizens and seems no longer willing to use the TFEU’s provisions on EU citizenship and the rights attached to it to interpret the Directive.

One may agree with the need to respect the will of the democratically legitimised legislator (national and European). However, if the EU is governed by the rule of law, it should be up to its highest Court to control the decisions of the legislatures, especially in times of socio-economic crisis. The Citizens’ Directive cannot be seen as giving the Member States *carte blanche* to discriminate between EU citizens.

In this area, in fact, the EU legislator may be on the verge of intervening.

The Commission has adopted on 14 December 2016 a proposal for a Regulation amending Regulation No 883/2004¹⁴⁵, which is currently still under ordinary legislative procedure¹⁴⁶ and some of the changes proposed

142 D Kochenov, ‘The Citizenship of Personal Circumstances in Europe’, in D Thym (ed), *Questioning EU Citizenship* (Oxford, Hart, 2017), 37–56, 51.

143 AP van der Mei, ‘Overview of Recent Cases before the Court of Justice of the European Union (July–December 2015)’ 77.

144 H Verschuere, ‘Preventing ‘Benefit Tourism’ in the EU’ 378–379.

145 COM (2016) 815: Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 883/2004 on the coordination of social security systems and regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004.

146 Procedure 2016/0397/COD.

are inspired by this line of case law. A new recital (5a) is to be inserted in the Regulation No 883/2004 stating that

‘The Court of Justice has held that Member States are entitled to make the access of economically inactive citizens in the host Member State to social security benefits, which do not constitute social assistance within the meaning of Directive 2004/38/EC subject to a legal right of residence within the meaning of that Directive. The verification of the legal right of residence should be carried out in accordance with the requirement of Directive 2004/38/EC. For these purposes, an economically inactive citizen should be clearly distinguished from a jobseeker whose right of residence is conferred directly by Article 45 of the Treaty on the Functioning of the European Union. In order to improve legal clarity for citizens and institutions, a codification of this case law is necessary’ (Article 1(1) of the Proposal).

According to the Proposal, *‘the application of Directive 2004/38/EC to the Regulations has been elucidated by the jurisprudence of the Court of Justice in Cases C-140/12, Brey, EU:C:2013:565, C-333/13, Dano, EU:C:2014:2358 and C-308/14 Commission v United Kingdom, EU:C:2016:436’*.¹⁴⁷

For this purpose, Article 4 of Regulation No 883/2004 is proposed to be amended. The current provision (*‘Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.’*) is to become Article 4 (1). Article 4 (2) will state, if the amendment is approved, that

‘2. A Member State may require that the access of an economically inactive person residing in that Member State to its social security benefits be subject to the conditions of having a right to legal residence as set out in Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States’.

Thusly, the *UK child benefit or child tax credit* decision is to become written law, a direct consequence of the UK ‘Remain-Leave’ referendum, effectively changing the interpretation of the principle of no discrimination to all the social benefits included in Regulation No 883/2004.

147 V. the Explanatory Memorandum of the Proposal, p. 9.

Several questions remain, leaving social solidarity as an element of EU citizenship at crossroads.¹⁴⁸

What motivated this change? Is the CJEU being influenced by the political debates in the Member States on 'social tourism'? Is it another long-lasting effect of Brexit?¹⁴⁹ Or is the *Dano/Alimanovic* case law driven by the view that the previous EU citizenship case law is now seen as having been too judicially activist?¹⁵⁰ How far will the Court go? What is then left of the previous jurisprudence on this matter? How will the other institutions respond? Will the Citizens' Directive or Regulation No 883/2004 be amended in light of this?

If, in terms of access to social assistance, EU citizens can only claim equal treatment if their residence in the territory of the host State complies with the conditions to lawfully reside there, established in the Citizens' Directive, what happens to those EU citizens whose right to reside in the host Member State is based on other EU instruments, such as Article 45 TFEU as in the *Saint-Prix* case¹⁵¹, or on national law which is more favourable than the Directive (as in the *Martínez Sala* and *Trojani* cases)? As Advocate General Wathelet pointed out, it is likely that the residence of non-national EU citizens will be jeopardised in the event of being excluded from entitlement to subsistence benefits.¹⁵² However, the Court has drawn a clear distinction between the right to reside and the right to social benefits in the *Tarola* case. Without sufficient means of subsistence, the Union citizens could be considered "illegal", which means that a consequence of the *Dano* jurisprudence is to allow for EU citizens to be classified as "illegal migrants".¹⁵³ Can they be expelled?

Is a right to Member States to discriminate economically inactive citizens being recognised? A kind of licence to discriminate unwritten in the Treaties, but established in a Directive can be used to such an end?

One can accept that there are financial reasons shared and approved by all Member States, which justify restrictions to the principle of equal treatment regarding the granting of social assistance benefits to non-nationals residing in the territory of the host State. However, one cannot forget that,

148 Mantu/Minderhoud, 'EU citizenship and social solidarity' 720.

149 J Shaw, 'EU citizenship: Still a Fundamental Status?' in R Bauböck (ed) *Debating European Citizenship* (Luxembourg, Springer, 2019) 1–17.

150 AP van der Mei, 'Overview of Recent Cases before the Court of Justice of the European Union (July-December 2015)', 77.

151 Case C-507/12 *Saint Prix* ECLI:EU:C:2014:2007.

152 Case C-333/13 *Dano* ECLI:EU:C:2014:341, Opinion AG Wathelet, para 125.

153 D Thym, 'The Elusive limits of solidarity', 45.

from the point of view of adversely affected citizens, this means that the free movement of citizens and workers in the European Union is still incomplete.