Free Movement of ‘Workers’?

The Status of Economically Inactive Citizens in EU Law

*Laura Gyeney**

Abstract

Early in its case law on the free movement of EU citizens, the CJEU took a very expansive stance in its rulings on social benefits for inactive EU citizens, thereby promoting social inclusion and individual social rights, while furnishing the institution of EU citizenship with real substance. However, the CJEU’s jurisprudence took a restrictive turn following the Eastern enlargement and, even more so, after the 2008 recession, in response to national expectations. The strict approach adopted by the CJEU in Dano, which insists on a literal interpretation of the social provisions of Directive 2004/38/EC, seems increasingly difficult to maintain and, in some cases, leads to unfair results. In addition to providing an overview of the relevant case law, this article analyses two specific cases (Jobcenter Krefeld and CG) to examine whether and in what direction the CJEU may depart from its earlier restrictive practice in its more recent case law.

Keywords: EU citizenship, economically inactive citizens, equal treatment, social benefits, Directive 2004/38.

1. Introduction

Over the past decade, the relationship between the rights enshrined in the Treaties and the limits set by the Directive 2004/38/EC[1] has been fundamentally altered through the judgments of the CJEU. Whereas the CJEU’s earlier jurisprudence was essentially based on the broad interpretation of the right to free movement, today, the protection of the financial interests of the Member States often takes precedence over the effective enforcement of the right to free movement. There are several reasons for this restrictive jurisprudence. On the one hand, the Eastern enlargement of the EU in 2004 as well as subsequent enlargements resulted in a drastic widening of the gap between the economic situation and the welfare measures of the different Member States. On the other hand, the EU and its Member States have faced several crises in recent years (*e.g.* Brexit, COVID-19

* Laura Gyeney: associate professor of law, Pázmány Péter Catholic University, Budapest; director, Institute for Minority Rights, Budapest.

1 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.

doi: 10.5553/HYIEL/266627012023011001004

pandemic, the war on Ukraine and the energy crisis), which necessarily require more prudent fiscal policies. Finally, this recent jurisprudence is not only in the interests of (more affluent) Member States but can also be discerned from the provisions of Directive 2004/38/EC. However, the legal scholarship rightly points out that while this changing jurisprudence may be justified on financial and budgetary grounds and may, in some cases, be in line with the letter of the Directive, it is, in fact, counterproductive to the concept of 'genuine European citizenship'.[2] I agree with this observation. On the one hand, the CJEU attaches great importance to further strengthening the legal institution of EU citizenship (even at the expense of national citizenship). On the other hand, it seems to apply this approach only to 'economically valuable' EU citizens while clearly seeking to place full responsibility for vulnerable citizens[3] solely on the Member State of origin.[4]

In this article, I will review the CJEU's case law on exercising the right to the free movement of economically inactive citizens in an attempt to outline the system that underlies (or may underlie) the often seemingly contradictory judgments. A key element of this system is Directive 2004/38/EC, which is essentially based on Article 21(1) TFEU: the TFEU only grants EU citizens the right to move and reside freely "subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect".

2. Freedom of Movement and Residence under the Directive

While there is no doubt that economically active workers and self-employed persons can benefit from a wide range of internal market advantages by exercising their right to free movement, economically inactive citizens only have an unconditional right to free movement for three months.[5]

Article 7(1)(b) of the Directive already requires, for stays exceeding three months, that the economically inactive EU citizen has sufficient resources so as not to become an unreasonable burden on the social assistance system of the host Member State, as well as comprehensive sickness insurance. While Member States can never invoke economic considerations as a justification for restricting internal market freedoms, EU law explicitly protects national public finances in the case of economically inactive citizens. Article 14(2) of Directive 2004/38/EC states that EU citizens and their family members have the right of residence provided for in Article 7 as long as they meet the conditions set out therein.

2 Katarina Hylten-Cavallius, *EU Citizenship at the Edges of Freedom of Movement*. Hart Publishing, Oxford, 2020, p. 122; Eleanor Spaventa: Earned Citizenship – Understanding Union Citizenship through Its Scope, *in* Dimitry Kochenov (ed.), *EU Citizenship and Federalism*, Cambridge University Press, Cambridge, 2017, p. 205.

3 Perhaps the only exception to this is children in the most vulnerable situations, as can be seen in *CG*.

4 This may deter many people from exercising their right to free movement. Gareth Davies, 'How Citizenship Divides: the New Legal Class of Transnational Europeans', *European Papers*, Vol. 4, Issue 1, 2019, p. 678.

5 Free Movement Directive, Article 6(1).

doi: 10.5553/HYIEL/266627012023011001004

And although it would follow directly from a combined reading of Article 7 and Article 14(2) that an EU citizen who is not economically active is no longer entitled to the right of residence beyond three months if he or she does not have sufficient financial resources, Article 14(3) provides that the expulsion measure cannot be the automatic consequence of the EU citizen or his or her family members having recourse to the social assistance system of the host Member State.

This provision is a kind of 'safeguard clause' to ensure that a temporary financial hardship of a short duration does not lead to an immediate loss of the right of free movement and residence. It follows from Article 14(3) that if, for any reason, an EU citizen has recourse to the social assistance system of the host Member State, there is a kind of proportionality test:

> "The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances, and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion."[6]

It follows directly from the above provision that a decision by a Member State authority to expel an EU citizen who is not economically active (which in most cases will be preceded by another application, namely the assessment of the EU citizen's entitlement to social benefits) may be subject to judicial review as to whether the Member State has indeed properly assessed the above circumstances. However, the strictness of the proportionality test seems to have changed over the last few decades.

3. Freedom of Movement and Residence on the Edge of the Directive – Proportionality Test of Sufficient Means

3.1. The Early Days of EU Citizenship – Financial Solidarity between Member States for the Protection of Rights

In its early case law following the creation of EU citizenship, the CJEU still attached great importance to ensuring that the rights of EU citizens were more fully guaranteed. Accordingly, the CJEU itself has considered it appropriate for the host Member State to provide a degree of financial solidarity to enable EU citizens from other Member States to exercise their right to free movement and residence.

For example, in *Grzelczyk*,[7] the CJEU stressed that a student who is an EU citizen and who is experiencing temporary financial difficulties could not automatically lose his right of residence merely because he has applied for social assistance in the host Member State[8] and even explicitly stated that, under Article 18 TFEU, which prohibits discrimination on the grounds of nationality, a citizen who has the right to move may also be entitled to equal treatment with

6 Id. Recital 16.

7 Judgment of 20 September 2021, *Case C-184/99, Grzelczyk*, ECLI:EU:C:2001:458.

8 Id. para. 44.

doi: 10.5553/HYIEL/266627012023011001004

nationals of the host Member State as regards social benefits. Essentially, the CJEU took a similar approach in *Baumbast*. It concluded that it was disproportionate to refuse Mr. Baumbast's right of residence simply because his sickness insurance did not cover emergency medical treatment in the host Member State.[9]

To summarize the case law of the CJEU during this period, the requirement of sufficient financial resources in EU secondary law is intended to ensure that EU citizens residing in another Member State do not become an unreasonable burden on the budget of the host Member State and, accordingly, the provisions of secondary law are more an 'interpretation' of the provisions of primary law (now the TFEU).

3.2. The New Turn – the Concept of the Self-Responsible Citizen

The CJEU's approach changed fundamentally following the economic crisis of 2008. However, two other factors may have played a vital role. On the one hand, the biggest enlargement in the history of the EU took place in 2004, with a clear trend toward East-West mobility due to the economic situation in the new Member States. On the other hand, the 2004 enlargement coincided with the entry into force of Directive 2004/38/EC. Thus, the change in secondary EU law in itself created an opportunity for the CJEU to bring its previous, more permissive jurisprudence into line with the letter of the law. While this restrictive interpretation is generally to be applauded, it cannot be ignored that in other areas of EU law, the case law of the CJEU is nowhere near as abstinent.

In the 2013 *Brey* case, the CJEU had to assess Austrian legislation which made the right of residence for more than three months conditional on the holder of the right having sufficient income not to be entitled to a so-called compensatory supplement (which was available to pensioners whose net income was below a certain threshold, provided that they had their habitual residence in Austria). In its judgment, the CJEU has already expressly stated that, although the aim of the Directive is to facilitate the exercise of the primary and individual right of free movement and residence, the legislation is also intended "to set out the conditions governing the exercise of that right."[10]

However, in the grounds of its judgment, the CJEU went on to stress that the fact that a person who is not economically active may be eligible to receive such a benefit because of the low amount of his pension is merely a general indication that that person does not have sufficient resources to avoid becoming an unreasonable burden on the social assistance system of that state.[11]

However, the national authorities must make an individual, not a general assessment. Accordingly, a person claiming benefits cannot be considered *a priori* (simply because he or she claims benefits) as not having the right to reside in the Member State. However, claiming benefits may be an 'indication' that the person concerned does not fulfil the requirements of Directive 2004/38/EC.[12]

9 Judgment of 17 September 2002, *Case C-413/99, Baumbast*, ECLI:EU:C:2002:493, para. 93.
10 Judgment of 19 September 2013, *Case C-140/12, Brey*, ECLI:EU:C:2013:565, para. 53.
11 Id. para. 63.
12 Id. para. 64.

doi: 10.5553/HYIEL/266627012023011001004

The *post-Brey* jurisprudence now represents a new approach to the principle of proportionality (a tightening of the test, so to speak). In the past, the CJEU essentially assumed that an economically inactive citizen enjoying the right of free movement only needed temporary assistance, which the host Member State had to provide to ensure the exercise of EU citizenship. However, recent jurisprudence has shown that the mere fact of recourse to the social assistance system is an 'indication' that the EU citizen may not fulfill the requirements of Directive 2004/38/EC.

Accordingly, the content of the proportionality test has changed fundamentally. Whereas the initial test was whether the financial assistance provided by the host Member State was proportionate to the enjoyment of EU citizenship, the test is now more about whether an economically inactive EU citizen who is forced to make use of the social assistance system of the host Member State remains covered by Directive 2004/38/EC.

4. Right of Residence under the Directive – Where No Proportionality Test Is Required

Directive 2004/38/EC explicitly allows for the exclusion of economically inactive EU citizens from social benefits in some instances. One such case is well illustrated by the *Garcia-Nieto* case, in which a German Employment Center refused to pay jobseeker's and children's benefits to a Spanish father and his son for the first three months of their stay in Germany.[13]

In its judgment, the CJEU explicitly stated that Article 24 of Directive 2004/38/EC did not apply to the Spanish father and son. According to Article 24(2) of the Directive, Member States are not obliged to provide social assistance during the first three months of residence in another Member State. This means that entitlement to social assistance can only arise after a stay of more than three months, before which the host Member State can automatically reject an EU citizen's application without examining its substance.[14]

Irrespective of this, however, the right to reside lawfully during this period is clearly conferred on applicants by Article 6 of Directive 2004/38/EC, as it is unconditional. Essentially the same conclusion was reached by the CJEU in *Alimanovic*, which will be discussed in more detail in the next Section (as it is almost entirely identical to another case). Here we will simply point out that Article 7(3) of Directive 2004/38/EC allows an EU citizen who has been employed for less than one year and then becomes involuntarily unemployed to retain the worker status for at least six months. However, if the six months elapse without result and the EU citizen becomes a jobseeker, social benefits can be refused without any proportionality criterion being considered by the national authorities.

The CJEU finds that, since the directive itself takes account of the principle of proportionality by providing for the possibility of retaining the worker status for a

13 Judgment of 25 February 2015, *Case C-299/14, Garcia-Nieto and Others*, ECLI:EU:C:2016:114.

14 Id. para. 46.

doi: 10.5553/HYIEL/266627012023011001004

certain period, there is no need to examine the individual circumstances of the person concerned in the light of that principle.[15]

5. Residence under EU Law but on Other Grounds – the Krefeld Case

The *Krefeld* case has made it clear that the legal residence of EU citizens in another Member State cannot be based solely on Directive 2004/38/EC, even within the framework of EU law. According to the facts of the case, JD, a Polish national, was separated from her wife and was living in Germany with her two daughters, who were attending school in Germany. JD had been in employment in Germany with short interruptions due to unemployment or incapacity for work, but in the autumn of 2016, his employment was terminated. JD then received subsistence benefits to cover living expenses for a period of time in his own right (subsidiary unemployment benefit) and on behalf of her children (social allowances). In June 2017, he applied for the continued payment of the subsistence benefits at issue, which was rejected by the competent German employment office (Jobcenter Krefeld) on the grounds that he had not retained the status of a worker and was residing in Germany only to seek employment.

The national court held that JD was no longer entitled to reside under the Directive but under Article 10 of Regulation (EU) No 492/2011, given that her minor children lived and went to school in Germany and that JD was a mobile worker previously employed in that Member State. Therefore, the central question in the case was whether an economically inactive EU citizen, whose residence in another Member State is based on EU law but not on Directive 2004/38/EC, is entitled to benefit from the principle of non-discrimination on the grounds of nationality concerning social benefits.

In its judgment, the CJEU pointed out that persons with a right of residence within the meaning of Article 10 of Regulation (EU) No 492/2011 (including JD in the present case) enjoy the right to equal treatment as regards the social advantages referred to in Article 7(2) of the Regulation, even if they can no longer rely on the worker status from which they initially derived their right of residence.[16] JD's legal situation was not simply that of an EU citizen seeking employment in another Member State or economically inactive, but that of an EU citizen whose legal situation made him subject to a specific provision of EU law.

Accordingly, the residence title based on Regulation (EU) No 492/2011 can be considered as a *lex specialis* compared to Directive 2004/38/EC. In this approach, the fact that Regulation (EU) No. 492/2011 provided for an equal treatment requirement was of particular benefit to JD, as it did not require a position on the

15 The time limit for retaining the status of worker is in itself a guarantee of legal certainty, which is fully in line with the principle of proportionality. Judgment of 15 September 2015, *Case C-67/14, Alimanovic*, ECLI:EU:C:2015:597, para. 61.

16 Judgment of 6 October 2020, *Case C-181/19, Jobcenter Krefeld*, ECLI:EU:C:2020:794, para. 55. This finding is essentially based on *Teixeira:* judgment of 23 February 2010, *Case C-480/08, Teixeira*, ECLI:EU:C:2010:83; Judgment of 23 February 2010, *Case C-310/08, Ibrahim and Secretary of State for the Home Department*, ECLI:EU:C:2010:80.

doi: 10.5553/HYIEL/266627012023011001004

question of whether the prohibition of discrimination on grounds of nationality in relation to social benefits applies to a residence title outside Directive 2004/38/EC but explicitly based on EU law.

It is interesting to draw a parallel between *Krefeld* and *Alimanovic*, all the more so as in both cases, the German authorities applied the same German legal provision. Nazifa Alimanovic and her three children were Swedish nationals who had previously lived in Germany and then moved back in June 2010, when the German authorities issued them with a certificate attesting the right of permanent residence in accordance with relevant provisions of the Law on freedom of movement. Alimanovic (like JD) was claiming subsistence benefits both for himself (subsidiary unemployment benefit) and for his children (social allowances). Two of the children were minors, so it can be assumed they had received primary education. It is also clear from the facts of the case that Alimanovic and his elder daughter were also in employment after their arrival in Germany. Based on this factual background, it would be reasonable to assume that the CJEU would have ruled in the same way in *Alimanovic* and *Krefeld*. However, this was not the case. In *Alimanovic*, the CJEU examined entitlement to social benefits solely on the basis of the Free Movement Directive and concluded that an economically inactive EU citizen is not *per se* entitled to social benefits in another Member State.[17] At the very least, it is difficult to reconstruct why the CJEU did not take into account the entitlements based on Regulation (EU) No. 492/2011 in *Alimanovic*.

It would be obvious to answer this question by saying that the referring German court in *Alimanovic* did not itself refer to the rules of the Regulation and this is the reason why the CJEU did not deal with the Regulation. However, Advocate General Wathelet, in his Opinion, expressly and extensively referred to the provisions of Regulation 492/2011 and suggested that it should be held that Alimanovic could rely on their right of residence under Article 10 of the Regulation.[18] In these circumstances, I have to conclude that the CJEU simply did not wish to depart from the *Dano* judgment, which was delivered shortly before *Alimanovic*.

The *Krefeld* judgment (even though it is highly controversial due to the way in which the earlier *Alimanovic* case was decided) contains a number of elements that point the way forward. On the one hand, it clearly establishes that Directive 2004/38/EC is not the only, but only one of the possible legal grounds for assessing the entitlement to social benefits of economically inactive EU citizens. On the other hand, if *Krefeld* is read in conjunction with the *Baumbast* case mentioned above (and also, in part, with the *CG* case discussed in the next Section), a trend seems to emerge whereby EU citizens with children, even in the case of economic inactivity, can expect a fundamentally different (more favorable) status under EU law than their EU citizen counterparts without children (or with adult children).

17 *Case C-67/14, Alimanovic*, para. 63.

18 Opinion of Advocate General Melchior Wathelet, Delivered on 26 March 2015, *Case C-67/14, Alimanovic*, ECLI:EU:C:2015:2010, para. 126.

doi: 10.5553/HYIEL/266627012023011001004

6. Right of Residence at the Discretion of the Member State – from Dano to CG

If the requirements of Directive 2004/38/EC are met, EU citizens can exercise their right to move and reside freely in another Member State for more than three months based on EU law.

However, as the Member States are free to decide (within certain limits) who is considered to have the right to reside on their territory, there is no obstacle to granting a right of residence beyond three months to EU citizens who do not otherwise meet the requirements of Directive 2004/38/EC. In this case, however, a specific legal situation arises: on the one hand, the stay of these EU citizens is considered legal, but on the other hand, the legal basis of this stay is obviously not Directive 2004/38/EC.

Suppose an EU citizen who has acquired the right of residence in this way subsequently becomes economically active. In that case, the problem is purely theoretical since the economic activity already brings the EU citizen within the scope of Directive 2004/38/EC. The real difficulty arises when the EU citizen concerned remains inactive and claims benefits from the social assistance system of the host Member State.

Regarding the EU legal solution to this situation, the case law of the CJEU shows a particular 'ripple effect', not independent of the change in the proportionality test (and the changes in circumstances justifying it) mentioned in the previous Section. Three cases illustrate this ripple effect.

In the early days of EU citizenship (essentially coinciding with the *Grzelczyk* and *Baumbast* cases), the CJEU put EU citizens' interests before Member States' financial interests, as the *Trojani* case[19] illustrates. According to the facts of the case, Trojani, a French national, moved to Belgium, where he lived in a Salvation Army hostel and provided various services for approximately 30 hours a week as part of an individual social and professional integration program in return for care and a minimum allowance. Trojani had no income and had to pay for accommodation, so he applied for a minimum subsistence allowance (the so-called minimex). The exciting aspect of the case is that, although it was at least questionable whether Trojani could be considered an economically active EU citizen, he was nevertheless granted a residence permit by the Belgian authorities.[20] After the Belgian authorities rejected Trojani's application for social assistance on the grounds that his residence permit was not based on EU law (he did not meet the requirements of EU secondary legislation in force at the time, which predated Directive 2004/38/EC), Trojani claimed a breach of the prohibition of discrimination on the grounds of nationality. The CJEU ruled that holders of a residence permit "may rely on Article 12 EC to obtain a benefit similar to the minimex provided by the social security system".[21] In other words, the logic of the *Trojani* ruling is essentially that the financial interests of the host Member State cannot take precedence over the rights of EU citizens.

19 Judgment of 7 September 2004, *Case C-456/02, Trojani*, ECLI:EU:C:2004:488.

20 Id. paras. 29 and 37.

21 Id. para. 46.

doi: 10.5553/HYIEL/266627012023011001004

Accordingly, when a Member State grants a right of residence on the basis of its own decision (and not on the basis of EU law), it must also take into account the subsequent consequences, possibly financial, of granting the right of residence.

However, while the *Brey* case only changed the level of the proportionality test with regard to the right of residence under Directive 2004/38/EC, *Dano* can be seen as a complete rejection of *Trojani* with regard to social benefits. This can only be partly explained by the very specific circumstances of *Dano*, which border on abuse. According to the facts of the case, a Romanian woman and her son applied for social benefits in Germany and were refused by the German authorities. Dano's individual circumstances were rather peculiar: the CJEU also underlined that she had no education, spoke a minimum of German (but can no longer read or write it), had not worked in Germany or Romania, and there was no evidence that she had ever sought work, while in Germany he was supported by her sister.[22] Despite these special circumstances, Dano had a residence permit issued by the German authorities for an indefinite period,[23] meaning that his stay in Germany was legal.

In his application, Dano complained that German nationals in a similar situation were entitled to social assistance in Germany, thereby breaching the principle of equal treatment. If the CJEU had followed the principles laid down in *Trojani*, it could hardly have come to any other conclusion than that, by the prohibition of discrimination on the grounds of nationality, Dano was entitled to the social benefits claimed based on the residence card issued to him by the German authorities. In the present case, however, the CJEU could hardly have overlooked that Dano's sole purpose in staying in Germany was presumably to benefit from the assistance provided by the German social assistance system. Accordingly, if the CJEU had followed its *Trojani* judgment, it would have effectively made the right to social benefits a substantive right for any EU citizen legally resident in the territory of another Member State, regardless of their legal status. However, this approach was not only not feasible to protect Member States' budgets but also because less than two months before the *Dano* case was decided, the CJEU had significantly tightened the test of sufficient resources for residence under Directive 2004/38/EC (in the *Brey* case). In these circumstances, the CJEU did not consider the approach taken in *Trojani* to be tenable and radically changed its case law without any indication of this in *Dano*.

In its judgment, the CJEU concluded that since Dano did not have sufficient resources as required by Article 7(1) of the Directive, her residence could not be justified under the Directive. It also concluded that Article 24(1) of Directive 2004/38/EC applies the requirement of equal treatment only to EU citizens residing in the territory of the host Member State "in accordance with this Directive."[24]

This approach is formally correct and in line with the wording of the Directive 2004/38/EC. Still, it completely ignores the prohibition of discrimination on the grounds of nationality under Article 18 TFEU. In fact, by making Dano's stay in

22 Judgment of 11 November 2014, *Case C-333/13, Dano*, ECLI:EU:C:2014:2358, para. 39.

23 Id. para. 36.

24 Id. para. 68.

doi: 10.5553/HYIEL/266627012023011001004

Germany lawful, Dano's legal situation necessarily fell 'within the scope of the Treaties'. In other words, it essentially follows from *Dano* that a distinction can and must be made between EU citizens lawfully residing in another Member State, depending on whether their legal residence is based on EU law (in particular, Directive 2004/38/EC) or on a discretionary decision of the Member State. While in the former case, the requirements under Directive 2004/38/EC can be examined, the CJEU has held that the latter case must be regarded as not, in fact, falling within the scope of EU law.

At the very least, it is questionable why the CJEU took such a rigid approach in *Dano* and decided the dispute without even referring to the proportionality test. According to some approaches, this was due to Dano's apparent lack of integrationist intention and the almost abusive use of the law.[25] Dogmatically, however, it is more correct to assess *Dano* as showing that the proportionality test is essential in cases falling within the scope of Directive 2004/38/EC, justified in 'borderline' cases where there is a question of compliance with the requirements of the Directive 2004/38/EC; and unnecessary where abuse of rights can be clearly established from all the circumstances of the case. In the *CG* case, the CJEU finally reviewed its untenably rigid position from *Dano* – again, in a way that does not suggest that it departed from its own earlier decision. While the *Dano* approach is well suited to protecting the financial interests of Member States, there may be situations in which a rigid application of the *Dano* approach may lead to an unacceptably unfair decision. The facts of the *CG* case resulted in such a situation, which rendered the *Dano* approach practically untenable.

According to the facts of the *CG* case, CG, a dual Croatian-Dutch national, arrived in Northern Ireland, which was part of the EU at the time, in 2018 with her partner, a Dutch national, and the father of her children. Following the break-up with his partner, CG moved to a hostel for abused women with her two minor children. During her stay in the UK, she never worked and had no other means of supporting herself or her children, *i.e.*, she was not legally resident in the host Member State within the meaning of Directive 2004/38/EC. However, following Brexit, CG was granted settled status under the terms of the UK's withdrawal agreement with the EU, based on which the UK recognized his right of temporary residence. However, this status was not conditional on the availability of sufficient financial resources. After her stay became legal, CG applied for social assistance but was refused on the grounds that the temporary right of residence, while making her stay in the UK legal, did not entitle her to social assistance.

In her application, CG relied on the *Trojani* case, which would have established that she was undoubtedly entitled to social benefits. On the other hand, the more recent approach of the CJEU, in line with *Dano*, would not have entitled CG to benefits – however unfair this approach may seem. The CJEU, therefore, reached a special compromise decision: it departed from the approach set out in *Dano* without going back to *Trojani*, but positioned itself between the two, essentially creating

25 Herwig Verschueren, 'Preventing "Benefit Tourism" in the EU: A Narrow or Broad Interpretation of the Possibilities Offered by the ECJ in Dano', *Common Market Law Review*, Vol. 52, Issue 2, 2015, p. 373.

doi: 10.5553/HYIEL/266627012023011001004

the possibility for an EU citizen who does not meet the requirements of Directive 2004/38/EC to be entitled to social benefits at the individual discretion of the Member State. In its judgment, the CJEU made it clear that CG's residence did not meet the requirements of Directive 2004/38/EC, as her legal status did not depend on sufficient resources (and indeed, she did not have them).[26]

Consequently, as a result of *Dano*, CG is not entitled to social benefits and cannot rely on the prohibition of discrimination on the grounds of nationality. However, the CJEU went further in its reasoning:

> "a national of a Member State, who has moved to another Member State has made use of his or her right to move freely, meaning that his or her situation falls within the scope of EU law."[27]

This also means that the provisions of the Charter of Fundamental Rights can and must apply to the situation of CG, which enshrines the right to human dignity, the right to private and family life, and the obligation to take into account the best interests of the child.[28] Therefore, although CG is not automatically entitled to the social assistance she claims (as her residence is not based on Directive 2004/38/EC and she does not fulfill the requirements of the Directive), she is entitled to have her application for social assistance not automatically rejected by the authorities but to have the impact of a possible rejection of her application on the rights of CG and her children, which are also protected by the Charter, examined on the merits.[29]

The interesting thing about the judgment is that although it explicitly mentions that the national authorities must examine the possible violation of certain rights of CG protected by the Charter of Fundamental Rights, these rights, which are mentioned in the judgment, do not include the prohibition of discrimination on the grounds of nationality. The reason for this is presumably that the CJEU upheld its finding in *Dano* that the prohibition of discrimination on grounds of nationality cannot be invoked in the case of residence not based on the free movement directive. If the CJEU had not done so, it would have essentially reverted to its earlier *Trojani* judgment, but on the basis of a different reasoning, it had previously given.

Accordingly, when an EU citizen is not legally resident in a Member State under Directive 2004/38/EC and makes an application for social assistance, the Member State authorities are obliged to examine the merits of that application – but only based on the applicant's personal circumstances and fundamental human rights. Accordingly, CG (and other similarly situated applicants) may be entitled to social benefits if their individual circumstances so warrant, but indeed cannot become entitled to social benefits simply because others are receiving such benefits.

26 Judgment of 15 July 2021, *Case C-709/20, CG*, ECLI:EU:C:2021:602, para. 80.

27 Id. para. 57.

28 Charter of Fundamental Rights, Articles 1, 7, and 24(2).

29 *Case C-709/20, CG*, para. 92.

doi: 10.5553/HYIEL/266627012023011001004

However, the *CG* case raises further questions. The CJEU states that the Charter of Fundamental Rights applies in 'similar circumstances'.[30]

At the very least, it is unclear which cases fall into the category of 'similar circumstances': victims of domestic violence, EU citizens affected by Brexit, or single parents? Moreover, this wording implies that the Charter of Fundamental Rights does not always apply, even if the EU citizen's stay in another Member State is otherwise lawful and therefore (by virtue of the *CG* decision itself) subject to EU law. It, therefore, seems more appropriate to take the approach that in all cases where the residence of an EU citizen in another Member State outside the scope of Directive 2004/38/EC is considered lawful, it is covered by the Charter of Fundamental Rights. Whether or not the individual assessment required by the Charter of Fundamental Rights will ultimately result in the applicant being entitled to the social benefit in question is a separate question.

7. Conclusions

CJEU jurisprudence on the status of inactive EU citizens shows a rather uneven (mixed) trend. In the first years after the creation of EU citizenship, the CJEU aimed to ensure that the rights attached to EU citizenship were exercised more fully. In the following period, particularly after the 2004 eastern enlargement, the CJEU's jurisprudence changed dramatically and radically tightened the system of host state benefits for economically inactive EU citizens.

However, more recent case law since the late 2010s has relaxed the previous strictness, leaving national authorities with discretionary powers in individual cases. While this latter approach is justified in terms of fair adjudication of individual cases (such as the case of *CG*, a victim of domestic violence), the institutionalization of discretionary powers for individual authorities raises serious issues of legal certainty at a systemic level. This is particularly true when the CJEU itself gives a very different ruling in two cases that are identical in substance, simply because a few years have passed between the two judgments (*Alimanovic* and *Krefeld*). However, in addition to the above, a system seems to emerge from the case law of the CJEU, the cornerstones of which can be summarized as follows. *(i)* In cases that clearly and exclusively fall within the scope of Directive 2004/38/EC, the authorities of a Member State may exercise discretion as to whether or not to grant social benefits to an EU citizen from another Member State. *(ii)* In some cases, however, the Directive itself explicitly excludes the discretionary power of the Member State authorities. For example, an EU citizen from another Member State may legitimately be refused social benefits without any substantive test in cases of residence of less than three months (as yet) and unemployment of more than six months. The reason for this is that Directive 2004/38/EC itself is the result of a balancing exercise, and as a result of this exercise, the EU legislator decided that the EU citizen is not entitled to benefits in such cases. This may be particularly the case for EU citizens with a child at school:

30 Id. para. 88.

doi: 10.5553/HYIEL/266627012023011001004

by falling within the scope of the Regulation, the child's parent may also benefit from the rights under the Regulation, which (according to the case law of the CJEU) explicitly prohibits discrimination on grounds of nationality in the field of social benefits. *(iii)* Finally, it cannot be excluded that the authorities of a Member State may grant an EU citizen a right of residence based on their own decision. According to recent case law of the CJEU, in such a case, the national authorities are implementing EU law, and the EU citizen is subject to EU law – the Charter of Fundamental Rights must therefore be taken into account when a Member State takes a decision affecting the legal situation of an EU citizen. However, although the CJEU has previously (*Trojani* case) taken the approach that a decision by a Member State, based on its discretion, makes the prohibition of discrimination on the grounds of nationality applicable to an EU citizen as regards access to social benefits, recent case law has moved away from this approach and only requires that other rights in the Charter of Fundamental Rights (such as the right to private and family life, the best interests of the child or the right to human dignity) are unconditionally guaranteed.

doi: 10.5553/HYIEL/266627012023011001004