CITIZENS OR MIGRANTS? PRECARIOUS RESIDENCE IN THE CONTEXT OF EU CITIZENSHIP

DIEGO GINÉS MARTÍN[1]
Diego.Gines@eui.eu

Cómo citar/Citation
Ginés Martín, D. (2021).
Citizens or migrants? Precarious residence
in the context of EU citizenship.
Revista de Derecho Comunitario Europeo, 69, 653-680.
doi: https://doi.org/10.18042/cepc/rdce.69.05

Abstract

The judgment delivered by the Court of Justice of the European Union (CJEU) in *Dano* made clear that the conditionality of residence for economically inactive EU citizens is in Directive 2004/38 for a reason, and that it can be interpreted strictly. After an analysis of the trajectory of the CJEU in this field, this Note zooms in on grey areas deriving from State practice, in between lawful residence and expulsion. It then contends that these situations can be understood as the result of a tension among different dynamics of opening and closure, which are deeply embedded in the European citizenship project. By bringing to life the restrictive elements of the Directive, the *Dano* case facilitates the withdrawal of residence rights of certain EU citizens and allows for their expulsion. And yet, their rights to move freely and re-enter the host State immediately upon expulsion remain untouched, rendering the expulsion of the poor and economically inactive futile in practice. These ambiguities not only unveil the paradox of applying the concepts of illegality and expulsion to EU citizens in the context of European integration and internal open borders, but also facilitate the emergence of "non-removed" citizens. This creates an underclass of EU citizens who are simply "present" in the host Member State, staying unlawfully and without access to rights until, or unless, they are granted a valid residence permit or eventually removed.

[1] PhD Student at the European University Institute, Florence (Italy).

Keywords

EU citizenship; economically inactive citizens; residence; expulsion; non-removal.

¿CIUDADANOS O MIGRANTES? RESIDENCIA IRREGULAR EN EL CONTEXTO DE LA CIUDADANÍA EUROPEA

Resumen

La sentencia del Tribunal de Justicia de la Unión Europea (TJUE) en *Dano* puso de manifiesto que la condicionalidad del derecho de residencia de los ciudadanos europeos económicamente inactivos en la Directiva 2004/38 no es intrascendente, y que puede ser interpretada de un modo estricto. Después de analizar la trayectoria del TJUE en este ámbito, esta Nota examina las zonas grises resultantes de las prácticas de algunos Estados miembros, a medio camino entre la residencia legal y la expulsión. Asimismo, sostiene que dichas prácticas pueden entenderse como el resultado de una tensión entre dinámicas de apertura y clausura, profundamente arraigadas en el proyecto de ciudadanía europea. Al dar forma a los elementos restrictivos de la directiva, *Dano* facilita la revocación del derecho de residencia de determinados ciudadanos europeos y permite su expulsión. Sin embargo, sus derechos a la libre circulación y a regresar al Estado anfitrión inmediatamente después de la expulsión se mantienen intactos, frustrando en la práctica la posibilidad de expulsar a ciudadanos pobres e inactivos económicamente. Estas ambigüedades no solo revelan la paradoja existente en la aplicación de conceptos como la ilegalidad o la expulsión a ciudadanos europeos en un contexto de integración europea y fronteras internas abiertas, sino que también facilita la creación de ciudadanos «no expulsados». Ello crea una clase marginal de ciudadanos que se encuentran simplemente «presentes» en otro Estado miembro, permaneciendo irregularmente y sin acceso a derechos hasta que, o a menos que, se les conceda un permiso de residencia o en última instancia sean expulsados.

Palabras clave

Ciudadanía de la UE; ciudadanos económicamente inactivos; residencia; expulsión; no-retorno.

CITOYENS OU MIGRANTS? LA RÉSIDENCE PRÉCAIRE DANS LE CONTEXTE DE LA CITOYENNETÉ EUROPÉENNE

Résumé

L'arrêt rendu par la Cour de justice de l'Union Européenne (CJUE) dans l'affaire *Dano* a clairement établi que la conditionnalité de séjour des citoyens européens

économiquement inactifs, ne figure pas dans la Directive 2004/38 pour rien, et qu'elle peut être interprétée de manière stricte. Après une analyse de la jurisprudence de la CJUE dans ce contexte, cette Note se concentre sur les zones d'ombres découlant de la pratique des États, entre la résidence légale et l'expulsion. Elle affirme ensuite que ces situations peuvent être perçues comme le résultat d'une tension entre les dynamiques d'ouverture et de fermeture, qui sont profondément ancrées dans le projet de citoyenneté européenne. En donnant vie aux éléments restrictifs de la directive, l'affaire *Dano* facilite le retrait des droits de séjour de citoyens européens et permet ainsi leur expulsion. Cependant, leurs droits de circuler librement et de rentrer dans leur pays d'accueil immédiatement après l'expulsion restent intacts, ce qui rend l'expulsion des personnes pauvres et économiquement inactives vaine en pratique. Ces ambiguïtés dévoilent non seulement le paradoxe de l'application des concepts d'illégalité et d'expulsion aux citoyens de l'Union dans le contexte de l'intégration européenne et de l'ouverture des frontières intérieures, mais facilitent également l'émergence de citoyens "non expulses". Cela crée une sous-classe de citoyens de l'Union qui sont simplement "presents" dans l'État membre d'accueil, séjournant illégalement et sans accès à des droits, jusqu' à ce que, ou à moins qu'ils ne se voient accorder un permis de séjour valide, ou qu'ils soient finalement expulsés.

Mots clés

Citoyenneté européenne; économiquement inactif; résidence; expulsion; non éloignement.

CONTENTS

I. INTRODUCTION

There is, in EU law, a legal trichotomy that distinguishes between nationals, EU citizens and third-country nationals (Blázquez Rodríguez, 2020: 29). Whereas domestic citizenship, as a form of membership, combines the values of belonging, rights and participation, EU citizenship is characterised by an attempt to develop a sense of belonging through the conferral of rights, and to employ new and more selective forms of participation (Bellamy, 2008: 597). To date, however, it seems that it is only in the sphere of rights that EU citizenship is well advanced. And yet, EU citizenship is no doubt one of the main achievements of European integration. By creating a form of belonging that shifts away from the State and minimises the distinction between nationals and EU citizens, it is to a large extent a story of success, and widely regarded as the most advanced form of post-national membership (Benhabib, 2004; Soysal, 1994; Mindus, 2017). Moreover, the Court of Justice of the EU (CJEU), and later the European legislator, have made clear that EU citizenship would not be a trivial form of membership but the "fundamental status" of the citizens of Member States. The existential, "fundamental" or "quasi-national" nature of EU citizenship as a form of membership has been forged, to a great extent, through an extensive jurisprudence of the CJEU, which has made clear that free movement is not only crucial for economic growth and integration, but that it is now a fundamental right of EU citizens that contributes substantially to social and political integration (Martín Martínez, 2014: 771). But the "fundamental" character of EU citizenship has not only been pursued by means of a generous interpretation of free movement provisions, which are the subject of study of this Note. In the meantime, the

Court has also extended the reach of EU law to situations without a cross-border element that would otherwise fall outside of the reach of EU law,[2] and has been willing to recognise the legal validity, in the host Member State, of private juridical situations arisen under the legal order of the State of origin of a mobile EU citizen, among others (Blázquez Rodríguez, 2017). Against this backdrop, the analysis of EU citizenship would, *prima facie*, appear irrelevant for the study of illegality and non-removability.[3]

However, the development of Union citizenship, far from being a linear progression, constitutes a "hesitant process of polity building" beyond the State (Shaw, 2019: 5), in which there has been room for diverse processes of "othering" involving EU nationals, particularly in the context of poverty and criminality. EU citizenship is also a dynamic process which is deeply permeable to the historical evolution of the European project and to its economic, social and political crises (Martín Martínez, 2014: 768). The concepts of illegality and EU citizenship are not easy to reconcile, and yet irregular residence is no doubt a possible legal status for EU citizens living in a Member State other than their own (Menezes Queiroz, 2018: 48).

The right of residence is one of the key manifestations of both domestic and EU citizenship, albeit subject to conditionality in the EU case. This paper focuses on restrictions on residence rights and the existence of grey areas which relate to the setup of Directive 2004/38 and its interpretation by the CJEU.[4] The Directive distinguishes between three types of residence available for EU nationals: short-term residence (up to three months), medium-term residence (from three months to five years), and permanent residence (for those who have resided legally for five years in the host State).[5] In the case of medium-term residence, Article 7 establishes that EU citizens must be either economically active by being workers or self-employed or, alternatively, have comprehensive sickness insurance and sufficient resources "not to become a burden on the social assistance system of the host Member State".[6] The conditional right to reside held by economically inactive EU citizens by virtue of Article 7 offers

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2 For an analysis of the landmark case of *Zambrano* and its repercussions for EU citizenship as a "fundamental status", see Juárez Pérez (2011).

3 By non-removability, this Note refers to the phenomenon by which non-nationals remain in an irregular situation but, due to different circumstances, are not removed (non-removed) or cannot be removed (non-removable).

4 Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ L 158, 30 April 2004).

5 *Ibid.*, chapters III-V.

6 *Ibid.*, art. 7 paragraph 1, point b.

one of the most controversial and widely discussed elements of EU citizenship law. It is also one in which the distinction between the EU citizen and the third-country national, and between regular and irregular residence, may have become particularly hazy and at times unable to encompass the experiences of an important number of mobile EU citizens.

Section II provides an analysis of the CJEU's case law in this field, looking back at the Court's foundational stage (section II.1) and subsequently analysing the Court's shift to doctrinal conservatism in *Dano* (section II.2). Section III illustrates how, for poor EU citizens who do not fulfil residence conditions, lack of access to social benefits, precarious residence and non-removal is a possible outcome in between lawful residence and expulsion. These situations are ultimately the result of a policy choice of States not to remove, though tightly constrained by the EU legal order and its interpretation by the CJEU. Indeed, the legal link between the right to reside and equal treatment implies that restricting access to welfare in the host State ought to be followed by precarious residence, yet in a context of free movement whereby EU citizens are free to leave and re-enter the (expelling) Member State. This is framed as the outcome of an ambiguous EU framework that struggles to accommodate diverging dynamics of opening and closure and facilitates the emergence of precarious residence and non-removal. Lastly, section IV argues that, as much as the non-removal of EU citizens is strongly linked to the structural ambiguities and contradictions embedded in the Directive, EU law may also provide the tools to tackle at least some of these issues relating to precarious residence in the context of EU citizenship.

II. CITIZENSHIP CONDITIONALITY UNDER DIRECTIVE 2004/38

1. LUXEMBOURG'S EXPANSIVE CASE LAW: FROM *MARTÍNEZ SALA* TO *BREY*

The Court's foundational stage of citizenship law began with *Martínez Sala*, where a Spanish national with an expired residence permit was denied a child-raising allowance in Germany.[7] In short, the CJEU noted that, because she was not unlawfully residing in the host Member State, Ms. Sala was entitled to equal treatment with German nationals. In *Martínez Sala*, lawful residence was therefore seen as a presumptive status that triggered citizenship rights, rather than one to be subjected to close scrutiny and conditionality.

[7] Judgment of the Court of 12 May 1998, *Martínez Sala*, C-85/96, EU:C:1998:217, paragraphs 14-16.

In *Grzelczyk*, a French student was denied a subsistence allowance to conclude his studies in Belgium, as he could not prove that he had sufficient resources and social security cover to avoid becoming a burden on the social assistance system of the host Member State, in accordance with existing EU law at the time. In what it is perhaps the most resonant phrase of its citizenship jurisprudence (now included in Recital 3 of Directive 2004/38), the CJEU affirmed 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".[8]

The Court also relied on the principle of proportionality and stressed that the legislator, by establishing that EU citizens must not become an "unreasonable" burden on the social assistance system of the host State, was accepting a certain degree of financial solidarity between nationals of the host Member State and those of other Member States.[9]

The application of the principle of proportionality became even clearer in *Baumbast*, where the applicant, a German national residing in the United Kingdom with his family, was denied a residence permit because he did not hold comprehensive sickness insurance.[10] The Court held that Mr. Baumbast could rely on the right to move and reside freely as enshrined in primary law, and that all the restrictions and conditions to the exercise of his citizenship rights were limited by the principle of proportionality. Even though Mr. Baumbast's sickness insurance in Germany did not provide for emergency treatment in the UK, the interference with his right of residence was deemed disproportionate considering his financial resources, work history, the length of residence, the lack of usage of the host country's benefit system, and the possession of comprehensive sickness insurance in another Member State.[11]

Even in *Trojani*, where the Court acknowledged that residence conditions were not fulfilled and that the failure to recognise residence would not seem disproportionate,[12] the fact that Mr. Trojani was holding a valid residence permit granted by the municipality of Brussels entitled him to

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8 Judgment of the Court of 20 September 2001, *Grzelczyk*, C-184/99, EU:C:2001:458, paragraph 31 (emphasis added).

9 *Ibid.*, paragraph 44.

10 Judgment of the Court of 17 September 2002, *Baumbast and R*, C-413/99, EU:C:2002:493, paragraphs 18-21.

11 *Ibid.*, paragraph 92.

12 Judgment of the Court of 7 September 2004, *Trojani*, C-456/02, EU:C:2004:488, paragraph 36.

equal treatment in respect of Belgian nationals.[13] This style of reasoning is reminiscent of *Martínez Sala* (and repeated in *Bidar*),[14] inasmuch as is lawful residence that triggers access to social benefits, instead of access to social benefits that generates an inquiry into the legality of residence, as *Dano* and *Alimanovic* suggest more recently (see *infra* section II.2). Moreover, it acknowledged that lawful residence, regardless of whether it stems from EU, national, regional or municipal law, entitled EU nationals to full equal treatment.

In *Brey,* decided a year before *Dano,* the Court again relied on the principle of proportionality in order to elaborate further on the (un)reasonableness of the burden posed by EU citizens on the welfare systems of other Member States. Mr. Brey and his wife, German pensioners residing in Austria, were refused a complementary supplement because they did not have sufficient resources to establish lawful residence in Austria in accordance with Directive 2004/38.[15] The reasoning of the Austrian government revealed a latent paradox in EU citizenship law. As Spaventa puts it, the applicant was caught up in a Catch-22: the very fact that Mr. Brey had applied for the benefit meant that he lacked sufficient resources, making it impossible for him to have access to the benefit in conditions of equality with Austrian nationals without falling outside of the scope of Article 7(1)(b) (2016: 97). The Court argued that Member States cannot decide that an EU national is an "unreasonable burden" on its public finances without performing an overall assessment of the specific burden posed by the applicants.[16] Therefore, prior to denying access to social assistance and questioning the right of residence of the applicant altogether, domestic authorities must consider the length of residence of the person concerned, his/her personal circumstances, the regularity of income, the forecasted period during which he/she will receive the benefit, or whether the applicant is experiencing only temporary difficulties, among others.[17]

In these cases, it could already be observed that citizenship litigation was, at least theoretically, not only about access to welfare, but could also affect residence and expulsion. The conditionality of residence was repeatedly brought up by the Court, which in *Brey*[18] and *Trojani*[19] even recognised the possibility of expulsion of EU nationals solely on Article 7 grounds. Yet these

[13] *Ibid.*, paragraphs 27, 40, 43 and 46.

[14] Judgment of the Court of 15 March 2015, *Bidar*, C-209/03, EU:C:2005:169.

[15] Judgment of the Court of 19 September 2013, *Brey*, C-140/12, EU:C:2013:565, paragraphs 16-17.

[16] *Ibid.*, paragraph 64.

[17] *Ibid.*, paragraphs 70 and 78.

[18] *Ibid.*, paragraph 69.

[19] Judgment of the Court of 7 September 2004, *Trojani*, *cit.*, paragraph 45.

claims were very distant from the Court's practice, where the boundaries between equal treatment, residence and expulsion became rather hazy. In the cases analysed above, the Court not only made Article 7 "virtually meaningless as a Member State instrument for deportation" (Nic Shuibhne, 2006: 210), but was also reluctant to make it a source of inequality and irregular residence. In doing so, however, it sometimes relied on citizenship in an unclear manner that did not clarify in which cases EU citizens could face unequal treatment, irregularity or expulsion on economic grounds (if at all). Citizenship litigation therefore seemed to be about ensuring equal access to social benefits for mobile EU nationals, who always happened to be on the winning side.

Nevertheless, the widely praised jurisprudence of the Court in this field was fragile on at least two fronts. Firstly, as it was noted by O'Leary shortly after *Martínez Sala*, by deriving equal treatment automatically from lawful residence, the Court gave incentives for Member States to pre-emptively inquire who was residing within their borders and whether they fulfilled residence conditions in the first place (1999: 68) (although the principle of proportionality still provided backup protection for EU citizens not fulfilling the black letter conditions of Article 7). Secondly, precisely because landmark cases turned out to have a positive outcome for the applicant, little attention was paid to the legal consequences for those EU citizens who did not meet residence conditions in the first place, as the applicants seemed to always obtain the whole "citizenship pack".

This approach not only postponed a decision that the Court would eventually need to make (namely finding that a mobile EU citizen does not fulfil Article 7 conditions), but also lacked guidance as to what are the rights, legal status and protection against expulsion of those who do not fulfil residence conditions. The following paragraphs point at these grey areas in light of recent case law, under which the unlawfulness of EU nationals is now a more tangible reality.

2. THE *DANO* JUDGMENT: MAIN FEATURES AND IMPLICATIONS

The CJEU's long-standing claim that economically inactive migrants did not have unconditional access to welfare benefits in the host State finally materialised in *Dano*. This ruling not only evidenced that Article 7 conditions were there for a reason, but it is also widely considered as a shift towards doctrinal conservatism in the field of EU citizenship that departs from the creativeness of its previous case law (Thym, 2015a: 254).

In *Dano*, the applicant was a Romanian national that had last entered Germany with her son in 2010. Ms. Dano was financially dependent on her sister, had not worked in Germany or Romania and was not looking for a job.

Even though she had a residence permit as an EU citizen, child allowances and a maintenance payment, her application for a subsistence benefit was rejected in 2011.[20]

The Court claimed that, to accept that mobile EU citizens who do not fulfil residency conditions under the Directive can claim social benefits in equal conditions to nationals would run contrary to the Directive's objective of "preventing Union citizens […] from becoming an unreasonable burden on the social assistance system of the host Member State".[21] What follows is a literal application of Article 7 conditions to the facts of the case: "A Member State must therefore have the possibility, pursuant to Article 7 of Directive 2004/38, of refusing to grant social benefits to economically inactive 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".[22]

It is worth noting that the facts of the case are substantially different to those of *Baumbast*, *Brey*, or *Grzelczyk*, to name a few, although not so distant to the circumstances of the applicant in *Martínez Sala*. In this context, part of the Court's shift could be explained on the basis of the changing nature of the profile of the litigants (Davies, 2018: 1442). As anticipated above, however, the importance of *Dano* does not stem from the change in the outcome, but from the radical shift in a reasoning that completely disregards primary law and the principle of proportionality.

Firstly, the Court shows in *Dano* interpretative conservatism at its best by performing a literal interpretation of residence conditions (Thym, 2015a: 249). The case was rapidly criticised for signalling the end of the proportionality assessment in relation to the right to reside of EU citizens (Spaventa, 2016: 92). It is remarkable indeed that in *Dano*, decided only a year after *Brey*, the Court did not use the word proportionality once. Neither did it assess the number and length of the applicant's stays in the country, the ties developed therein, or the fact that her son was actually born in Germany. Other key words such as "facilitate", "narrowly", "strictly",[23] or "financial

[20] Judgment of the Court of 11 November 2014, *Dano*, C-333/13, EU:C:2014:2358, paragraphs 36-45.

[21] *Ibid.*, paragraph 74.

[22] *Ibid.*, paragraph 78.

[23] The notion that the aim of the provisions on free movement is to "facilitate" free movement and residence and hence limitations must be interpreted "narrowly" or "strictly" has been a constant feature of Luxembourg's case law on residence, from *Grzelczyk* to *Brey,* and of citizenship jurisprudence more generally. In relation to fam-

solidarity",[24] are also absent in the judgment. The ruling was ambiguous as to whether proportionality would be neglected only where citizens exercise free movement rights "solely in order to obtain another Member State's social assistance" (Verschueren, 2015: 363), but the abandonment of the principle of proportionality as we knew it seemed confirmed in *Alimanovic,* this time not concerning an economically inactive citizen but a jobseeker.

In *Alimanovic*, the Court considered that Directive 2004/38 and German legislation already included proportionality considerations and hence no individualised assessment was needed. In what seems a conscious misinterpretation of *Brey,* the Court argued that "while an individual claim might not place the Member State concerned under an unreasonable burden, the accumulation of all the individual claims which would be submitted to it would be bound to do so".[25] In *García-Nieto*, the Court confirmed the interpretation of the proportionality principle articulated in *Alimanovic*, putting forward the view that the Directive "itself takes into consideration various factors characterising the individual situation of each applicant for social assistance".[26] In both cases, the Court disregards the fact that the proportionality principle, as enunciated in *Brey,* was not about whether one individual puts the social assistance system as a whole at risk, but about whether the individual circumstances of the applicant (e.g., personal links and integration in the host society, foreseen length of financial difficulties, whether he/she fulfils at least some of the residence conditions, and so on) would make it reasonable for the host Member State to bear that specific burden.

Secondly, these cases confirm the automatic acquisition and loss of free movement rights. In *Dano*, the applicant held a valid permit for EU nationals, but this was not an obstacle for the CJEU to state that she was not a lawful resident and was therefore not entitled to social assistance. This view was already put forward in *Dias*, where the Court argued that EU law "precludes a Union citizen's residence from being regarded as legal, within the meaning of European Union law, solely on the ground that such a permit was validly

ily reunification rights of EU citizens, for example, see Judgment of the Court of 4 March 2010, *Chakroun*, C-578/08, EU:C:2010:117, paragraphs 43 and 47

[24] See, among others: Judgment of the Court of 20 September 2001, *Grzelczyk*, *cit*., paragraph 44; Judgment of the Court of 15 March 2015, *Bidar*, *cit*., paragraph 56; Judgment of the Court of 19 September 2013, *Brey*, *cit*., paragraph 72.

[25] Judgment of the Court of 15 September 2015, *Alimanovic*, C-67/14, EU:C:2015:597, paragraph 62.

[26] Judgment of the Court of 25 February 2016, *García-Nieto and others*, C-299/14, EU:C:2016:114, paragraph 47.

issued to him".[27] Similarly, in *Commission v UK*, delivered by the Court after *Dano*, the CJEU endorsed the UK's "right to reside test", according to which the fulfilment of residence conditions was monitored every time that an EU citizen applied for certain benefits.[28] This turn increases the uncertainty of legal residence for the poorer EU citizens, given that it is not only difficult to ascertain whether one is lawfully residing in another EU country, but also the loss of residence follows automatically once the conditions of residence stop being fulfilled, regardless of whether the EU citizen in question holds a valid permit, registration certificate or otherwise (Thym, 2015b: 41).

Thirdly, *Dano* and *Alimanovic* might indicate the end of domestic residence permits as a valid source of citizenship rights. In the words of the Court, "[t]o accept that persons who do not have a right of residence *under Directive 2004/38* may claim entitlement to social benefits under the same conditions as those applicable to nationals of the host Member State would run counter to an objective of the directive […]".[29] Although, according to the CJEU, Ms. Dano did not have a residence permit at all, it is possible that eligibility for non-discrimination is now implicitly ruled out when the lawful residence of an EU citizen stems from domestic law alone (Nic Shuibhne, 2015: 931). Under this interpretation, lawful residence should be established solely through elements of EU law and it would, again, contradict the approach of *Martínez Sala* and *Trojani,* where a residence permit granted strictly on the basis of national law activated EU citizenship rights. "This is an issue that the CJEU will have to explicitly address in *The Department for Communities in Northern Ireland*, where AG Richard de la Tour recently contended that the fact that residence permits are granted to EU nationals solely on the basis of domestic law does not justify their systematic exclusion from social assistance, as this would amount to indirect discrimination on the grounds of nationality".[30]

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27 Judgment of the Court of 21 July 2011, *Dias*, C-325/09, EU:C:2011:498, paragraph 54.

28 Judgment of the Court of 14 June 2016, *Commission v United Kingdom*, C-308/14, EU:C:2016:436.

29 Judgment of the Court of 11 November 2014, *Dano*, *cit.*, paragraph 74 (emphasis added). The same wording was repeated in *Alimanovic* (see Judgment of the Court of 15 September 2015, *Alimanovic*, *cit.*, paragraph 50).

30 Opinion of Advocate General Richard de la Tour, *The Department for Communities in Northern Ireland*, C-709/20, EU:C:2021:515, point 97.

III. WHAT NEXT? LEGISLATIVE AND JUDICIAL AMBIGUITIES AND MEMBER STATE PRACTICE

The shifting jurisprudence of the CJEU exposes the ambiguities of a Directive that seeks to reconcile both "the logic of closure which underpins national dispositions and practices of social sharing, and the logic of opening which typically inspires the European integration project" (Ferrera, 2005: 252). Certainly, the development of European citizenship is marked by a fragile balance between the Directive's commitment to facilitating the exercise of the fundamental right to free movement, while reassuring Member States that EU citizens will not become a financial burden on their welfare systems. At the legal level, however, the tension between these different dynamics is buried under a seamless link between residence rights and equal treatment.

The jurisprudential turn in *Dano* has generally made it easier for States to find that mobile EU citizens do not satisfy residence conditions. But, if the "Danos" are no longer legally resident under EU law, one wonders: What is their status in the host country? Are they considered irregular migrants? Can these citizens be expelled solely on the basis of their lack of sufficient resources? Are they deported in practice? It is no longer feasible to postpone answering these questions.

In this context, it must be noted that becoming an "unreasonable burden" is directly related to becoming an unlawfully staying citizen (Menezes Queiroz, 2018: 54), and if a Union citizen does not have a right of residence, the host Member State will be legally entitled to expel him or her from its territory. There is, in EU law, no legal obstacle to the expulsion of EU nationals who do not fulfil residence conditions under Directive 2004/38 beyond those stemming from Member States' obligations under Article 8 ECHR (Article 7 of the Charter), yet this is far from being a common practice of Member States. Notwithstanding the seemingly unequivocal outcome in *Dano* (that poor and economically inactive citizens are not legally resident under Directive 2004/38), the status of these citizens remains unclear in practice. As the following paragraphs illustrate, Member States, constrained by an institutional framework that is not built to deport undesirable EU citizens (except in cases of public policy, public security and public health derogations), may instead opt for precarious residence, and not expulsion, for those EU citizens that do not fulfil Article 7 conditions.

Firstly, it must be highlighted that neither the Directive nor the Commission Communication on the transposition of the Directive foresee a procedure for the expulsion of EU citizens on the basis of a lack of suffi-

cient resources or comprehensive sickness insurance.[31] Moreover, Article 15 of Directive 2004/38 prohibits the issuing of entry bans if residence is lost "on grounds other than public policy, public security or public health".[32] This prohibition on limiting the re-entry of EU citizens affects both the receiving and the sending State. In *Jipa*, the Court of Justice confirmed that Romania could not restrict a citizen's right to move to another Member State from which he had been expelled unless he was deemed to pose a "genuine, present and sufficiently serious threat to one of the fundamental interests" of the host society.[33] This means that, if expelled, the "Danos" can simply fly back to the host State, showing the paradox of applying the concepts of illegality and expulsion to EU citizens in the context of European integration and internal open borders. Following the (so far uncontested) logics of opening, citizenship rights, when lost, can be re-activated by leaving and re-entering the host Member State, offering the citizen another opportunity to justify his or her free movement rights (by, for example, showing to be a jobseeker with a reasonable chance of success) or simply go unnoticed by State authorities. As a result, States' prerogative to deport people is deeply undermined inasmuch as it is not accompanied by the competence to regulate and control entry. It then comes as no surprise that little evidence of expulsion taking place in these cases can be found across Member States even if media rhetoric in some Member States suggests otherwise (Shaw and Nic Shuibhne, 2014: 93).[34]

This does not mean, however, that Member States do not have recourse to expulsion at all. In fact, the lack of clarity of an EU framework that neither prohibits expulsion, nor offers clear rules on the procedures leading to the expulsion of EU citizens, might facilitate selective and discriminatory deportation. An example of this can be found in the expulsion of Roma people from some Member States. The most salient example is provided by France, where 80 % of the EU citizens who are deported are either Romanian or Bulgarian citizens (13 241 in the first 10 months of 2010 alone) (Basilien-Gainche,

[31] Communication from the Commission, Communication on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, 2 July 2009, COM(2009) 313 final, p. 38.

[32] See art. 15, paragraphs 1 and 3, of Directive 2004/38, *cit*.

[33] Judgment of the Court of 10 July 2008, *Jipa*, C-33/07, EU:C:2008:396, paragraph 30.

[34] By 2014, there was no evidence that expulsion on purely economic grounds was taking place in Austria, Bulgaria, Croatia, Estonia, Greece, Hungary, Italy, Malta, Poland, Portugal, Slovenia, Spain or Sweden.

2020: 268).[35] Even if many of the citizens removed from France might not fulfil residence conditions, it seems to be the case that, if not by the law, these communities are targeted by administrative practices and that their Roma origin constitutes a significant motive for their arrest and expulsion (Maslowski, 2015: 73). Another example is provided by the "hostile environment" policies implemented by the UK towards rough-sleeping EU citizens, which often led to their deportation even without them seeking access to social assistance (Evans, 2020). In both cases, the letter of EU citizenship law might certainly allow for the expulsion of many of these economically inactive citizens, and yet the fact that States selectively pick the victims of an all-of-a-sudden strict interpretation of EU law raises serious questions about the compatibility of these practices with the principle of non-discrimination under EU law.

Despite these practices, however, expulsion is not necessarily *the* tool for States to manage the issue of unlawfully staying EU nationals. In practice, it might be easier for States to follow a "starve them out" strategy (Nic Shuibhne, 2015: 933; Thym, 2015a: 260), denying access to social benefits or residence, or issuing deportation orders which will never be enforced in practice, hoping that people leave by their own means. With *Dano*, the CJEU facilitates such an interpretation of EU law, as it makes it easier for States to find that an EU citizen ought to leave, yet in a legal setting that, unlike the migration *acquis*, does not enable Member States to realistically expel as a norm. Again, deportation is simply too expensive (and time-consuming) a venture for a State with no power to decide over the re-entry of returnees. This interpretation can create an underclass of EU citizens who are simply "present" until or unless they are issued a residence permit or actually removed. A few domestic examples are provided below.

Firstly, in the (pre-Brexit) UK immigration regulations, the Secretary of State was legally entitled to verify any EU citizen's right to reside and to enforce removal when residence conditions were not met.[36] However, a report on the implementation of the Directive conducted in collaboration with British authorities in 2014 revealed that "[t]he solution adopted by the UK courts is to treat EU citizens who do not enjoy a right of residence by virtue of [Article 7 of the Directive] as simply "present" in the United Kingdom. That status does not confer any right of residence in the UK under either EU or national law" (Shaw and Nic Shuibhne, 2014: 90).

In Austria, EU citizens must show that they fulfil residence conditions in order to obtain the necessary registration certificate to reside in the country for

[35] On the expulsion of Roma people from France, see further Parker, 2012.

[36] United Kingdom, The Immigration (European Economic Area) Regulations 2016, Statutory Instruments, 2016, No. 1052, Arts. 22 and 23(6).

longer than three months. Moreover, the right of residence is reviewed each time that an EU citizen asks for a supplementary pension, as welfare authorities often notify immigration authorities (Heindlmaier and Blauberger, 2017: 1209). Even if according to Austrian law EU citizens should be expelled when "the prerequisites for this right of residence do not apply or no longer apply",[37] between 2008 and 2013 only 752 out of 9887 unlawfully staying EU citizens (*Aufenthaltsverbote*) were issued with expulsion orders (Heindlmaier and Blauberger, 2017: 1208). However, these statistics do not show the reasons leading to removal. According to Heindlmaier and Blauberger, Austrian officials noted, when interviewed, that lack of resources was hardly ever the reason due to the ineffectiveness of expulsions without a re-entry ban (2017: 1208). Thus, it is to be assumed that, considering the already low numbers of expulsion orders issued to EU citizens from Austria, those expelled due to the lack of fulfilment of residence conditions constitute a negligible amount of the unauthorised population. In the meantime, EU citizens are asked to leave the country voluntarily and often live under the threat of being deported, although hardly ever followed by a formal expulsion order (Heindlmaier and Blauberger, 2017: 1209).

The clearest example of an institutionalised "starve them out" strategy is however provided by Belgium, which stands out due to its openness to disclose the number of return orders issued strictly on Article 7 grounds.[38] Between 2012 and 2018, expulsion orders due to the lack of fulfilment of residence conditions ranged from 1350 to 2712 per year (Valcke, 2020: 178). Whereas the statistics on enforced removals are only available for those

[37] See section 55 of the Austrian Residence and Settlement Act (*Niederlassungs— und Aufenthaltsgesetz (NAG)*). English summary of the Austrian legal framework concerning the removal of EU citizens available at: https://www.oesterreich.gv.at/en/themen/leben_in_oesterreich/aufenthalt/4/Aufenthaltsbeendigung-von-EU-B%C3%B-Crgern-und-deren-Angeh%C3%B6rigen.html.

[38] For the (rather literal) transposition of the Directive into Belgian Law, see the Royal Decree of 8 October 1981 on the entry, residence, settlement and removal of foreigners (*Arrêté royal du 8 octobre sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers*). In its Article 42bis, the Decree implements the Directive and establishes that, whereas residence permits can be withdrawn when EU citizens become an "unreasonable burden", such decision must not be the automatic consequence of having recourse to social assistance and must take into account the personal circumstances of the citizen. The Constitutional Court confirmed the legal limitations in the access to social benefits for economically inactive EU nationals in Belgium (see Belgium, Constitutional Court, Decision of 30 June 2014, No 95/2014), although, in the same ruling, it also annulled foreseen limitations in their access to emergency health-care treatment or in the access to social assistance by workers and job-seekers.

expelled on grounds of public policy and public security, the Belgian Secretary of State explicitly noted that expulsion orders based on other grounds are purely symbolic and that "the removal of a European national will only take place if and only if there is fraud or problems linked to public order" (Valcke, 2020: 184). In a recent work based on ethnographic fieldwork conducted with Italian citizens in Belgium, Lafleur and Mescoli found that the Belgian government uses, since 2010, a policy of systematic cross checking between migration and social security databases to determine whether EU nationals are using non-contributory benefits for "too long" or have "no reasonable chance of finding employment" (2018: 486). If this is the case, they are considered an "unreasonable burden" on the Belgian welfare state, their residence permits are withdrawn, and they are issued with expulsion orders. Unlike in the case of Roma minorities or other "less deserving" EU citizens, for Italian nationals (like for French or Spaniards) deportation is only a theoretical possibility which does not materialise in practice (Lafleur and Mescoli, 2018: 484). However, their unlawful stay is characterised by lack of access to rights, the removal of their data from residence registries, personal intimidation in bureaucratic interactions, and a threat of being deported (Lafleur and Mescoli, 2018: 487-488). These EU nationals have, *de facto*, become non-removable migrants, staying unlawfully and under the threat of deportation, but never actually removed. In these cases, it is not the existence of a legal or technical obstacle that impedes the expulsion of these individuals (as it often occurs with third-country nationals), but a policy choice of States not to do so. A similar practice was reported by Spanish citizens residing in Belgium, who noted that, once they rejected the expulsion order that was issued to them, they were not forcibly deported, but simply removed from all the official registries. This precludes them, for instance, from signing a rental contract or having access to health care or education.[39]

In sum, the restriction of the mobility of the poor in the context of EU citizenship does not seem to be generally carried out by means of deportation, even when domestic legislation so provides. This can possibly be explained due to the high costs of expelling a person who can freely fly back to the host country, for the sake of friendly relationships with fellow EU governments, or other reasons. The draconian interpretation of *Dano* undertaken by some Member States, according to which an EU citizen with a valid residence permit who asks for social benefits gets exposed not only to having the benefits denied, but to become an irregular migrant, requires legal residents to be aware of the latest EU law developments coming from Luxembourg so as to

[39] Abellán, L. (2014). "Así se expulsa a un europeo de la UE" ["This is how an EU citizen is expelled"], *El País,* 12-1-2014. Available at: https://bit.ly/3cW41Sz.

know whether the mere act of asking for a benefit can put an end to their rights as EU citizens altogether.

The general scarcity of available data on the expulsion of EU nationals (Ballesteros *et al.*, 2016: 122), as well as the fact that some States might take a more liberal stance towards the residency of EU citizens, make it difficult to draw conclusions on the quantitative relevance of the issue. It is thus not my contention that this is *the* way through which Member States deal with economically vulnerable citizens, but rather that when these situations occur, they can be understood as a by-product of EU law. In *Dano,* the Court facilitates the withdrawal of residence rights by bringing to life the dynamics of closure embedded in the Directive. However, the dynamics of opening which are (too) rooted in the Directive remain untouched as regards citizens' right to re-enter the country from which they are expelled on residence conditionality grounds, limiting States' capacity to deport in practice. Between *de jure* non-removable and *de facto* non-removed, these EU citizens ultimately remain due to a policy choice of the host Member State which makes a decision not to enforce removal (yet one that is deeply constrained by EU law). In this context, Belgium provides the clearest example of a Member State that takes full advantage of the ambiguities of the EU legal framework while being generally compliant with the Directive.

IV. EU LAW TO THE RESCUE? EU LAW SOLUTIONS TO AN EU LAW PROBLEM

The obscure relationship between access to welfare, residence and expulsion in Article 7 has made it possible for some States to trap EU citizens into a circular interpretation of this provision. According to this interpretation, EU citizens can only ask for social benefits if they are legal residents, but asking for social benefits may reveal a lack of resources and make them automatically lose social benefits, legal residence and protection from expulsion altogether. This is particularly relevant considering that no individual proportionality assessment seems to be required according to *Dano*. Moreover, these ambiguities also make it possible to expel certain EU citizens following a strict interpretation of the Directive. Whereas the issues highlighted above are, to a great extent, the result of the application of an EU legal framework which is too often ambiguous in its application, EU law also provides for the necessary tools to address its most adverse effects.

Firstly, for those who are expelled for no longer fulfilling residence conditions, this might take place, as anticipated above, in a manner contrary to non-discrimination provisions despite removals being enforced following a

literal application of EU law. In 2010, when the French government dismantled over 500 Roma settlements and expelled more than 1 000 EU citizens between July and September (Basilien-Gainche, 2020: 267), the European Parliament condemned the practice as being discriminatory on the ground of origin and constitutive of mass expulsion,[40] although the Commission surprisingly did not initiate infringement procedures against France (Maslowski, 2015: 73). In the UK case, it was the UK High Court that ruled that the Home Office policies towards rough-sleeping EU citizens were contrary to EU law.[41]

For those who are not removed, some have advocated for an interpretation of *Dano* according to which lawful residence and unconditional access to social benefits do not necessarily go hand in hand. This would satisfy statist concerns about "benefit tourism" while maintaining a reasonably meaningful (though incomplete) status for EU citizens. Soon after *Dano*, Spaventa anticipated that this ruling, while undeniably a step back in many respects, offered an opportunity to close a gap in citizenship law that dated back to *Martínez Sala*. As highlighted above, *Martínez Sala* provided incentives for Member States to closely monitor which citizens were truly fulfilling residence conditions before these asked for social benefits on the basis of their residence. In other words, "Member States who were pretty *laissez-faire* in relation to residence of non-economically active migrants might become stricter if hospitality came with a price tag attached" (Spaventa, 2016: 95). The key question will thus be to ascertain whether *Dano* implies that the conditions for residence rights differ from those of equal treatment rights. Indeed, the CJEU rules, beyond reasonable doubt, that Member States are not obliged to grant social benefits to those EU citizens that do not fulfil Article 7 conditions. But, according to Spaventa, if the EU citizen in question does not have access to the welfare system of the host State, it is hard to envisage how he or she could become an "unreasonable burden" on its social assistance system. There would be, as a result, little harm in allowing citizens in this situation the possibility to reside in the host State (2016: 98). Thus, a strict interpretation of Article 7 would apply as far as equal treatment is concerned, but a more expansive interpretation based on primary law and individualised proportionality would apply for residency and protection against expulsion. This interpretation would

[40] See Resolution of the European Parliament on the situation of Roma and on freedom of movement in the European Union, 9 September 2010, P7 TA(2010) 0312.

[41] England and Wales High Court, Judgment of 14 December 2017, *Gunars Gureckis v Secretary of State for the Home Department*, EWHC 3298 (Admin), paragraphs 84 and 106.

address States' concerns about "welfare tourism",[42] maintain a reasonably meaningful concept of EU citizenship and avoid vulnerable people facing precarious residence and threat of expulsion solely on the basis of economic considerations.

Remarkably, time might have proven Spaventa right (but only to a certain extent). Already in *Alimanovic*, the Court showed some hints that the right to reside and equal treatment might not be inevitably linked. Despite denying access to benefits on the basis of a strict interpretation of the Directive, the Court argued that Ms. Alimanovic and her daughter could rely on Article 14(4)(b) in order to enjoy a right of residence in the host State due to her status as a jobseeker, although the provision only provided for protection against expulsion and not for lawful residence.[43] In this case, however, the separation between lawful residence and access to welfare derived from an express derogation enshrined in Article 24(2) of the Directive, which enables States to deny social assistance to first-time jobseekers.

More recently, in *Bajratari* the Court had to interpret Article 7(1)(b) in the context of a minor EU citizen whose "sufficient" resources derived from the unlawful employment of his father, an irregular migrant from Albania. In this case, the Court not only established that both the EU citizen and his father had a right to reside under the Directive, but it did so in a way that resembles more the reasoning of the Court in *Brey* than that of *Dano*. The CJEU remarked that the objective of the Directive is to "facilitate the exercise of the primary and individual right to move and reside freely"[44] and, paraphrasing *Brey*, it argued that free movement is the general rule and that "the conditions laid down in Article 7(1)(b) of Directive 2004/38 must be construed in compliance with the limits imposed by EU law and the principle of proportionality".[45] What follows is an individualised proportionality test in light of primary law which, breaking free from *Alimanovic,* establishes that making lawful residence dependent on having resources obtained from legal work would be "a disproportionate interference with the exercise of the Union citizen minor's fundamental right of free movement and of residence under

[42] We must not forget that the citizenship cases analysed above, without exception, emerged in the context of social benefits. Even in *Dano*, where the Court admitted that the applicant did not fulfil residence conditions, the German government was never bothered by Ms Dano's residence in the country until she asked for non-contributory benefits.

[43] Judgment of the Court of 15 September 2015, *Alimanovic*, *cit*., paragraphs 56-59.

[44] Judgment of the Court of 2 October 2019, *Bajratari*, C-93/18, EU:C:2019:809, paragraph 47.

[45] *Ibid*., paragraph 35.

Article 21 TFEU".[46] In doing so, it carefully considers (in a *Baumbast*-like manner) the applicant's individual circumstances, including his father's tax and social security contributions, as well as the fact that in 10 years none of them had received social assistance in the UK.[47]

The case of *Bajratari* thus supports the claim that the Court might have *de facto* adopted different standards as to what "sufficient resources" and comprehensive sickness insurance mean depending on whether the case is about residence only, or whether it also includes a claim to social assistance. It thus seems to be easier for litigants to obtain a positive outcome from Luxembourg if social benefits are out of the equation. This would probably be the only way to make sense of the CJEU's leap from *Brey* to *Dano*, and back to individualised proportionality in *Bajratari*, and one that might address the issue of precarious residence for some non-removed EU citizens.

However, as soon as a dispute over social benefits comes into play, the proposal of separating lawful residence from equal treatment rests on shaky legal grounds. Firstly, because Article 24(1) of the Directive rules that, "[s]ubject to such specific provisions as are *expressly* provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty".[48] In addition, Article 34 of the EU Charter for Fundamental Rights guarantees the right to "social security benefits and social advantages in accordance with Union Law and national laws and practices" of everyone residing legally in the EU,[49] and Article 18 TFEU prohibits the discrimination of Union citizens on the grounds of nationality. Whereas in *Alimanovic* the CJEU made use of the express derogation enshrined in Article 24(2) of the Directive so as to limit the access to social benefits of a first-time jobseeker, there seem to be no legal grounds to limit the rights of lawful residents as a general rule. This can also help explain why the Court might be eager to implicitly adopt a more generous approach when a case is only about residence, but it is however incapable of separating residence and welfare within the very same case. Indeed, as soon as a conflict

[46] *Ibid.*, paragraph 42. In *Alokpa*, the Court had already stressed that "[a]rticle 7(1)(b) of Directive 2004/38 must be interpreted as meaning that it suffices that such resources are available to the Union citizens, and that that provision lays down no requirement whatsoever as to their origin" (see Judgment of the Court of 10 October 2013, *Alokpa*, C-86/12, EU:C:2013:645, paragraph 27).

[47] *Ibid.*, paragraphs 44-45.

[48] Article 24(1) of Directive 2004/38, *cit.* (emphasis added).

[49] European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/c 326/02, art. 34.

over equal treatment arises, the legal link between residence rights and equal treatment drags the CJEU into adopting an "open-open" or "closed-closed" solution, despite the fact that, in the real world, both elements are affected by ongoing (and sometimes differing) dynamics of opening and closure.

And yet, some Member States like Spain (Valina Hoset and Roman Vaca, 2016),[50] Italy (Brunello and Perego, 2016), Germany and, to a lesser extent, Austria (Heindlmaier and Blauberger, 2017), do in practice separate their policies as regards residence and equal treatment. These practices (which perhaps fail to comply with EU law by omission) are certainly hard to reconcile with the notion of EU citizenship as the fundamental status of EU citizens, as they provide for different "classes" of EU citizens based on perceived levels of deservingness. That being said, these practices retain *some* meaning to the status of the poor and economically inactive.

Moreover, the ambiguities of the Directive can also be used to the citizen's advantage. Firstly, it remains the case that the CJEU has created an autonomous concept of worker based upon an expansive interpretation of the "real and genuine" economic activity needed to qualify as a worker or self-employed person.[51] The economic activity might be regarded as genuine,

[50] In the Spanish case, the authors of this report note that the health care and social systems no longer function on the basis of the "universal service principle" for EU citizens (as it did prior to 2008), and that it does not cover those who are staying for less than three months or those who have not registered and shown to have sufficient resources (see Royal Decree-Act 16/2012 on urgent measures to guarantee the National Health System and improve the quality and safety of its services (*Real Decreto-ley 16/2012, de 20 de abril, de medidas urgentes para garantizar la sostenibilidad del Sistema Nacional de Salud y mejorar la calidad y seguridad de las prestaciones*), Spanish Official Journal 98, 24 April 2012). However, Spanish legislation only provides for the refusal of a right of residence (and expulsion) under grounds of public policy, public security and public health, according to Chapter IV of the Royal Decree-Act 2 Royal Decree 240/2007 on the entry, free movement and residence in Spain of Union citizens and of citizens within the European Economic Area (*Real Decreto 240/2007, de 16 de febrero, sobre entrada, libre circulación y residencia en España de ciudadanos de los Estados miembros de la Unión Europea y de otros Estados parte en el Acuerdo sobre el Espacio Económico Europeo*), *Spanish Official Journal,* 51, 28 February 2007.

[51] Judgment of the Court of 3 July 1986, *Lawrie-Blum*, C-66/85, EU:C:1986:284; Judgment of the Court of 23 March 1982, *Levin*, C-53/81, EU:C:1982:105; Judgment of the Court of 4 February 2010, *Genc*, C-14/09, EU:C:2010:57. More recently, on the retention of the status as a self-employed person, see Judgment of the Court of 20 December 2017, *Florea Gusa*, C-442/16, EU:C:2017:1004.

among others, where the worker engages in brief and minor employment that "did not ensure him a livelihood",[52] in cases of traineeships,[53] or in a case of part-time employment of between 3 and 14 hours per week.[54] More recently, the Court had to tackle all worker status, residence rights and social benefits in the case of *Tarola*, where it protected the worker status of a Romanian national who had worked for two weeks in Ireland before becoming involuntarily unemployed.[55] In doing so, the Court referred to the Directive's objective "to strengthen the right of free movement and residence of all Union citizens",[56] and remarked that the interpretation of its provisions cannot be done restrictively.[57] Thus, from a litigant's perspective, it might be desirable to undertake (any) economic activity so as to be regarded as a worker under EU law and hence fall under full equal treatment, or alternatively to register as a first-time jobseeker with no access to benefits other than those intended to facilitate access to the labour market.[58] Secondly, upon the loss of residence rights, EU citizens may alternatively opt to leave and re-enter the country in other to re-activate their citizenship rights. Upon re-entry, they may seek to engage into economic activities, register as jobseekers, or simply go unnoticed by State authorities if no social assistance is sought.

Lastly, even if EU citizenship, as the "fundamental status" of EU citizens, is arguably intended to go well beyond States' human rights commitments under the ECHR, violations of citizens' rights to family and private life under Article 8 of the Convention cannot be discarded. A case in point is, again, provided by *Dano*, where, as noted above, the CJEU did not require German authorities to assess the number and length of the applicant's previous stays

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52 Judgment of the Court of 4 June 2009, *Vatsouras and Koupatantze*, C-22/08, EU:C:2009:344, paragraph 25.

53 Judgment of the Court of 17 March 2005, *Kranemann*, C-109/04, EU:C:2005:187, paragraph 13; Judgment of the Court of 9 July 2015, *Balkaya*, C-229/14, EU:C:2015:455, paragraph 52.

54 Judgment of the Court 18 July 2007, *Geven*, C-213/05, EU:C:2007:438, paragraph 30.

55 Judgment of the Court of 11 April 2019, *Tarola*, C-483/17, EU:C:2019:309, paragraph 54.

56 *Ibid*., paragraph 49.

57 *Ibid*., paragraph 38. The positive outcome of the ruling might have also been facilitated by the fact that the applicant did not seem to have access to social benefits anyway, as Irish law required one year of fixed-term employment contract for both EU and Irish nationals to access the benefit under dispute.

58 According to the Court, these do not qualify as "social benefits" under EU law. See Judgment of the Court of 4 June 2009, *Vatsouras and Koupatantze*, *cit*., and Judgment of the Court of 23 March 2004, *Collins*, C-138/02, EU:C:2004:172.

in the country, her private and family ties with both the host country and the country of origin, or the fact that her son was born in the host State. Whereas the result of the balancing exercise is, in principle, for domestic courts to perform (particularly considering Strasbourg's "procedural turn" (Kleinlein, 2019; Arnardóttir, 2017)),[59] the fact that no individualised proportionality assessment seems to be required at all by the CJEU in cases like *Dano, Alimanovic* or *García-Nieto* may end up in Article 8 violations, and hence human rights litigation might prove a fruitful route to explore.[60]

V. CONCLUSIONS

This article has analysed the trajectory of the Court of Justice in the much-explored field of free movement rights, yet from a different angle. The case of *Dano*, albeit a regrettable step back to doctrinal conservatism, opens up a space to look into past case law with fresh eyes. Indeed, the *Dano* case not only questions the nature of EU citizenship as the "fundamental status" of EU citizens through a strict interpretation of their basic rights as citizens of the Union, but also allows us to reflect on the structural ambiguities of EU citizenship and their consequences in terms of legal status and access to rights for economically inactive citizens.

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[59] By "procedural turn", I refer to the notion that the ECtHR seems to increasingly scrutinise procedural diligence at the domestic level (this is, whether or not the State in question performs a "balancing exercise" between the competing public and private interests at stake), while following a practice of partial deference towards domestic courts insofar as the normative assessment of the merits of the case is concerned.

[60] Some of the seminal cases of the ECtHR on Article 8 of the Convention include *Berrehab* (ECtHR, 28 May 1988, *Berrehab vs. The Netherlands*, CE:ECHR:1988:-0621JUD001073084), *Moustaquim* (ECtHR, 18 February 1991, *Moustaquim vs. Belgium*, CE:ECHR:1991:0218JUD001231386), *Boultif* (ECtHR, 2 August 2001, *Boultif vs. Switzerland*, CE:ECHR:2001:0802JUD005427300) or *Üner* (ECtHR, 18 October 2006, *Üner vs. The Netherlands* [GC], CE:ECHR:2006:1018JUD004641099). For a more recent case of a violation in an expulsion case, see ECtHR, 18 December 2018, *Saber and Boughassal vs. Spain*, CE:ECHR:2018:1218JUD007655013. In addition, the Strasbourg Court has found that Article 8 may include a positive obligation to regularise the status of the person concerned, in cases like *Rodrigues da Silva* (ECtHR, 31 January 2006, *Rodrigues da Silva and Hoogkamer vs. The Netherlands*, CE:ECHR:2006:-0131JUD005043599), *Jeunesse* (ECtHR, 3 October 2014, *Jeunesse vs. The Netherlands* [GC], CE:ECHR:2014:1003JUD001273810), or in *Mendizábal*, where the applicant was interestingly an EU national residing in another Member State (ECtHR, 17 January 2006, *Aristimuno Mendizábal vs. France*, CE:ECHR:2006:0117JUD005143199).

I have argued that, for economically inactive citizens, the legal link between the right to reside and equal treatment hides a tension between divergent dynamics of opening and closure. The dynamics of opening, deeply rooted in the European project, are manifested by means of a so far uncontested right to move (and re-enter) to any Member State. Conversely, the dynamics of closure, exacerbated by the economic crisis and embraced by the CJEU in *Dano*, reflect the will of States to restrict welfare access for those EU citizens who are perceived as less deserving. In this context, the social and economic consequences in the wake of the COVID-19 pandemic might provide yet another test to the resilience of EU citizenship.

These ambiguities in the legal architecture of EU citizenship are manifested in the adoption of policies of closure (via irregular residence and expulsion) in a context of EU integration and open borders. Against this backdrop, this paper has provided examples of State practice along the lines of precarious residence and non-removal. It is contended that the existence of an EU legal framework that authorises expulsion but also makes it futile in practice has a key role in the creation of these liminal statuses. Whereas these situations ultimately derive from a policy choice of States not to remove EU citizens, such decisions are tightly constrained by an EU framework that severely limits States' capacity to manoeuvre in practice.

By looking at the most recent developments in the CJEU's jurisprudence, one last question arises: is the Court now, through a chamber judgment in *Bajratari*, overturning the Court's shift in *Dano* and *Alimanovic* and going back to *Baumbast* and *Brey*? It seems highly unlikely. It must be recalled that, in *Bajratari,* not only there is no access to social benefits involved, but the fact that the Bajratari family had never asked for them weighted in favour of their status as lawful residents. As it has been suggested in the literature, it might be the case that the CJEU has *de facto* attached a greater value to the citizens' right to reside than to their right to full equal treatment via social benefits. The Court thus seems to be adopting a double standard as to what amounts to "sufficient resources" and comprehensive sickness insurance depending on whether the case involves a demand for social benefits, or whether it is strictly about residence. In the former case, States would be allowed to restrict access to social benefits by law, with strict conditionality, and without incorporating personalised proportionality considerations to each specific case. In the latter case, lawful residence could only be withdrawn if States demonstrate in each specific case that the individual concerned is an "unreasonable burden" on the public finances of the State, by considering the length of stay and links to the host State, the records of his/her access to its welfare system, whether his/her financial difficulties seem temporary, and so on.

Whereas this reasoning flows logically when the case at hand is strictly about residence, the Court is reluctant to separate the two when equal treatment is at stake (and for good reasons). Certainly, there seems to be no legal grounds to deny equal treatment to lawfully staying EU citizens, other than those expressly provided for by the law. Thus, despite the existence of State practice in this direction, the proposed two-tier citizenship for economically inactive citizens does not seem to hold under EU law. As long as the CJEU holds on to *Dano*, by asking for social benefits, the citizen risks obtaining a "closed-closed" interpretation according to which they may lose both benefits and residence altogether.

In the meantime, however, EU law still offers citizens the possibility to make use of it to their advantage. Firstly, the low standards coming from Luxembourg as to who qualifies as a worker under EU law (and hence becomes a more "worthy" citizen) open up a possibility for citizens to undertake minor economic activities so as to be regarded as workers under EU law. Secondly, the ambiguities highlighted in this paper also make it possible for citizens to repeatedly lose and re-activate their citizenship rights. Unlike with third-country nationals, the loss of residence rights is not necessarily game over for EU citizens.

Bibliography

Abellán, L. (2014). Así se expulsa a un europeo de la UE, *El País*, 12-1-2014. Available at: https://bit.ly/3cW41Sz.

Arnardóttir, O. M. (2017). The "procedural turn" under the European Convention on Human Rights and presumptions of Convention compliance. *International Journal of Constitutional Law*, 15 (1), 9-35. Available at: https://doi.org/10.1093/icon/mox008.

Ballesteros, M., Kelly, G., Meurens, N., and Perego, A. (2016). *Obstacles to the Right of Free Movement and Residence for EU Citizens and Their Families*. Brussels: European Parliament, Study for the LIBE and PETI Committees. Available at: https://bit.ly/3cQSROF.

Basilien-Gainche, M.-L. (2020). European States Returning European Citizens: France and the Roma Populations. In E. Guild, P. Minderhoud and S. Mantu (eds.). *EU Citizenship and Free Movement Rights Taking Supranational Citizenship Seriously* (pp. 265-283). Leiden; Boston: Brill. Available at: https://doi.org/10.1163/9789004411784_013.

Benhabib, S. (2004), *The Rights of Others: Aliens, Residents and Citizens*. Cambridge: Cambridge University Press. Available at: https://doi.org/10.1017/CBO9780511790799.

Bellamy, R. (2008). Evaluating Union Citizenship: Belonging, Rights and Participation within the EU. *Citizenship Studies*, 12 (6), 597-611. Available at: https://doi.org/10.1080/13621020802450676.

Blázquez Rodríguez, I. (2020). El Estatuto Jurídico de los Nacionales de Terceros Países. *Cuadernos de Derecho Transnacional*, 72 (1), 27-52. Available at: https://doi.org/10.17103/redi.72.1.2020.1.01.

Blázquez Rodríguez, I. (2017). Libre Circulación y Derecho Internacional Privado: Un Análisis a la Luz de la Jurisprudencia del TJUE. *Cuadernos de Derecho Transnacional*, 9 (2), 106-126. Available at: https://doi.org/10.20318/cdt.2017.3867.

Brunello, S. and Perego, A. (2016). *Obstacles to the Right of Free Movement and Residence for EU Citizens and Their Families: Country Report for Italy*. Brussels: European Parliament, Study for the LIBE and PETI Committees. Available at: https://bit.ly/3iSf2rQ.

Davies, G. (2018). Has the Court Changed, or Have the Cases? The Deservingness of Litigants as an Element in Court of Justice Citizenship Adjudication. *Journal of European Public Policy*, 25 (10), 1442-1460. Available at: https://doi.org/10.1080/13501763.2018.1488881.

Evans, M. (2020). Abusing or Misusing the Right of Free Movement? The UK's Policy towards EU Nationals Sleeping Rough. In E. Guild, P. Minderhoud and S. Mantu (eds.). *EU Citizenship and Free Movement Rights Taking Supranational Citizenship Seriously* (pp. 302-322). Leiden; Boston: Brill. Available at: https://doi.org/10.1163/9789004411784_015.

Ferrera, M. (2005). *The Boundaries of Welfare: European Integration and the New Spatial Politics of Social Protection*. Oxford: Oxford University Press. Available at: https://doi.org/10.1093/0199284660.001.0001.

Heindlmaier, A. and Blauberger, M. (2017). Enter at Your Own Risk: Free Movement of EU Citizens in Practice. *West European Politics*, 40 (6), 1198-1217. Available at: https://doi.org/10.1080/01402382.2017.1294383.

Juárez Perez, P. (2011). La Inevitable Extensión de la Ciudadanía de la Unión: A Propósito de la STJUE de 8 de Marzo de 2011 (Asunto Ruiz Zambrano). *Cuadernos de Derecho Transnacional*, 3 (2), 249-266.

Kleinlein, T. (2019). The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution. *International and Comparative Law Quarterly*, 68 (1), 91-110. Available at: https://doi.org/10.1017/S0020589318000416.

Lafleur, J.-M. and Mescoli, E. (2018). Creating Undocumented EU Migrants through Welfare: A Conceptualization of Undeserving and Precarious Citizenship. *Sociology*, 52 (3), 480-496. Available at: https://doi.org/10.1177/0038038518764615.

Martín Martínez, M. (2014). Límites a la libre circulación de personas en la UE por razones de orden público, seguridad o salud públicas en tiempos de crisis: una reevaluación a la luz de la jurisprudencia del TJUE. *Revista de Derecho Comunitario Europeo*, 49, 767-804.

Maslowski, S. (2015). The Expulsion of European Union Citizens from the Host Member State: Legal Grounds and Practice. *Central and Eastern European Migration Review*, 4 (2), 61-85.

Menezes Queiroz, B. (2018). *Illegally Staying in the EU: An Analysis of Illegality in EU Migration Law*. Oxford: Hart Publishing.

Mindus, P. (2017). *European Citizenship after Brexit: Freedom of Movement and Rights of Residence*. Cham: Palgrave Macmillan. Available at: https://doi.org/10.1007/978-3-319-51774-2.

Mitsilegas, V. (2016). The Uneasy Relationship Between EU Criminal Law and Citizenship of the Union, in *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe* (pp. 212-235). Oxford: Hart Publishing.

Nic Shuibhne, N. (2006). Derogating from the Free Movement of Persons: When Can EU Citizens Be Deported? *Cambridge Yearbook of European Legal Studies*, 8, 187-227.

Nic Shuibhne, N. (2015). Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship. *Common Market Law Review*, 52 (4), 889-937.

O'Leary, S. (1999). Putting Flesh on the Bones of European Union Citizenship. *European Law Review*, 24, 69-79.

Parker, O. (2012). Roma and the Politics of EU Citizenship in France: Everyday Security and Resistance. *Journal of Common Market Studies*, 50 (3), 475-491 Available at: https://doi.org/10.1111/j.1468-5965.2011.02238.x.

Shaw, J. (2019). EU Citizenship: Still a Fundamental Status? In R. Bauböck (ed.). *Debating European Citizenship Cham* (pp. 1-17). Cham: Switzerland: Springer. Available at: https://doi.org/10.1007/978-3-319-89905-3_1.

Shaw, J. and Nic Shuibhne, N. (2014). General Report: Union Citizenship: Development, Impact and Challenges. In U. Neergaard, C. Jacqueson and N. Holst-Christensen (eds.). *Union Citizenship: Development, Impact and Challenges, The XXVI FIDE Congress in Copenhagen, 2014 Congress Publications Vol. 2*. Denmark: DJØF Publishing.

Soysal, Y. N. (1994). *Limits of Citizenship: Migrants and Postnational Membership in Europe*. University of Chicago Press.

Spaventa, E. (2016). Once a Foreigner, Always a Foreigner: Who Does Not Belong Here Anymore? Expulsion Measures. In H. Verschueren (ed.). *Residence, Employment and Social Rights of Mobile Persons* (pp. 89-110). Cambridge: Instersentia.

Thym, D. (2015a). When Union Citizens Turn into Illegal Migrants: The Dano Case. *European Law Review*, 40 (2), 249-262.

Thym, D. (2015b). The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens. *Common Market Law Review*, 52 (1), 17-50.

Valcke, A. (2020). Expulsion from the "Heart of Europe": The Belgian Law and Practice Relating to the Termination of EU Residence Rights. In E. Guild, P. Minderhoud and S. Mantu (eds.). *EU Citizenship and Free Movement Rights Taking Supranational Citizenship Seriously* (pp. 265-283). Leiden; Boston: Brill.

Valina Hoset, R. and Roman Vaca, C. (2016). *Obstacles to the Right of Free Movement and Residence for EU Citizens and Their Families: Country Report for Spain*. Brussels: European Parliament, Study for the LIBE and PETI Committees. Available at: https://bit.ly/3wBZPza.

Verschueren, H. (2015). Preventing "Benefit Tourism" in the EU: A Narrow or Broad Interpretation of the Possibilities Offered by the ECJ in Dano? *Common Market Law Review*, 52 (2), 363-390.