

LEGAL VALUES AND HERMENEUTIC VIRTUES: THE STATUS QUO OF EUROPEAN SOCIAL CITIZENSHIP

This paper deals with cross-border access to national social protection systems by economically inactive EU migrants and shed light on the current state of European social citizenship. It explores the transnational space of social solidarity by looking at the challenges posed by Union citizenship to the paradigm of intra-EU migration by virtue of the far-reaching principle of equal treatment, as well as the social security coverage of vulnerable migrants under Regulation 883/2004. Based on the analysis of the legal framework and the recent ECJ's case law on lawful residence and entitlement to welfare benefits, the contribution makes a plea for systematic coherence in the interpretation of secondary law and challenges the prevailing reading of the relationship between Directive 2004/38 and Regulation 883/2004 on grounds of systemic rationality.

Key-words: Union citizenship- solidarity – social protection – free movement – economically inactive citizens

1. The constitutional rise of EU social citizenship

The TFEU (Treaty on the Functioning of the European Union) citizenship provisions, as interpreted by the ECJ (European Court of Justice)

in its earlier case law, and Regulation 883/2004 on the coordination of social security systems have been allowing cross-border access of economically inactive citizens to welfare provision in the host State for more than a decade, depicting new welfare boundaries in the European Union. The introduction of Union citizenship, in particular, challenged the paradigm of intra-EU migration and ensured, by virtue of the far-reaching principle of equal treatment under Article 18 TFEU, transnational – albeit limited – social solidarity towards vulnerable migrants, regardless of their market credentials. Regulation 883/2004, on the other hand, included economically inactive citizens in its personal scope by replacing the previous Regulation 1408/71, which was underpinned by a market component inasmuch as exclusively addressed to workers.

It is known, indeed, how the Court has extended the scope of application of EU law through that deconstructive attitude shown from the leading case *Martínez Sala*,¹ where it stated that falling within the only personal sphere of application of the Treaty by virtue of the sole citizenship would allow to claim equal treatment in relation to any benefit encompassed in EU legislation even when it has been limited to certain categories of claimants.

This hermeneutic path implied the broadening of the scope *ratione materiae* of EU law for the purposes of Article 18 despite the claimant not being subsumed into the personal scope of the secondary legislation's instrument in question. Similarly, the combination of Articles 18 and 21 TFEU affected the entitlement to welfare benefits not expressly mentioned by secondary legislation and yet brought within the material scope of EU law by the exercise of the right of movement. The expansive effects of Union citizenship, in fact, reached national rules granting social benefits,² more

¹ C-85/96, *Martínez Sala*.

² Article 21 TFEU expanded the material scope of the Treaty inasmuch as the mere fact of moving suffices to bring a situation within the scope of EU law. Consequently, any national rule, hence benefit, needed to be justified as likely to affect the rights conferred upon Union citizens by the Treaty.

likely to contain a territorial element as a residence clause and therefore to constitute an indirect discrimination on grounds of nationality. Thus, Member States could shelter their social protection systems by making access to welfare provision conditional upon lawful residence, but such a restriction should have been justified by reference to a sound public interest. Hence, national legislations governing access to welfare coverage have come under the scrutiny of the Court in relation to their necessity and proportionality. According to such a jurisdictional test, a national rule is considered compatible with EU law as long as it pursues a legitimate aim in a proportionate and necessary way. As a result, Member States may erect barriers by linking the grant of welfare benefits to certain conditions, such as a residence or a length of residence requirement or the completion of secondary education in their territory,³ but they have to justify any indirect discrimination on grounds which are not merely economic.

In relation to the entitlement to social grants, indeed, nationals and non-nationals are not in a comparable situation since every welfare society is based on links of belonging, which are acquired by contribution or the simply passage of time. The territorial element of lawful residence, thus, should be considered legitimate both in its aim and proportionality so far as it presumes and subsumes the establishment of that meaningful link.⁴

Consequently, Union citizens who are *lawfully* resident in the host State should be considered to be in a comparable situation to own nationals and, therefore assimilated into the host social protection system (Dougan, Spaventa 2005). In fact, membership of the host welfare community and the consequent grant of social provision are normally subject to the acquired right of residence under EU or national law. According to settled case-law,⁵ since the right to reside within the territory of the Union is directly conferred by a clear and precise provision of primary law, Article 21 TFEU,⁶ any restriction on that right, which is not unconditional but is subject to the limitations and conditions further specified by measures adopted to give it effect,⁷ must be interpreted having regard to the general principles of EU law.

³ See for instance case C-224/98 *D'Hoop*. In this case, however, the relevant conditions at issue were those imposed by the State of nationality, Belgium, which denied a own national who had completed her education in France a tideover allowance.

⁴ See *D'Hoop* where the reference is to «a real link between the applicant and the geographic employment market concerned»; and C- 209/03 *Bidar* where the Court held that it is legitimate for a Member State to cover maintenance costs only to students who have demonstrated a *certain degree of integration* into its society. This latter case regarded a French national pursuing higher education in the UK who was denied a maintenance loan due to the fact that he was not settled in the host State according to the relevant British legislation which demanded a three-year period of residence not wholly or mainly intended to receive full-time education.

⁵ This statement has been repeated in a consistent case law. See cases C-184/99 *Grzelczyk*, para 23, C-456/02 *Trojani* para 31(both concerning the refusal of the Belgian minimex to French nationals) and C-209/03 *Bidar*, para 37.

⁶ For the direct effect of Article 21 TFEU see C-413/99, *Baumbast and R* para 84. In particular, the Court stated that to deny the right of residence of an EU citizen on the ground that his sickness insurance does not cover emergency treatments in the host State would amount to a disproportionate interference with the exercise of a right directly conferred on him by the Treaty.

⁷ Directive 2004/38/CE on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States specifies the conditions governing the exercise of the Treaty migratory rights by codifying the previous ECJ's case law. It repealed a bundle of older directives dealing separately with workers, self-employed persons, students or other inactive persons (Directives 64/221/EEC, 86/360/ECC, 72/194/ECC, 73/148/ECC, 74/34/ECC, 75/35/ECC,90/360/ECC,90/365/ECC and 93/96/ECC) . It also amended Regulation (ECC) No 1612/68 on freedom of movement for workers.

In particular, Directive 2004/38, codifying this previous case law, specified that for sojourns longer than three months residency rights are conditional upon possession of sufficient resources and comprehensive health insurance so as to prevent medium-term visitors from becoming a burden on the social assistance system (Art. 7 (1) (b) & (c) Dir. 2004/38).⁸

The lack of sufficient financial resources and comprehensive health insurance, hence, may constitute a reason for terminating residency rights of those who do not (or no longer) meet those conditions, but limitations laid down in Article 7 must be interpreted having regard to the general principles of EU law as they affect a right directly conferred by the Treaty.⁹ As stated in *Grzelczyk*, Member States have accepted “a certain degree of financial solidarity” between own and other nationals particularly when the financial difficulties encountered by the claimant are temporary in nature.¹⁰ The proportionality appraisal thus implied that a national rule in the abstract compatible with EU law could be found contrary to the yardsticks of proportionality and fundamental rights protection when applied.¹¹ This *ad hoc* assessment of all the factual circumstances of the claimant had resulted in an “indirect judicial review” of secondary EU legislation (Dougan, 2006), since most of the national legislations under the scrutiny of the Court were quite often the mere and correct implementation of secondary EU law and then *a priori* consistent with EU provisions, being the conditions of self-sufficiency and sickness insurance defined by the Directive and States’ discretionary power curtailed.¹²

The extension of the judicial scrutiny over national rules simply implementing the letter of Union normative acts reinforced Union citizenship as a constitutional status capable of shaping in hierarchical terms the way in which primary and secondary law provisions related to each other. This hermeneutic trend recognising the Treaty primacy, clearly perceivable in the post-*Baumbast* case-law, was openly criticised for frustrating Member States’ political choices and providing solidarity sometimes even against the expressed provisions of EU legislature, as in the case of maintenance and training loans for students. In this field, the Court has openly applied the creative approach previously developed in *Martínez Sala* to individuals like students *expressis verbis*

⁸ These requirements, however, were not meant to apply to workers and self-employed persons or to persons who stopped being economically active but who nevertheless retain this status pursuant to Art. 7 (3) in certain circumstances, i.e. being temporarily unable to work as the result of an illness or accident, being in duly recorded involuntary unemployment after having been employed for more than one year or after having completed a fixed-term contract of less than one year, having embarked on vocational training. Nor do they apply to jobseekers who entered the territory of the Member State in order to seek employment: the said categories of persons, contrary to other economically inactive citizens without any potential link with the market, retain the right of residence and cannot be expelled as long as they can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged (Art. 14 (4) (b) Dir. 2004/38).

⁹ See for instance the already mentioned cases *Baumbast* and *Trojani supra*, or the older case C-55/94 *Gebhard*, para 37.

¹⁰ See *Grzelczyk* para 44.

¹¹ A practical result of this approach is for instance the irrelevance of the source of the individual income in order to assess the fulfilment of the mentioned requirements of financial resources and sickness insurance. See in this regard Cases C-200/02 *Zhu and Chen* and C-408/03 *Commission v. Belgium*, in which the Court held that a Member State cannot refuse residency rights on the grounds that the resources are not the claimant’s own: the denial cannot be justified by the risk of termination of the relationship upon which the citizen relies since the loss of the resources is always an underlying risk, irrespective of their provenience.

¹² It was the case in *Baumbast*, in relation to the requirements to be satisfied by economically inactive persons in order to acquire residency rights, and in *Bidar* in relation to maintenance loans for students.

excluded by a clear provision of secondary legislation from social assistance of the host Member State.¹³

For instance, in *Bidar* the exclusion of maintenance loans for foreign students pursuant to Article 3 of Directive 93/96/EEC did not preclude a French student resident in the UK for study purposes from relying on the fundamental principle of equal treatment in order to claim a maintenance grant. Here, the Court not only eluded the limits of application of the student directive (since Mr Bidar's right of residence derived from the general residence directive, Directive 90/364/EEC, which did not expressly exclude maintenance grants) but it also disregarded a precise normative choice, i.e. denial of student loans for medium term residents, and therefore any *effet utile* of the relevant secondary law provisions.

Such attempts to create a transnational – albeit incipient – space of solidarity have been reflected in Directive 2004/38, which nevertheless posed a strain on the following ECJ's jurisprudence. It seems, indeed, that after the adoption of the Directive, the Court has become more acquiescent with the compromise through which national legislations accommodate budgetary concerns by virtue of conditional rights of residence.

In *Förster*, for instance,¹⁴ the five-year residence requirement was justified inasmuch as it did not go beyond the threshold necessary to ensure that claimants from other Member States are, to a certain degree, integrated into the host State. But - contrary to its findings in *Bidar* - the Court carried out an abstract analysis of the national rules at issue, rather than the *ad hoc* assessment based on the factual conditions of the claimant.

As a result, a national legislation *prima facie* similar to that concerned in *Bidar*, was found to be legitimate as far as its five years prior residence clause was *abstractly* construed as creating a real link, without thus having regard to the individual case.¹⁵

This more abstract analysis was symptomatic of a more mature case law, intended to avoid that randomness in welfare coverage of citizens arising from the uncertain result given by the balance between individualistic expectations of the concrete claimant and public interests crystallized in domestic rules. In this judicial phase, the rights for economically inactive citizens have been made more predictable and the case-by-case approach progressively abandoned, even if - mostly with regard to the economic free movement provisions - this dismissal did not mean passive acceptance of the Directive as a straightjacket to a purposive interpretation of the Treaty provisions (Spaventa, 2017).

2. The retreat of the recent case-law

Yet, the legal foundations upon which the Court of Justice had been forging the concept of European social citizenship have been dismissed. The latest ECJ's case law exhibits a clear retreat from its

¹³ See Article 24 (2) of Directive 2004/38.

¹⁴ Case C-158/07 *Förster*, where a German citizen resident in the Netherlands was asked to repay a maintenance grant she had received for the period in which she was not economically active. According to the national legislation, indeed, in order to qualify for maintenance assistance for studies she should have been residing in the host State for five years (whilst at the time of the payment she had been resident for only three years).

¹⁵ The ruling differed from that of *Bidar* because, if the British legislation in *Bidar* made impossible for students to ever qualify for maintenance grants (due to the fact that residence periods for education purposes were not taken into account to establish length of residence), the motives of residence in the Dutch rules at issue were immaterial for establishing the required prolonged residence.

earlier ambitious stance on Union citizenship, which seems to have resulted in a clear de-constitutionalisation.

The rights of economically inactive citizens vis-à-vis welfare provision are now those granted by Directive 2004/38/EC, which becomes “the floor and the ceiling” of the rights under Union law (Spaventa, 2016), so that the limitations imposed on equal treatment no longer need to be interpreted in the light of primary law. As a result, migrants who do not satisfy the conditions laid down in the Directive, namely the self-sufficiency and sickness insurance criteria, fall outside the scope of Union law. This shift from the primacy of the Treaty to a straightforward application of Directive 2004/38, clearly perceivable in *Dano*,¹⁶ implies that the proportionality-driven scrutiny of national rules limiting welfare provision is no longer required, since the only relevant balance between individual social expectations and financial public budgetary concerns is now that one abstractly internalised in the Directive. The elusive formula of the “unreasonable burden” conceived to strike that balance does not result in an *ad hoc* assessment of the personal situation of the claimant. Thus, it is no longer open to a Union migrant to argue that she is part of the host solidaristic community, as it no longer for Member States to prove the unreasonable burden that granting a benefit would place on their public budget. On the one hand, this evaporation of the burden of proof owing to a presumption (i.e. the missed fulfilment of the requirements of resources and sickness insurance preventing unbearable claims) relieves States of an arduous task such as to determine, according to the *Brey* formula,¹⁷ the *specific* burden of the claim on the *whole* welfare system - a task which seems impossible to carry out due to the fact that a *single, specific* claim will never have itself any effect on the national budget, and due to the paucity of statistical data through which assessing the overall effect of cumulative claims. On the other hand, the dismissed scrutiny of national legislation is problematic inasmuch as it excludes citizens failing to fulfil the black letter conditions of Directive 2004/38 from the scope of Union law *tout court*, preventing them from proving the existence of a real link to the host State.

The *Dano* ruling was ambiguous in many respect, as witnessed by the multiple hermeneutic possibilities it offered (Verschuere, 2015). A strict interpretation of the *Dano* formula would have meant that social benefits could be refused without any proportionality test, *only* to persons who – to quote the ECJ – “exercise their right to freedom of movement *solely* in order to obtain another Member State’s social assistance”,¹⁸ namely to persons whose *only* motive of migration is the so called “benefit tourism”. A broad interpretation instead could have led the host State to deny *all* social benefits to *all* economically inactive Union citizens whose residence period is shorter than five years and who do not have sufficient resources, without any necessary assessment of the unreasonable burden.

¹⁶ C-333/13 *Dano*. This case regarded a Romanian national living with her sister in Germany (after having entered the country not to seek work) who was denied access to a benefit for jobseekers on the grounds that she was not lawfully resident for the purposes of Union law as she did not comply with the sufficient resources criterion, though her sister provided for her and her son born in Germany.

¹⁷ C-140/12 *Brey*, para 77. The claimant here was a German pensioner settled in Austria who claimed a “compensatory supplement” which was refused since, due to his low retirement pension, he did not possess sufficient resources to establish lawful residence.

¹⁸ *Dano*, para 78 (emphasis added).

Moreover, whilst according to the ruling in *Dano*, residence pursuant to national law (as in *Martínez Sala*) or other EU law instruments (as in *Teixeira*)¹⁹ becomes immaterial to equal treatment, it is less clear whether the conditions detailed in Directive 2004/38 exhaust the right to reside in the host State. In other words, the Court did not clarify whether the fulfilment of the black letter criteria provided for in secondary legislation also amounts to a prerequisite to be met in order to establish a *per se* lawful residency right, i.e. to invoke Article 21 TFEU.

Consequently, the effects of the ruling on the regime of expulsion measures for lack of sufficient resources are rather doubtful. In this regard, it is worth recalling how Article 14 (3) of Directive 2004/38 envisages that expulsion measures shall not be the automatic consequence of recourse to the social assistance system of the host State. Similarly, as remarked in *Brey* (para 69), recital 16 in the preamble to the Directive states that, before adopting an expulsion measure, the host Member State should examine whether the person concerned is experiencing temporary difficulties and take into account her personal circumstances, including the length of residence and the amount of aid granted. Doubts as to whether the principle of proportionality may still play a role in the assessment of residency rights persist even after the ECJ's ruling in *Alimanovic*.²⁰

Here, in a concise passage recalling its previous findings in *Brey* on the necessary evaluation of the personal situation of the claimant either when adopting an expulsion decision or assessing the unreasonable burden placed on the social assistance system, the Court, nevertheless, stated that such an individual assessment was not required in circumstances as those examined in that proceeding (para 59). Should this be confirmed *ex professo*, the traditional approach to expulsion measures as fully compliant with proportionality and procedural safeguards would be definitely disregarded. However, even without issuing a deportation order, national authorities can starve indigent citizens out by denying them access to welfare provision (Thym, 2015).

Although *Alimanovic* did not take a clear stance on the latter point, it clarified the ECJ's previous findings in *Dano*, whose meaning needed to be completed by subsequent judgements in order to be fully understood. The variety of the factual situations related to free movement, indeed, postulates the construction of 'jurisprudential chains' to detect whether the *ratio decidendi* of a case is an expression of a broader principle or rather a solution strictly tailored to its facts (Iliopoulou-Penot, 2016). In this regard, *Alimanovic* confirmed the hermeneutic solution adopted in *Dano*, restating the prevalence of secondary law over the Treaty provisions. Specifically, citizens like the Alimanovics, who became unemployed after short periods of work (less than one year), were not considered former workers within the meaning of Article 7 (3) (c) of Directive 2004/38, and therefore admitted to retain access to social assistance benefits by virtue of Article 24 (1) thereof on equal treatment.

The ECJ subsequently assumed that, after the expiry of the period provided for in Article 7 (3) (c) of Directive 2004/38 (six months after the last employment had ended), the rules on first-time job-seekers applied by analogy. Hence, whilst the latter may not be expelled for as long as they can

¹⁹ C-480/08 *Teixeira*, where a Portuguese national derived her right of residence as a primary carer for her daughter from Article 12 of Regulation 1612/68, without having to satisfy the conditions laid down in Directive 2004/38.

²⁰ C-67/14 *Alimanovic*. In this proceeding, two Swedish nationals, a mother and her elder daughter, who had worked in Germany between June 2010 and May 2011 in temporary jobs with a duration of less than one year, claimed special non-contributory benefits such as subsistence allowances for long-term unemployed people.

provide evidence that they are continuing to seek employment and have a genuine chance of being engaged according to Article 14 (4) (b) of the Directive, the host Member State may rely on the derogation in Article 24 (2) in order to deny them the social assistance sought.²¹ Once again, any claim of equal treatment by persons economically non-active (due to the loss of the status of workers or due to the status of job-seekers) is subject to the right of residence under Directive 2004/38. The judgement extended the *Dano* rationale to a factual situation evidently not related to welfare tourism, thus applying the jurisdictional test previously developed, the “right-to-reside-under-Directive 2004/38-test” (Verschueren, 2015), even to persons seeking integration into the labour market.

In particular, the Court, after having qualified the special non-contributory benefit sought as social assistance within the meaning of Directive 2004/38, reiterated its previous finding in *Dano*, according to which as far as concerns access to social assistance a Union citizen can invoke Article 24 (1) of Directive 2004/38 on equal treatment *only* if her residence in the territory of the host Member State complies with the conditions laid down by the Directive.²²

It followed that, once again, even in the case in which a national legislation as the German law at issue does not *under any circumstances* allow access to welfare benefits, like subsistence allowances for the long-term unemployed, irrespective of their link to the host State, no individual assessment of the personal circumstances of the claimant is necessary. Aware of the doubts that the *Brey* judgement had raised as regards the overall appraisal of the burden that the award of a specific benefit would place on the national social assistance system as a whole- since assistance granted to a single applicant would scarcely result in an “unreasonable burden” for a Member State - the ECJ dismissed its case-by-case approach by observing that the accumulation of all the individual claims would always be destined to jeopardize the sustainability of welfare systems.

The cumulative effect argument, indeed, was used by the Court to not follow the Advocate General’s opinion, according to which the proof of a real link with the host State would have prevented the *automatic* effect of exclusion from entitlement to social assistance linked to the loss of the status of worker.²³ In fact, whilst in his conclusions AG Wathelet considered that the national legislation banning jobseekers with a previous connection with the labour market automatically from the award of special non-contributory benefits would amount to a measure disproportionate to the aim pursued, the ECJ held that the Directive already takes into account various factors stemming from personal circumstances of the claimant, inasmuch as it establishes a gradual system of retention of the status of worker, based on the duration of the exercise of any economic activity. From the point of view of the Court this solution would favour legal certainty and transparency in the context of the award of social assistance, allowing the claimants to know in advance their rights and obligations. However, it is evident that the abstract assessment made by the legislature cannot, by definition, encompass the bundle of concrete situations arisen from free movement and precludes other factors representative of the real and effective connection between the applicant and the reference market.

²¹ According to paragraph 2 of Article 24, Member States are not obliged to confer access to social assistance during the first three months of residence.

²² See *Dano*, para 69 and *Alimanovic*, para 49.

²³ Opinion of Advocate General Wathelet in case C-67/14, *Alimanovic*, para 99- 111.

It should be noted how the rewritten relationship between the Treaty and the Directive - and the consequent disappearance of the personalised proportionality test - affected even the interpretation of the notion of former worker, which was not interpreted by reference to Article 45 TFEU as a matter of primary law, and therefore assigned to the Court's review despite the possible constraints of secondary law.²⁴

The *ratio decidendi* in *Alimanovic* was later confirmed in *Garcia-Nieto*, a case concerning lawful residence under Article 6 (1) of Directive 2004/38 and exclusion from entitlement to social assistance by virtue of the explicit derogation from equal treatment under Article 24 (2) of Directive 2004/38 during the first three months of residence.²⁵

Here, the Court remarked that if an individual assessment is not required in the case of a citizen seeking employment after having lost the status of worker, the same applies *a fortiori* to first-time jobseekers in their first three months of residence.

The last two cases regarding jobseekers are instructive inasmuch as they show the extent to which free movement rights have been demoted. The fabric of that hybrid system created by *Collins* has been deconstructed, since the job-search no longer triggers the application of Article 45, within the scope of which benefits of financial nature destined to facilitate access to the labour market are thus no longer encompassed, as their predominant function was deemed to be the coverage of minimum subsistence costs. As a result, jobseekers would find themselves in a worse legal position than they might have been pre-citizenship.

Furthermore, the ECJ's deference to the exclusionary powers exercised by Member States in sheltering their welfare nets risks stepping back even from a strictly functional interpretation of free movement provisions, given the implications of national residence-tests for low-income workers. Indeed, "Member States are creating an elitist model of free movement – alienating the working poor, and effectively awarding rights on the basis of socio-economic class" (O'Brien, 2016, 939). The ascendancy conferred on the Directive by the latest judicial trend threatens one of the pillars of the internal market, i.e. the free movement of workers and their unconditional right to equal treatment as regards social advantages. Earlier attempts to introduce further qualitative criteria for welfare claims were already discernible in the case law on frontier workers, which has shown "an interpretative reorientation, or detour" by demanding proof of a certain degree of integration (Giubboni, 2015).

This hermeneutical retrenchment raises open questions as to whether the limitations laid down in Directive 2004/38 can affect the domain of free movement of workers and its *acquis*. For instance, even if there has always been a presumption that derogation from equal treatment during the first months of residence does not apply to workers, the wording of Article 24 of Directive 2004/38 does not explicitly envisage any exclusion for economically active citizens (Nic Shuibhne, 2016).

²⁴ See for instance *C-507/12 Saint-Prix* .

²⁵ *C-299/14, Garcia-Nieto*. This case concerned a Spanish couple and their two children who moved to Germany in 2012 (Ms García-Nieto and her daughter in April, whilst her partner, Mr Peña Cuevas, and his son in June). In July, after having applied for subsistence benefits, Mr Peña Cuevas and his son were refused them due to the fact that, at the time of the application, they had resided in Germany for less than three months and Mr Peña Cuevas did not have the status of worker or self-employed person.

Similar doubts arise from residence tests contained in national legislations, such as the British one at issue in *Commission v. UK*.²⁶ In this case, the Commission challenged the compatibility of national rules imposing lawful residence under Directive 2004/38 as a condition for claiming child benefit and child tax credit under Regulation 883/2004 with the EU non-discrimination principle.

A key feature of the recent jurisprudence, indeed, is the reach of the Directive into the scope of application of other pieces of legislation, and in particular Regulation 883/2004, any time a certain benefit encompassed by its provisions is to be granted on the basis of residence.

3. Squaring the circle: the relationship between Directive 2004/38 and Regulation 883/2004

The mutual interplay between the Regulation 883/2004 and Directive 2004/38 has long been relevant to the examined case-law with regard to the so called “special non contributory cash benefits” (SNCBs), provided for in Article 70 of Regulation 883/2004 and listed in Annex X thereof.

The peculiarity of these benefits is their hybrid nature, as they fall within both the notions of social security (whose national systems the Regulation aims to coordinate) and social assistance (which is, instead, excluded from the material scope of the coordination system established at the EU level). They are meant to provide minimum subsistence income by offering a complementary cover against the risks associated with the branches of social security legislation referred to in Article 3 (1); secondly, although their funding “exclusively derives from compulsory taxation intended to cover general public expenditure” and their conditions for calculation “are not dependent on any contribution in respect of the beneficiary” (Art. 70 Reg. 883/2004), they are payable as a right similarly to social security benefits.²⁷

In order to avoid the exportability of these benefits, which are strictly related to the socio-economic context of the State providing for them, the EU legislator created a special regime by introducing an “habitual residence” clause as a precondition for their payment.

By virtue of the personal scope of the Regulation then, economically inactive citizens can rely on equal treatment provision in order to claim social benefits – especially SNCBs and healthcare coverage - in the host Member State on the basis of residence. Yet, under Directive 2004/38 access to social assistance benefits by virtue of equal treatment is subject to the derogations envisaged by Article 24 thereof.

The relationship between the two instruments of secondary legislation, consequently, poses the question about the meaning of “social assistance” for the purposes of Article 24 of Directive 2004/38, compared to the one presupposed by the Regulation. In fact, if the SNCBs are to be qualified as social assistance within the meaning of Directive 2004/38, Member States could legitimately derogate from equal treatment within the limits of Article 24 (2), by making a connection between the grant of such benefits pursuant to Regulation 883/2004 and the assessment of the legality of residence.

²⁶ C-308/14, *Commission v. UK*.

²⁷ ²⁷ Examples of such SNCBs are supplements to pensions or allowances for disable persons: see, for instance, cases C-1/72, C-63/76 *Inzirillo*, C-139/82 *Piscitello* or the more recent C-140/12 *Brey*.

The Court solved the conundrum by conferring a normative super-status to the Directive: since *Brey*, the argumentative line followed has focused on the imposition of the meaning of social assistance for the purposes of Directive 2004/38 over the coordination framework of the Regulation.

The teleological (re)interpretation of the Directive - whose objectives have been now identified with the need to prevent abusive welfare claims, whereas previously construed as intended to facilitate the exercise of migratory rights – could explain this alignment of Regulation 883/2004 and Directive 2004/38 around the notion of social assistance.

Notwithstanding contrary doctrinal opinions (van Overmeiren, Eichenhofer & Verschueren, 2014; Cornelissen, 2013), the ECJ has consequently made the grant of SNCBs under Regulation 883/2004 subject to the conditions for legal residence set out in Directive 2004/38, stating that NCSBs should be regarded as social assistance for the purposes of the Directive. In fact, although encompassed within the scope of Regulation 883/2004 due to some features of social security they contain,²⁸ these benefits are paid by the State out of general taxation, whether or not based on a right or on a state of need and whether or not associated to a specific risk in terms of social security. Thus, insofar as they involve the public expenditure, they should fall within the notion of social assistance for the purposes of the Directive, including that of preventing persons who have not made any contribution to financing the social security schemes from becoming an excessive burden.²⁹

In terms of systematic rationality, indeed, the irrelevance of the contributory or non-contributory nature of a benefit as regards its qualification cannot straightforwardly be a solution in line with the accepted foundations of transnational solidarity insofar as it allows inactive citizens to claim benefits paid out by general revenue. The inclusion of SNCBs within the meaning of social assistance pursuant to the Directive might have resulted in a more coherent regime, given that *non-contributory social security* benefits and *social assistance* benefits, despite their formalistic qualification, seem to be expression of the same bonds of solidarity resulting from the process of subsidisation.³⁰

The rationale that underpins this stance emphasises the way in which benefits claimed are financed and may explain the extension of the right to reside test to the eligibility for “pure” social security benefits in *Commission v. UK*.

Despite completing the jurisprudential chain on legal residence, this judgment differs from previous cases insofar as the benefits concerned are not SNCBs but rather family benefits listed in Article 3(1) of the Regulation and claimed by economically inactive persons to whom Article 11(3)(e) applies. Here, the Court “distilled a fundamental principle of exclusion from paragraph 44 of *Brey*”

²⁸ According to the ECJ, the distinction between social security and social assistance rests on factors such as the purpose and the conditions relating to each benefit, so that none but the case-by-case approach can determine whether the benefit at issue is covered by the Regulation (See cases C-249/83 *Hoeckx*, para 11 and C-122/84 *Scrivner and Cole*, para 18). However, the two guiding criteria elaborated by the Court in order to qualify a benefit as belonging to social security are 1) the coverage of one of the risks mentioned in Article 3 and 2) the legally defined position of the claimant so as to have a right to the benefit in question.

²⁹ See in this regard *Brey*, para 24.

³⁰ The SNCBs, whereas at the public expense, can be imbued with a redistributive spirit: in this case they would be closer to the social assistance’s concept, from which they would differ as far as they are not means-tested.

(O' Brien, 2017), according to which the granting of social (security) benefits to inactive citizens can be made conditional upon the fulfilment of the lawful residence condition.

The right to reside test applied to social security benefits, then, refined the scope of Article 11 (3) (e) which states that persons not falling under previous subparagraphs shall be subject to the legislation of the State of residence. .

Although the reasoning of the Court appears elliptical in many respects, the alignment of the scope of the two instruments might have reduced the idiosyncrasies of EU free movement law, as well as the disparities arising from a *de facto* double regime of solidarity. Indeed, considering the Directive and the Regulation as independent and non-interfering spheres of law would allow a “two-speed solidarity”, namely different fiscal burdens depending on whether the Member States organise the grant of non-contributory benefits through the schemes of social security³¹, as well as diverse treatments for individuals in relation to the type of benefit claimed.³² The panoply of rights granted by the combination of the Treaty provisions, albeit theoretically broader,³³ is more limited in practice than that provided for in Regulation 883/2004, since once a claimant succeeds in bringing herself within the Regulation she can rely on its straightforward provisions.³⁴

Insistence on compartmentalising the two instruments would raise disparities not only among States (especially those having social protection systems of Beveridgian fabric), but also, and more importantly, among (equally) indigent citizens.

The new trend of the ECJ case law can then be read as more responsive to the legal values of clarity and predictability, which happened to be the objectives of the European Commission's proposal for amending Regulation 883/2004.³⁵ The related explanatory memorandum, indeed, recalls the need to ensure legal certainty, as well as a fair and equitable distribution of the financial burden among Member States, together with administrative simplicity and enforceability of the rules.

4. A (conciliatory) conclusion

Yet, the plea for a systematic coherence does not imply the acceptance of the prevalence accorded to the Directive (at the expense of primary law) over the Regulation. Given their equal

³¹ After all, as noted by the UK in its observations, it is odd to conceive a system allowing restrictions for some benefits but not for others which are funded from taxation so as to potentially burden the public finances of the host State, thus presenting some endemic characteristics of social assistance.

³² Depending on whether it is encompassed within the scope *ratione materiae* of Regulation 883/2004.

³³ Since it encompasses even social advantages deriving from service provisions, for which citizens may be qualify *qua* recipients of economic services.

³⁴ Indirect discrimination is more likely to occur when reliance on Articles 18,20 and 21 TFEU is at stake. Nevertheless, it can be legitimate even under the coordination system, as Member States can concretely demand the proof of a real link, according to an emerged case law's trend (cases C-212/05 *Hartmann*, C-213/05 *Geven*, C-287/05 *Hendrix*, C-503/09 *Stewart*).

³⁵ EUROPEAN COMMISSION Strasbourg 13.12.2016, COM (2016) 815 final 2016/0397 (COD). The Proposal, which is part of the 2016 European Commission *Labour Mobility Package*, is at available at ec.europa.eu/social/BlobServlet?docId=16784&langId=e

standing, the disciplines of both normative sources should be reconciled by restating their authentic rationale in order to solve the (apparent) conflict of norms.

In this regard, it should be noted that notwithstanding the structural differences of the two instruments of secondary legislation as regards residence and, therefore, entitlement to social benefits on equal footing with nationals of the host State, both pursue similar objectives.

Indeed, the notion of residence adopted by Regulation 883/2004 diverges from that provided by Directive 2004/38 in two respects: first, the length of residence required in order to be eligible for social benefits, since for the purposes of the Regulation only an habitual and in that way continuative and stable presence in the territory of the Member State is relevant (on the contrary the Directive also takes account of temporary stay); second, the qualitative nature of residence, given the definition of “legal residence” for the purposes of the Directive as a territorial presence compliant with the requirements of economical resources and comprehensive health insurance. In this respect, Regulation 883/2004 makes even the exercise of non-remunerative activities material for the assessment of the place of residence: a type of approach that reflects its aim to prevent the migrant from falling between two stools due to the absence of affiliation to any social security scheme.

However, the Regulation seems to have also taken into account the improper use of domestic welfare circuits – whose prevention is now the new *telos* of the Directive – inasmuch as the requirement of “habitual residence” is abstractly considered as a condition creating a *genuine link* between the claimant and the host Member State asked for the grant of non-exportable benefits. Similarly, through the re-affirmation of the proportionality scrutiny of national rules derogating to equal treatment, the *ad hoc* assessment of the factual and individual circumstances of the claimant should prevent the abusive practices captured by the evils, more imaginary than real, of “welfare tourism”.

In short, the problematic aspect of the examined case law is not the imposition of a right to reside test, but *how* that test is concretely carried out (i.e. to what extent proportionality applies).

The right to social protection in the host Member State under both the Directive and the Regulation, thus, relies on a previous attachment of the citizen to the State, so that *only* persons whose *only* motive of migration is clearly fraudulent should be excluded from the circle of transnational solidarity. This stress on the subjective intentions, although inconsistent with the traditional agnosticism of EU free movement law with regard to the motives which may have led to migration, could be a valid buttress against the exclusionary powers of Member States, which in time of crisis tend to shelter sharply their domestic space of distribution of collective good. A hermeneutic virtue reliable for those who truly belong across borders.

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