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I. A Brexit Introduction

The question of when EU citizens should be able to work, live, and claim benefits in a host Member State has exploded recently into the political arena following the Brexit referendum in the United Kingdom, in which these issues were central. Claims that EU law does not do enough to prevent benefit tourism have circulated in politics for years, but the UK discussion added a new twist, with the claim that migrant workers were themselves a drain on the state, or at least could be.[1]

How can this be? EU law concerning internal migration is based on a few clear, and apparently reasonable assumptions: that workers and the economically active may be allowed free movement and full equality rights, because they contribute to their host societies, while the non-economically active may only migrate if they are self-sufficient, precisely to avoid them being a drain on public finances. What has then gone wrong? How can migration be an economic threat? Where does the perception come from that the law does not work as it was intended?

Some of the answers to this are of course political: there is much confusion and disinformation about what the law actually says and does, and much cultivated hysteria about the consequences of migration.[2] However, there are also legal issues to be resolved: thanks to ambiguous and over-complicated legislation, and to outdated concepts, and to changing welfare states, the law does not achieve its goals as well as law should.

This paper looks at how EU law on migration and social assistance actually works, and compares that with its stated goals and implicit premises. There is clearly a disparity, to be resolved either by changing the law or by accepting that the premises of free movement deserve updating in the direction of greater transnational solidarity.

This discussion comes too late for the UK. Perhaps if free movement law had been different five years ago, the point of Brexit would never have been reached, although that may be to underestimate the longer-term and deeper British discomfort with the EU, for which free movement of persons may merely have been a convenient rallying point. Yet it is unlikely that post-Brexit the issues will go away. Resistance to free movement of persons is present in many states, and may only increase if there is significant diversion of migration from the UK to other Member States. There will be discussion of reform, and there will be discussion of the terms on which Europeans should be allowed to live in other nations and enjoy public support. This paper does not intend to take any stance on what those terms should be, but merely to clarify what the law currently does.

The justification for that unfashionably non-normative stance is that there appears to be a great deal of confusion around this area of law, and a widespread perception that it is messy and unclear. Whichever way we, as Europeans, wish to take our law and policy, it will be helpful to know how that law works. One theme of the discussion

[1] See the letter from David Cameron to Donald Tusk, dated 10th November 2015, at p 6. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/475679/Donald_Tusk_letter.pdf

[2] See the editorial comments 'The free movement of persons in the European Union: Salvaging the dream while explaining the nightmare' (2014) 51 CMLRev 729.

which follows is that it is largely unintended consequences – consequences of the interaction of complex norms and social change - which have created the law's problems. Exposing those consequences and how they have come about may help us ensure that in the future the law does whatever it is that we want it to do.

II. Consistent law, but growing welfare states

The EU law concerning the right of migrant EU citizens to receive social assistance in a Member State other than their own is the product of a compromise. For Member State governments, and indeed the public, the perception has always been that free movement rights should be for those who will be a net asset to their host states, and not a burden on either its economy or its public finances. They have never embraced the idea of a Union citizenship in which the poor and dependent are equally free to choose their place of residence throughout the EU. On the other hand, there is an EU interest in integration of states and populations, most forcefully represented by the Commission, but certainly also enjoying some support in the European Parliament and the Court of Justice, which would like to see the barriers to movement for all Europeans as low as possible, even if this entails some intra-state redistribution via the movement of persons who rely on social assistance.

The law embodies this compromise, with all the tensions that this entails. It apparently awards the right to move and reside throughout the EU to all Union citizens, but then makes this subject to the conditions in the Treaties and secondary legislation.[3] That legislation then allocates the right to live in another Member State only to the economically active (workers or the self-employed), imminently active (work-seekers) or those with sufficient means to support themselves, and insured against medical costs.[4] It is clear that the dependent citizen is not in fact granted the right to live in other Member States.

Yet despite this apparent clarity in the citizenship directive – and in the directives which preceded it – there are hints that not all is as tidy as first appears. The preamble speaks of migrant citizens not being an 'unreasonable burden' on their host state,[5] which immediately suggests that they can be at least a bit of a burden – a reasonable one - although how that is to fit with the idea that they have sufficient resources not to be any burden at all (which is what the text of the directive says[6]) is left unresolved. Article 14(3) of the directive also says that the mere fact that a non-economically active migrant applies for social assistance should not lead automatically to the loss of their residence right. Yet does such an application not demonstrate precisely that the migrant does not have sufficient resources not to be a burden on the social assistance system of the state? So why should loss of a residence right not be automatic?

The Court has seized on these and other lacunae in the texts, adding several lawyers of complexity to the law. It has introduced proportionality tests at some points, so that even a relatively clear rule may be non-absolute if it would lead to disproportionate results.[7] It has emphasized the need for individual assessments and flexible thresholds, rather than accepting the desire of Member States to translate the directive's rather open-textured instructions into precise and unyielding income thresholds, time limits, and conditions.[8] Concerning workers, it has defined these quite simply as persons who do some non-negligible paid work, and not, as Member

[3] Article 20 TFEU
[4] Directive 2004/38 (Hereafter 'Citizenship Directive'), Articles 7 and 14
[5] Preamble to Citizenship Directive, recitals 10 and 16.
[6] Article 7(1)(b) Citizenship Directive
[7] Case C-413/99 Baumbast
[8] Case C-184/99 Grzelczyk

States would have liked, as persons whose employment is the effective means of their subsistence.

Two stories are commonly told about this case law. One is a story of change: that in its early case law on citizenship the Court was generous to migrants, and took an expansive view of citizenship and a restrictive view of limitations on free movement. Then, at some point early in the new century, it began to back down in the face of a changing political climate and the case law became more limited and respectful of the desire of Member States to exclude the dependent and costly migrant. Both phases are of course criticized, the early one for undermining the policy compromise in the law and imposing unsustainable burdens on the welfare systems of states receiving many migrant citizens,[9] and the latter for undermining the meaningfulness of Union citizenship and entrenching a market-based view of human value and rights.[10]

Another story is that the law is full of inconsistencies and confusions, and based on a rather unsatisfactory principled framework.[11] Whichever side one criticizes from, it is common to claim that the rights of migrants to social assistance require greater clarity. Academic lawyers would like to see greater precision of principle and concept, and more persuasive explanation and reasoning in judgments, while administrations would like the EU to either give them clear rules, or allow them to make and enforce clear rules themselves, rather than the individual assessments and very open normative concepts of which the Court is arguably beloved.[12]

This article tries to bring these stories together, to refine them, and to rebut some parts of them. The article makes three main points:

1. Concerning non-economically active migrants, the Court has been reasonably consistent in its interpretations throughout its case law, and it has been relatively restrictive of the rights non-self-sufficient migrants to live in host states. The problems of this area of this law are not really ones of over- or under-generosity by the Court, but of under-defined core concepts and an over-complex structure of rights, which makes the law hard to effectively enforce. Making the right to social assistance dependent on lawful residence, while lawful residence is in turn dependent upon the degree of use of social assistance – as the Court has done - creates a confused and confusing circularity in the law, which is only made worse by uncertainties about what social assistance means.

2. Concerning economically active migrants – in practice, workers, since the case law on the self-employed and social assistance is negligible – the core problem is that the law has become divorced from the underlying policy compromise on which it was based. The concept of a 'worker' serves two purposes in the law: it determines the access of a migrant to the particular

[9] See e.g. K. Hailbronner 'Union citizens and access to social benefits' (2005) 42 CMLRev 1245; A.J. Menéndez (2010), 'European Citizenship after Martinez Sala and Baumbast: Has European Law Become More Human but Less Social?', in: M. Poiares Maduro and L. Azoulai (eds), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Oxford: Hart, pp. 391

[10] E. Spaventa 'Earned citizenship: understanding Union citizenship through its scope' in D. Kochenov (ed) Citizenship and Federalism: The Role of Rights (CUP, 2016), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2497941 . See also N. Nic Shuibhne 'Limits rising, duties ascending: the changing legal shape of Union citizenship' (2015) 52 CMLRev 889.

[11] D. Thym 'The elusive limits of solidarity: residence rights of and social benefits for economically inactive Union citizens' (2015) 52 CMLRev 17; Editorial, 'The free movement of persons', n 2 above; K.Hailbronner 'Union citizenship and access to social benefits' (2005) 42 CMLRev 1245.

[12] M Blauberger and S Schmidt 'Welfare migration? Free movement of EU citizens and access to social benefits' (2014) 1(3) Research and Politics.

roles and privileges granted to employed persons in their host state, and it also determines the very right of the migrant to be there at all. The problem is that a definition well-suited to the former role is not necessarily well-suited to the latter. It seems fair that rights to be treated as an equal within the sphere of your work should not depend on how much of it you do or how much you earn, but it is far less obvious that these factors should play no role in determining residence rights. Making worker status a sort of residence and rights trump-card potentially encourages strategic behavior which was surely never intended to be allowed.

3. In both situations above - the non-economic migrant and the worker - it is changes in society, working patterns, and the welfare state which have brought the law's problems to a head and made its deficiencies acute. The enormous increase in the size and sophistication of welfare systems, and the diversity of employment possibilities, means that it is almost impossible for a person not to be a burden on public finances somehow, even if they are in fact in possession of reasonable means. Public financial assistance is no longer for those on the edge of the abyss, but often for all those facing economic challenges, and sometimes even for all citizens. A clear division between recipients of support and non-recipients of support is no longer viable. The idea of 'sufficient resources not to be a burden on the social assistance system' is then far from clear. Similarly, the phenomenon of an 'in-work benefit' is no longer the marginal, perhaps almost oxymoronic, thing that it once was. The assumption that those in employment are self-sufficient is not reflected in many European societies, where significant parts of the labour force may rely on support varying from subsidized housing and medical care to tax breaks and income top-ups. The automatic residence rights granted to workers were partly the product of a political assumption that such people would not be a significant burden on public finances. That assumption is now sometimes open to question, and in extreme situations work may even be sought primarily for the access it gives to welfare states.

The article goes on to consider how the law might be realigned with the prevailing policy consensus: that the migrant should be free to live and work wherever they like within the EU, on condition that they are not a burden on the social assistance system of their host state. It may be noted that the aim is not to endorse that consensus, but merely to assess the law in its light. Such a realignment is possible, and would add considerable clarity to the law.

However, it might be less effective at solving the social problems associated with it: the challenges arising out of relatively poor migrants and of wealth differences between states are not amenable to solution by an abstract rights regime on its own. Excluding without expelling creates an outsider class within states, which is socially challenging and morally questionable and may be a pyrrhic victory for those states. On the other hand, meaningful expulsion raises serious law and policy challenges of its own.

Perhaps we can say, as Verschueren has noted, that there are three matters at stake in the free movement of persons,[13] which create a trilemma. One is the possibility to move freely between states. The other is the possibility to keep solidarity largely national, and avoid inter-state redistribution, because the national community is still financially, emotionally, and functionally central to European life. The third is social harmony, and a high degree of equality and inclusion within society. The desire for

[13] H. Verschueren 'Preventing "benefit tourism" in the EU: a narrow or broad interpretation of the possibilities offered by Dano' (2015) 52 CMLRev 363 at 364.

each of these is present to varying degrees, and understandable. However, it appears that a community of nations can only enjoy any two of the three at once.
The following sections expand on the points above, and do so by going step-by-step through the core concepts of the law and how they have developed.

III. The introduction of a two-step test: lawful residence as the pathway to equal treatment

Martinez-Sala is commonly treated as the beginning of the case law on non-economically active migrant citizens and social assistance.[14] There is of course earlier case law on both migrants and benefits, but Martinez-Sala was the first substantive judgment on Union citizenship, and the structure of the citizenship directive provisions reflects the structure of the reasoning in this seminal judgment, and that structure frames both the law and the debate.
While the case has many aspects, the most important is the Court's insistence that if a migrant EU citizen is lawfully resident in their host state then they must be treated with full equality. The application of the right to equal treatment is a consequence of the existence of the right to residence.
This two-step approach has had enormous consequences. One might treat the right of residence in a state and the right to equal access to benefits in that state as independent questions. By contrast, the Court insists that we begin by considering whether a person is lawfully present. Once we know the answer to that, the question of whether they should be treated equally to nationals follows.
Although the case was regarded as 'progressive', in the sense that it protected Ms Martinez-Sala's rights, O'Leary noted soon after that in giving the lawfully resident migrant very strong and broad rights it would encourage Member States to challenge rights of residence, which might ultimately be more restrictive for migrants than if they were allowed to reside, but merely denied certain substantive privileges.[15] That is indeed what has happened: the Martinez-Sala two step approach was reconfirmed in Grzelczyk, and after that Member States realized that they could not challenge rights to benefits as such, and instead moved to challenging the right to residence.[16]

IV. Residence thanks to EU law, and thanks to national law

This makes the concept of lawful residence extremely important. Ms Martinez-Sala did not reside in Germany on the basis of EU law, but of German law, so that the case was understood as saying that as long as residence was lawful it did not matter whether it was national law or EU law which provided the basis for that residence.[17]
It is unclear whether this is still the case. Dano is widely understood having changed matters.[18] The question asked in that case, in substance, was whether a Member State was permitted to refuse social assistance to a migrant who did not have a right of residence under the directive. The Court answered that they could: if migrants could migrate and claim social assistance even though they did not comply with the conditions for residence, that would undermine the intention of the directive to prevent them from being an unreasonable burden.
It is therefore beyond doubt that EU law only obliges Member States to grant social assistance to those living in that state on the basis of EU law. However, this does not answer the question at hand. The Court in Dano found that a Member State is

[14] Case C-85/96 Martinez-Sala
[15] S O'Leary 'Putting Flesh on the Bones of European Union Citizenship' (1999) 24 ELRev 68
[16] Case C-184/99 Grzelczyk
[17] Although see O'Leary, n 15 above, who considered the case merely to be uncertain on this point, perhaps presciently.
[18] Case C-333/13 Dano

permitted to deny persons not complying with the directive conditions social assistance *because that state is permitted to deny them a right of residence*. The Court indicates that there is a legal pathway provided for states to exclude migrants from social assistance, and indeed such a pathway is clear from the directive.

However, what happens if a state ignores that pathway and follows another one? Is that also possible? Concretely, what happens if the state does not exercise its directive-based right to deny residence, but for reasons of its own chooses to extend a residence right based on national law? Nothing in the text or spirit of Dano answers this. From the reference it was quite clear that there was no question of a national law right of residence, so the Court was not called to consider this hypothetical situation. The judgment is quite explicit that it addresses persons 'in the situation of the applicants', that is to say persons whose only possible right of residence derives from the directive, and where that right is disputed.[19] The case is simply not about people in the odd position of enjoying uncompelled national residence rights. The only case which ever has been about such people is Martinez-Sala, which has never been overruled. In fact it seems that the general rule is as stated in Brey, that social assistance is only a right for those complying with the conditions for lawful residence, a statement which leaves the meaning of 'lawful' open.[20]

However, in making this statement the Court in Brey cited a range of cases, in which the applicable conditions for residence were not actually all the same, including Martinez-Sala, but also Trojani and Grzelczyk.[21] The point seems to be that whatever conditions a particular individual may have to comply with in order to be lawfully resident, a failure to comply with them, since it makes them not lawfully resident, will deprive them of a right to social assistance. Hence the reference in Dano to the importance of compliance with the directive for 'persons in the situation of the applicants', for whom no other route to legality was open.

This interpretation is supported by the fact that Dano ignored Teixeira and Ibrahim, cases concerning the right of residence granted to the children of workers and their carers on the basis of Article 12 of regulation 1612/68.[22] In those judgments it was clear that no right of residence arose from the directive, but nevertheless the Court found one to exist on the basis of the regulation, as indeed it also did in Baumbast.[23] That right of residence was moreover independent of means. The question of equal treatment did not arise in the judgments, but it seems implicit, and indeed inevitable, that if EU law grants a means-independent right of residence to child citizens, on the basis of their need to continue their schooling, then equal treatment surely also applies.

Is Dano really to be understood as overruling this? Does its reference to the directive residence rights as the only basis for equal treatment mean that migrant citizens whose residence right derives from the regulation, and not the directive, do not enjoy equality? It seems more plausible that the specificity of the language in Dano is because the Court was considering a quite specific situation. There is no reason to think that it was laying down a complete rule.

Moreover, any kind of exclusion of lawful residents from equal treatment would create practical problems and surprising results. If a citizen lives in another Member State on the basis of national law, and perhaps has a family, is it really the case that in all her interactions with the apparatus of the host state she will enjoy no right to equal treatment at all? Can her children be discriminated against in school? Can she be discriminated against in medical care? Does she still enjoy the right to vote in local and European elections – the Treaty and implementing directives speak of

[19] Ibid, para 73
[20] Case C-140/12 Brey, para 44.
[21] Case C-146/02 Trojani.
[22] Case C-480/08 Teixeira; Case C-310/08 Ibrahim. See also Case C-115/15 NA.
[23] Case C-413/99 Baumbast

voting in the state of residence, but does this now mean residence in accordance with the citizenship directive (or other EU legislation)? The idea that a migrant citizen, lawfully in another Member State, might fall entirely outside EU judicial protection because of the basis of her residence seems odd. It is an attempt to find a position in between rejection and acceptance of a person's participation in society.

Such midway positions have often been rejected in other branches of free movement law: a total ban is typically easier to defend than a partial one.[24] The reason is that a genuine perception of threat may logically lead to banning a good or service. However, if it is allowed onto the market, but with various restrictions, this may sometimes undermine the claim that such a threat exists: if it's so dangerous, why do you allow it all?

Similarly, with people, one might well say that Member States have no EU law obligation to admit and care for persons who are not self-sufficient, because this generates genuine policy risks. However, if they voluntarily choose to admit a certain person to their society despite that person's lack of self-sufficiency, that is to say if they openly say that the person's residence and participation in their society is lawful and legitimate, then it is incompatible with this claim, and with the goals and spirit of EU law, to then deny the person equality within that society.

On the other hand, one could also argue that if a Member State chooses to grant a right of residence to someone not complying with EU law conditions, then they do so outside the scope of EU law: their decision is not compelled by the Treaty, and so outside its scope, so that there is no basis for applying EU law equality rules.

In the end it probably matters very little. Member States will not often recognize the lawful residence of an EU citizen failing to comply with EU law conditions, and if they do, for policy reasons of their own, then they are quite likely to in fact extend equal treatment to that person anyway. The real issue in Dano was whether equal treatment had to be extended to a person who was not lawfully resident, and the answer to that was obviously not. No preceding case had ever suggested that the answer would be anything different.

It will be apparent from all this that the most substantive question in this field of law is when exactly someone is to be considered as complying with the EU law conditions of residence found in Article 7 of the citizenship directive. For almost all non-economically active persons, this will be the matter determining their access to social assistance.

V. The conditions of EU law residence

Grzelczyk, the next big step after Martinez-Sala, is often cited as one of the founding documents of Union citizenship, largely because of its use of the now well-known phrase that 'Union citizenship is destined to be the fundamental status of nationals of the Member States'.[25] However, it should be remembered that rhetoric is justificatory more than constitutive: the Court does not engage in lengthy Anglo-Saxon style judgments, in which it explores all possible positions and their pros and cons.[26] Rather, having chosen its position the function of the judgment is to justify that position. Hence grand phrases about citizenship will typically be attached to judgments in which citizens, perhaps to the surprise of states, win, whereas one should expect phrases about the legitimate interests of states in cases where states win. That does not indicate a changing court, but just that in any legal framework there will be some cases going each way. What the case law seems to display is that

[24] Case 121/85 Conegate; Case 41/74 Van Duyn; Case C-46/08 Carmen Media.

[25] Grzelczyk, para 31.

[26] See M Lasser 'Anticipating Three Models of Judicial Control, Debate and Legitimacy: The European Court of Justice, the Cour de cassation and the United States Supreme Court', Jean Monnet Working Paper 1/03

within a relatively consistent legal framework the Member States have slowly begun to understand what the rules of the game are, with the corollary that they lose fewer cases, fight fewer hopeless ones, and produce more successful arguments in the ones that they do bring. The recent Dano/Alimanovic moment, heralded as a new restrictiveness from the Court of Justice,[27] is more plausibly understood as an indication that Member States are beginning to master the law – as well as of the fact that the low-hanging citizenship fruit is long gone: in any emerging rights regime the rate of innovation must at some point slow down.

At any rate, in Grzelczyk the Court followed Martinez-Sala in finding that as long as Belgium recognized this young student's right of residence, they were bound to accord him equal treatment. However, what is less discussed is that they went on to almost invite the Belgian state to dispute that right of residence: the Court said that the fact he was applying for social assistance – the core of the case – might well be taken to indicate that he did not comply with the conditions for lawful residence.[28] As O'Leary warned, the two step test moves the battlefield from equality to the lawfulness of residence, not necessarily a more strategic location for the migrant. The Court found that it was for the national authorities and courts to consider whether Grzelzcyk was in fact a lawful resident, but if not, then of course there was no right to the benefit. On the basis of the judgment it is perfectly plausible that he was in fact expelled from Belgium.

There was an important sting in the tail for the state: the innovation of Grzelczyk was the Court's finding that while lawful residence was based on the conditions in the directive (which were essentially the same in the older directive then in force as they are now in the citizenship directive) those conditions must be applied in a proportionate way. It did not use that word, instead speaking of the way that a migrant may experience changing circumstances, and of a 'certain degree of financial solidarity' between states, particularly when migrants experience 'temporary' difficulties,[29] but the idea was clear: that there should be some kind of proportionality/undue hardship test applied before a right of residence was treated as coming to an end. This was confirmed in Baumbast, decided just a year later, where the Court made quite explicit that the residence conditions in the directive must indeed be applied with an eye to consequences and to the history and behaviour of the migrant, and that the relevant conceptual frame for this was proportionality.[30]

As a corollary of introducing this proportionality test, the Court found in Grzelczyk that an application for benefits could never lead 'automatically' to a denial of residence rights – that would exclude the possibility of considering the individual circumstances and applying proportionality.[31] This no-automaticity rule was picked up by the Commission and introduced into the citizenship directive, along with a provision that 'sufficient resources' must be individually assessed.[32]

While this personal and contextual approach to lawful residence can be seen as undermining the certainty of the residence conditions, and even as undermining the 'sufficient resources' condition in the directive, it should be put in perspective. Doctrinally, the Court supported its decision by reference to the directive preamble, which provided that migrant students should not be an unreasonable burden on the

[27] Case C-67/14 Alimanovic. See Spaventa, and Nic Shuibhne, both n 10 above

[28] 'That interpretation does not, however, prevent a Member State from taking the view that a student who has recourse to social assistance no longer fulfils the conditions of his right of residence or from taking measures, within the limits imposed by Community law, either to withdraw his residence permit or not to renew it' para 42, Grzelczyk.

[29] Para 44. That idea of temporary difficulties was adopted into the preamble of the Citizenship Directive

[30] Case C-413/99 Baumbast, para 91.

[31] Grzelczyk, para 43.

[32] Articles 8(4) and 14(3) Citizenship Directive

public finances of the Member State.[33] This is prima facie a remarkable thing to put in the preamble, given that the actual provisions of the directive were much stricter, envisaging no burden at all.[34] Reconciling them by finding that in some, exceptional, circumstances a certain call on social assistance must be seen as reasonable is a defensible judicial response to an apparently incoherent text.

As well as this, the idea that an apparently clear rule or condition should be set aside if it causes undue or exceptional hardship is not unusual, either in national legal systems or in EU law. Its introduction here, via the concept of proportionality, is not a radically innovative legal step. That is particularly the case because Grzelczyk and Baumbast both concern citizens who had been lawfully resident for some years in their host state, and where denial of their residence would have had severe consequences: Grzelczyk was in the last year of a four-year degree and wanted financial support during this final period, while Baumbast concerned an apparent defect in sickness insurance which had had no consequences for a family already resident for years in the UK, and which was correctable. It is easy to see how it could be argued that a denial of residence rights in these circumstances might be disproportionate. Nevertheless, in Grzelczyk the Court did not state that this was the case. It merely implied that it might be, particularly if the financial difficulties experienced by Mr Grzelczyk were purely temporary.[35] If a few months' social assistance, after more than three years of lawful residence, would make the difference between him getting a degree or not, the Court invites, but does not compel, the national judge to support this. However, if he is likely to be a longer-term burden on the Belgian state then a national authority or court could deny his right of residence without conflicting with the spirit or letter of the judgment.

The relatively strict proportionality review envisaged by the Court is further displayed in Trojani, a case decided a year or two later.[36] After a few years of self-sufficient residence and lawful residence in Belgium, during some of which time he may have been a worker, he applied for the same benefit as Mr Grzelczyk. The Court emphasizes the two-step test - as long as Belgium does not challenge the lawfulness of his residence, they are compelled to give him social assistance – but goes on to reaffirm that 'it remains open to the host Member State to take the view that a national of another Member State who has recourse to social assistance no longer fulfils the conditions of his right of residence.'[37] This decision must be taken in accordance with proportionality, they also restate, but the judgment implies, as with Grzelczyk, that disproportionality would result from specific factors, rather than as a general rule. There is no suggestion in these early cases that every resident acquires at some point a right to social assistance, only where particular features justify it.

VI. The Brey Deviation

This is what makes Brey an odd case.[38] It, not Dano or Alimanovic, is the outlier in the case law on social assistance and migrant rights. It concerns a German retiring to Austria on a low pension, and applying for an Austrian benefit available to pensioners on low incomes.

The broad frame of the case is conventional enough, using the established two-step approach. While the judgment is not among the clearest the Court has produced, the underlying question throughout is whether Mr Brey is lawfully resident, which in turns

[33] Recital 6 of Directive 93/96 on the residence right for students, now replaced by the Citizenship Directive.
[34] Article 1 of Directive 93/96.
[35] Para 44, Grzelczyk.
[36] Case C-456/02 Trojani.
[37] Para 44, Trojani.
[38] Case C-140/12 Brey

depends upon whether he has sufficient resources in the directive sense. The Court finds, using the preamble in the same way that it did in Grzelczyk, that this in turn depends on whether the grant of social assistance would create an unreasonable burden for the Austrian system.

This is a rewriting of the directive, in which the Article 7 requirement not to be a burden is judicially replaced by the requirement not to be an 'unreasonable burden', but that creative step was already taken in Grzelzcyk.[39] The novelty of Brey is in the way that it is applied, for unlike Grzelczyk Mr Brey was not asking for social assistance because he had fallen upon difficult times, but at the very beginning of his stay in Germany. This would seem to be a most radical challenge to the directive, directly in contradiction to the idea that migrants should have sufficient resources. While we may bend that rule after a period of residence, in certain circumstances, and fairly call it proportionality, that idea is far less applicable here. The kinds of factors which might justify flexibility after time has passed – a long prior period of lawful and self-sufficient residence, a degree of integration, particular hardship caused by breaking those established links[40] – are not likely to be present when a migrant first moves to their new state. It would be, one might say, a most disproportionate use of proportionality.

Thus the suggestion in Brey that social assistance might be available to an arriving migrant seems initially to be a full-frontal assault on the text and policy of the directive, as well as on the spirit of the preceding case law, which showed cautious respect for the residence requirements of the directive. Yet when one looks more closely at the terms of the attack, it is far weaker than first appears. The Court structures the law in such a way that the substantive question is whether the grant of social assistance would be unreasonable. Then it goes on to indicate the criteria for unreasonableness. These are adopted from the directive preamble, which in turn largely took them from the Grzelczyk judgment.[41] Thus a Member State assessing whether a grant of social assistance would be an unreasonable burden, and thereby undermine the applicant's residence right, should take into account the duration of their residence, their personal circumstances, the amount of aid they are applying for, whether their difficulties are likely to be temporary, and the degree of burden which the assistance would impose on the social assistance system of the state. This latter criterion is of course to be measured by considering the precedential effect of the decision: no individual applicant imposes a significant burden, but the question is whether a finding that a certain benefit may be awarded in certain circumstances is likely to lead to many migrants being entitled to it, and the relevant factor is the total burden that they would impose. This was not entirely clear in Brey, but later clarified in Alimanovic.[42]

The striking thing about these criteria is that it is extremely hard to see how they would help someone in Mr Brey's situation. The person-oriented criteria – the duration of residence and personal circumstances – are clearly intended to reflect undue-hardship Grzelzcyk type situations, and a new migrant will almost inevitably win no points here, barring some exceptional situation. Moreover, the emphasis on the temporary nature of the need for social assistance will exclude a non-economic migrant unless they can show how their situation is expected to improve, quite a challenge for most, and certainly for a pensioner whose income is likely to be fixed. If Mr Brey needed a bit of help getting settled, he might have an argument, but if he is asking for social assistance for the entire duration of his stay in Germany, possibly the rest of his life, then the law is clearly against him.

[39] Grzelczyk para 44.
[40] See recital 16, Citizenship Directive
[41] Brey, para 69.
[42] Case C-67/14 Alimanovic Para 62.

The systemic arguments are also restrictive: there will be few migrants who are unique, so any principle that a certain benefit is available to the migrant without means is likely to be financially significant for the state. Given the fact that migrants are generally intended to be self-sufficient, any such burden is arguably unreasonable. One might say that the burden on the state social assistance system will always be unreasonable if it is the result of a general awarding of social assistance, and will only be reasonable if is the result of the particular circumstance of the migrant. The line between reasonableness and unreasonableness is then partially determined by the precedential value of a decision – how many migrants does it potentially bring within the benefit's scope? This must be the point that the Court was making in Alimanovic, where it clarified what it meant by the total burden on the social assistance system:

> Moreover, as regards the individual assessment for the purposes of making an overall appraisal of the burden which the grant of a specific benefit would place on the national system of social assistance at issue in the main proceedings as a whole, it must be observed that the assistance awarded to a single applicant can scarcely be described as an 'unreasonable burden' for a Member State, within the meaning of Article 14(1) of Directive 2004/38. However, 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.*[43][italics added]

The Court here was talking about work-seekers, but it is hard to see why the analysis should be different for other non-economic migrants.

Brey is then a rather Janus-faced judgment. The Court's discursive use of proportionality and reasonableness has given the judgment a reputation as migrant-friendly, but its principles are not threatening to public finances at all, and are even quite restrictive: the emphasis on the length of time for which a benefit is needed will exclude non-economic migrants unless they can show some reason to expect impending improvement in their situation, while the emphasis on the total burden on the system is a false friend to migrants, since most benefits address potentially large groups of people and relatively few situations are unusual enough not to have significant precedential value. Given that there are no doubt many pensioners in the EU whose income is as low as the Brey's (they received about 1000 euros per month) and for whom the Austrian top-up would be welcome, and given that there was no reason to think that Mr Brey's other income was likely to increase in the future (his was not a situation of temporary support during a few difficult months), the judgment provides ample support for a denial of his residence right followed by a refusal of social assistance.

Why then did the Court not just say this? It is often not shy of indicating the right result in a case. Perhaps it was respect for the jurisdiction of the national court, but perhaps it was also discomfort with the conclusion. For the facts in Brey reveal the weak spots in the law, and show how it can lead to strange, and even paradoxical results.

For Mr Brey clearly had sufficient resources not to be a burden on the social assistance system of Austria. His pension was low, but not miniscule, and it seems likely that he could have lived on it. He did not face vagrancy or starvation or even living conditions which violated his basic dignity. Any plain-text reading of the sufficient resources condition in the directive alone would lead to him enjoying a right of residence.

[43] Ibid

Yet this would severely undermine the policy of the directive, because it would mean that Mr Brey was entitled to social assistance, and so could in fact become a burden on the social assistance system, to a potentially unlimited extent – as long as you have enough, you are entitled to lots more. Only those without enough for their basic needs could be denied anything at all.

This would be an extremely difficult position to defend: it would mean that two migrants might be exactly the same burden on the social assistance system, costing their host state exactly the same amount of money, but one could be denied these benefits because he actually needs them – he does not have resources without them – whereas the other would be entitled to them precisely because he does not need them – because he could, if necessary, be self-sufficient, and therefore meets the resources condition.[44]

The Court seeks to avoid this by integrating the use of benefits into the sufficient resources condition, so that whether a migrant has sufficient resources is not just a product of what he independently has, but also of what he takes from his host state. Thus the amount of, and reasons for, the claim to social assistance is part of the assessment of resources. Hence although Mr Brey may have had, as a matter of fact, sufficient resources to live on, once he claimed social assistance he may well have been found not to have sufficient resources in the sense of the directive. Individual assessment does not always work in the migrant's favour.

The problem with this feedback loop between claims to social assistance and the sufficient resources condition is that it risks leading the law into serious logic and policy problems. If Mr Brey had merely settled in Austria on his low pension, and had succeeded in supporting himself and his wife, then it would seem that the Austrians would have had no basis for denying him a residence right. Although his income might have been low, even below the social assistance level, it was not below what a person, even a careful couple, could live on, and the mere fact of self-sufficiency would be indicative that it was sufficient resources. So the claim that he did not have sufficient resources was essentially based on his application for benefits. The judgment confirms this: it is the fact that he may receive a benefit which might make him an unreasonable burden which may justify a finding that he does not have sufficient resources.[45]

But then there is potentially a sort of regress which arises: if Austria grants him the benefit then he will be a burden, and he will cease to have a right of residence and the benefit can be withdrawn. But then he will not be a burden, and could reclaim a right of residence. And so on. If, on the other hand, Austria refuses him the benefit he will not be a burden and there is no basis for withdrawing his right of residence. Which would mean he is entitled to the benefit. But then he will be a burden…. It could be argued, in a true Catch-22 way, that Mr Brey is entitled to his benefit as long as he does not get it.

The law should not be as messy as this. The implicit assumption must be that if a person applies for a benefit they actually need it – so that the application itself is, genuinely, evidence – if not conclusive - that in their personal circumstances they do not have sufficient resources. Yet of course life is not as simple as this: many people, and many migrants, might welcome a particular benefit, but get by without it somehow if it was refused.

The problem is that the law is based on a distinction between those with sufficient income to support themselves, and those receiving social assistance, as if these are non-overlapping groups. The sufficient resources condition was intended to prevent anyone becoming an unreasonable burden, because if one has resources, how

[44] O'Brien 'Civis capitalist sum: Class as the new guiding principle of EU free movement rights' (2016) 53 CMLRev 937 at 947. See also pp 961-66.

[45] Brey, paras 63-64 and 69-72.

would one be a burden? However, in modern welfare states social assistance is extended to large groups of the population, not just those at the very bottom of the income ladder. Those with an adequate income may nevertheless have a right to public support. This was Mr Brey's situation. A secure income of 1000 euros net of tax per month is not high, but it is enough to get by on, and would be, on most understandings, sufficient resources. To deny someone arriving with his income a residence right would be a very restrictive approach to free movement. Yet, in wealthy social-democratic Austria pensioners on such an income had a right to top-ups from public finances. To grant him the benefit, the usual consequences of a right of residence, would undermine the clear policy of the directive. The final result of the case is to let him stay and have the benefit as long as it wouldn't be unreasonable – or to deny him a residence right unless that would be unreasonable, if one prefers this perhaps more realistic formulation -, a clear attempt to negotiate a middle way between two unattractive options. Reasonableness, the real substance of the case, is deferred to the national authorities and courts.

This approach may be successful in allowing, in principle, 'reasonable' decisions to be made by authorities and courts, but it makes the law over-complex and that must make it hard to administer. Right B (equality in benefits) is a corollary of Right R (right of residence), but the existence of Right R depends on whether Right B is being exercised. That is conceptually inefficient.

A better solution would be to separate the right of residence, and the right to social assistance, and to treat them as independent questions. A Union citizen may have the right to reside in another Member State so long they are able to support themselves at a level compatible with basic dignity, as understood in that state: so if they can avoid vagrancy, and keep themselves in a level not regarded as unacceptably squalid or precarious, then they have the right to live in that state.[46] A separate question is then whether they have a right to social assistance, and the answer will be, on the prevailing political and legal consensus, negative, except in situations where a denial would be disproportionate due to the factors with which we are now familiar – length of prior residence, temporariness of difficulties, and perhaps particular personal factors. There is no real reason to take account of the total consequences for the social assistance system, because these are effectively managed via the restriction to exceptional circumstances.

This would make the law a great deal simpler, and also make it more accessible to rational renegotiation.[47] The residence rule enables states to exclude migrants who cannot look after themselves, which the current political and public consensus requires. The degree to which, exceptionally, non-economically active migrants should be entitled to public support can be separately considered and regulated, hopefully in a more transparent way than is currently the case. Should political moods change or develop, it would be relatively easy to change the terms of such access, without having to restructure an entire castle of interlinked law. The Netherlands authorities already use a form of sliding scale, whereby a non-economic migrant who has been lawfully resident for 2 years is entitled to X months of social assistance, after three years Y months, and so on.[48] It amounts to a sort of gradual step-up to the status of permanent resident, and takes account of the fact that the longer someone is present, the more integrated they are, and the more reasonable it is to provide them with temporary assistance in difficult circumstances. Something

[46] See Alimanovic, para 45-46.

[47] This may of course be a reason to resist it: for those who would like to entrench all aspects of free movement and treat renegotiation as taboo.

[48] D. Kramer, 'Verdiend verblijf: EU-burgers en de sociale bijstand', SEW Tijdschrift voor Europees en economisch recht, 2016 (2), pp. 60-69; D. Kramer, 'Earning Social Citizenship in the European Union: Free Movement and Access to Social Benefits Reconstructed', Cambridge Yearbook of European Legal Studies (forthcoming 2016).

like this model would make sense within the EU legal framework itself – or, at least that framework could make clear to states that they should be encouraged to develop their own version of this structured interpretation of 'reasonable burden'.

This approach is a challenge to some of the traditional conceptions of Union citizenship, because it openly acknowledges that a migrant citizen may reside in a host state without enjoying full rights of equality there. Yet de facto this is already the case, and there seems little moral merit in hanging onto poorly working legal structure just so that one can pay lip-service to equality. The current law is not just tangled, but rather dishonest in its maintenance of an equality rule which becomes precarious the moment it is relied upon.

The separation of the two rights is in practice already occurring, and recent judgments suggest that the Court tolerates it. For when a migrant applies for benefits and these are denied, the Member State may feel legally compelled to package this denial within a denial of a right of residence, but this is unlikely to be enforced by expulsion. Firstly, the authorities administering benefits are not generally those responsible for expulsion. Secondly, expulsion is expensive, and fairly ineffective, since nothing stops the migrant from returning straight away. It may be nothing more than state financing of a visit to home. In practice what may be occurring is that benefit authorities are learning to apply the criteria for lawful residence, and are using these to determine access to benefits, but that the immigration authorities may be uninterested, perhaps even uninformed. In Brey, and Dano it seemed to be the social assistance authorities who were involved in the issue, and the Court laid down the criteria that they should use in determining lawful residence, apparently uninterested in whether their conclusions would have any consequences for actual residence.[49] This is perhaps appropriate: the inter-institutional allocation of functions within states is a national matter, not for the Court to be concerned with.

Most clearly, in the recent Commission v UK case, the Court found it permissible for the UK to restrict child benefits to migrants whose residence was lawful under EU law.[50] The interest of the case is in not in the result, which was predictable, but the implicit finding that it is sufficient for an authority to take a founded and reasoned view on legality of residence, and to act accordingly. There does not seem to be any requirement that a finding of no lawful residence should only come from e.g. immigration authorities or the police. Nor does there seem to be any requirement that such a finding should be followed up by active steps to expel.

Commission v UK seems rather to suggest that the crucial matter is not formalities, nor the steps taken by states, but the substantive compliance or not with EU law conditions of residence. Thus in principle any branch of the administration can take a view on legality of residence and draw the appropriate conclusions, provided they do so in a reasoned and legally correct way, and that there are the possibilities of appeal that the directive requires.[51]

This is consistent with most earlier case law, where the emphasis has always been on substantive compliance.[52] However, in the specific context of a denial of residence rights the Court had taken an unusually formal approach in Trojani, where it found that as long as a state had taken no steps to withdraw a residence card, it was required to treat a migrant as lawfully resident and therefore entitled to equal

[49] See H Verschueren 'Free movement or benefit tourism. The unreasonable burden of Brey' (2014) 16:2 European Journal of Migration and Law p 147 at 174-5.

[50] Case C-308/14 Commission v UK

[51] The obligations to provide reasons and appeal follow from Articles 15, 30 and 31 of the directive, and the finding in para 81 of the judgment that the habitual residence test falls within Article 14(2) of the directive.

[52] E.g. Case 48/75 Royer; Case C-215/03 Oulane. See also Case C-262/09 Lassal; Cases C-147/11 and C-148/11 Czop and Punakova; Case C-325/09 Dias; Cases C-424/1- and C-425/10 Ziolkowski and Szeja.

treatment.[53] The same approach was echoed more weakly in Brey, where the Court found that the fact that a residence card had been issued should be treated as a relevant factor in deciding whether a call on social assistance would be unreasonable.[54]

On the one hand, migrants are entitled to clarity over their rights. A state cannot treat them as lawfully resident for one purpose, and then unlawful for the purpose of social assistance. It may be noted that this is exactly what happened in Trojani, where Belgium issued him a 5-year residence permit even after they had full knowledge of his circumstances, possibly because they regarded him as a worker, and in the court case did not challenge the lawfulness of his residence or continuing validity of his residence documents.[55] One would expect this kind of double treatment to be estopped, if only because it undermines the judicial protection of the migrant: the ambiguity of the state's position may harm the migrant's capacity to challenge decisions and enforce their rights.

In Commission v UK the situation was different: the UK did explicitly address the lawfulness of residence of benefits applicants, as part of that application. Unlike Trojani, they took a two-step approach, but in an integrated way, as the Court has been implicitly recommending since Grzelczyk, in its repeated reminders that it is always open to challenge the residence rights of benefit applicants. The Court accepted the integration of a residence status check into benefit applications, but made clear that this process would be an Article 14(2) check of their lawfulness.[56]

The importance of that rather technical point is that Article 15 makes clear that decisions following such checks are subject to the procedural protections provided later in the directive.[57] A denial of residence rights by a benefits authority is a finding by the state that a migrant is unlawfully resident, and must be challengeable as such. Commission v UK is not offering states a way to deny residence without any fuss or consequences. Nevertheless, it does appear that the card is no longer sacred. Just as with the acquisition of residence rights, it is a piece of evidence, but no more or less.[58]

The more important question arising from Commission v UK is whether a state who denies residence rights, whichever authority it is that does this, is obliged to follow this through by taking steps to expel, or at least to actively withdraw a residence card. Such an obligation would seem implicit in the Trojani logic of consistency. It is not obvious whether Commission v UK has overruled this. Must a benefits authority denying a residence right then communicate with the immigration authorities who must then pursue the now-illegal migrant?

The directive text does not offer clear answers to this, and neither in fact does the case law. On balance it would seem that the migrant's right to clarity concerning their rights implies that a state should indeed inform a migrant whose benefits have been denied on the basis of no lawful residence that they are seen as unlawful and their card is no longer regarded as valid. There is, after Commission v UK, and Dano, clearly no obligation to do this before the denial of benefits, but those cases do not contain anything arguing against an obligation on a state to act consistently with its findings on lawfulness, once it has found them.

Whether this obligation extends to active expulsion is another question. The directive does not seem to require states to actively expel those who do not comply with residence conditions, and there are good reasons for this: it achieves little, and in an area with open borders is a relatively pointless gesture. On balance there does not

[53] Trojani, paras 43 and 46
[54] Brey, para 78.
[55] Advocate General's Opinion, Trojani, para 3; para 37-38 judgment.
[56] Para 81, Commission v UK
[57] Articles 30 and 31 Citizenship Directive.
[58] Royer, n 52 above; Oulane, n 52 above.

seem to be any particular obligation, either in the directive or in case law, for states to actually enforce a finding that a migrant has no right of residence by expelling that migrant.
The consequences of this are more beneficial for states than for migrants. If the Court insisted that a denial of residence rights was only legitimate if it was followed by steps to enforce that position – expulsion – then this would make it so difficult and expensive for states to deny such rights that it might be easier for them just to grant social assistance. The most efficient position for states is to tolerate migrants living on low means, while granting them no assistance, and only actively expelling them if they cross a line into criminality or vagrancy. Yet at the same time, this approach contributes to the buildup of a subclass of foreign *marginaux* within host states which is often visible, disturbing, and politically somewhat dangerous. There is no obvious answer to this, as long as the terms of movement between societies – essentially uncontrolled – are so fundamentally decoupled from the terms of membership in those societies. Whether one will give, or alternatively whether Europeans will learn to live with enhanced social and legal inequality within their states, remains to be seen.

VII. What is social assistance?

The biggest unanswered question in this area of law is the meaning of social assistance, and the question whether there should be a right to social assistance, and to what extent, can only be seriously answered in conjunction with a policy decision on what social assistance is. Certainly, there is a reasonably stable jurisprudential definition: the Court has said that social assistance is all forms of state assistance for those who do not have enough resources to meet their basic needs.[59] Yet this phrase alone leaves a number of questions open.
Most simply, must the assistance be in financial form, or could it be in the form of direct provision of e.g. food or shelter?[60] There is nothing in the case law to suggest that it must be money, and such narrowness would seem at odds with the nature of the concept. We may assume that assistance-in-kind is also covered.
Rather more challengingly, how should assistance be classified which is available both to those who cannot meet their own basic needs and to those who can: universal or widely available benefits? A child benefit or housing subsidy aimed at meeting the cost of feeding and clothing children, or of obtaining housing, would be obviously social assistance if only provided to the poor. If it is provided, perhaps on a sliding scale, to all persons, or to a range of persons extending into those with reasonable resources, what then, however? To treat it as not social assistance at all is to open this form of public assistance to non-economic migrants and thereby to undermine the policy of the directive. It will also punish more universal welfare states, which rely less on means testing. Alternatively, to treat it as social assistance only where it is provided to the poor is to allow wealthy migrants to benefit from generous public assistance schemes, where poorer ones cannot – a hard policy to justify. The third option, to treat it as social assistance in all cases means that even migrants with ample resources risk undermining their own residence rights, unless they display voluntary restraint and do not apply for benefits to which they may be entitled: the Brey situation.
There is no good answer here. One solution is for Member States to redesign their welfare systems so that the wealthy are benefitted via tax breaks rather than benefits – to move to a more safety-net oriented welfare state, rather than an inclusive one. However, this is a policy decision of enormous social significance, and a relatively

[59] Alimanovic para 44; Dano para 63; Brey para 61.
[60] On benefits-in-kind in a similar EU law context see Trojani, para 22, and Case 196/87 Steynmann.

un-European direction to go in. If the directive really compels this kind of change, then it is surely time for the directive to be changed.
Another solution is, indeed, voluntary restraint: migrants who have enough to live on, but are nevertheless entitled under national law to certain forms of benefit, should not apply for these, for to do so would make them a burden on public finances. That would give an outcome probably close to the intention in the legislative compromise, but is demanding of both migrants and benefit administrations. May they apply for nothing at all? Bus pass discounts for residents? Swimming pool passes for those with children?
Once again, it becomes apparent that the eligibility of migrants is best dealt with by a direct rule on a right to social assistance, combined with a more worked-out definition of what social assistance is, rather than indirectly and ambiguously via residence rights and a resources test.
Yet that worked-out definition brings us to the third challenge of social assistance: what is a basic need? What is the scope of the help covered? In the UK Brexit debate the use of healthcare by migrants was a political issue. Certainly, health or healthcare can be seen as basic needs. Yet in most countries a large part of the population can be seen as receiving public assistance with the costs of this. Even insurance-based systems typically enjoy large subsidies from taxation, and some systems, such as the UK, are taxation-funded, meaning that all those paying less than the average amount of tax (or all those using more than a certain amount of healthcare?) could be seen as receiving social assistance. Should migrants be forced to pay the 'market rate' for healthcare insurance, or an extra tax rate? This would be wildly impractical – the 'true' unsubsidised price of healthcare is almost always unknown, and generally infeasible to calculate.
Moreover, once one begins to see receipt of tax-funded benefits as a form of social assistance, a very slippery slope reveals itself. Is security a basic need? Transport? Protection from public health risks and external threats? Education? The core elements of the state, national defence, public order, a justice system, public health protection, school education, are provided by taxation and in that sense are a form of social assistance to the poorer half of the population, if they are seen as addressing basic needs. Is it realistic to claim that they are not? A browse through any human rights document, including the EU charter, would make it hard to claim with a straight face that the basic needs of a human being do not include safety and education.
A second issue that was prominent in the British debate was housing subsidies. These work in different ways in different Member States, but social housing, or housing with subsidised rent, is a significant part of the housing market in some. Shelter is certainly a basic need. Are all those using some form of housing assistance in receipt of social assistance? That would seem logical, but the consequence would be that non-economic migrants would be not only excluded from a large part of the housing market, but there would be little left over to which they did have access: in states where the poor or the middle class live in subsidised housing, the free market in accommodation often confines itself to expensive accommodation. Free movement of persons would be only for those with very significant incomes in such states if the entire public housing world was closed to them.
It is clear that any attempt to draw a clear and conceptually robust line between help to the poor and other aspects of the modern welfare state is hopeless, and at odds with integrative and broad nature of that state. One might even say that precisely the blurring of that line is a policy goal and an achievement of many European countries. Social assistance, then, is something requiring legislative choices: we cannot 'work out' what it means, or expect judges or administrations to derive this from the general concept, but we must choose. There is a need for practical, formal, decisions on which benefits are to be seen as social assistance and which not.

There would be much to be said for including only those forms of assistance which are provided directly to the recipient, rather than via tax-funded institutions. So a rent subsidy would be social assistance, but use of a rent-controlled sector of the housing market would not. A subsidy for the cost of healthcare insurance would be social assistance, but the use of a tax-funded healthcare system would not be. A free travel pass for the poor would be social assistance, but use of tax-funded roads or trams would not be. Yet while making the concept easy to administrate, this would punish certain forms of welfare state, and have a steering effect on national policy.

Another form of practical delimitation would be to include only assistance to do with immediate, day-to-day, living costs: food, shelter, clothing, perhaps transport, but to exclude matters such as healthcare and education which are typically organised collectively on the national scale. That is not a deep policy or logic distinction, but merely one which corresponds to the popular idea of being 'on benefits' and which may aid practical administration.

A third form of delimitation would be to include only assistance which is in some means-tested, and intended not to make an aspect of life more comfortable, but to make it possible for those who otherwise would be unable to meet the basic standards of dignified life in a developed nation. This does raise the risk of the prosperous migrant being a very great drain on public finances in some contexts, thanks to e.g. housing and healthcare schemes which they may enjoy, but perhaps that policy risk is manageable, and not so great that it outweighs the advantages of practicality.

At any rate, it is clear that the concept of social assistance is too obscure to be left properly to judges, and while national administrations should be capable in principle of managing it intelligently, they would inevitably come to very different conclusions. It requires, as the Court has noted, a Union definition, and while it has offered its own concise jurisprudential mottos, it is for the legislature to do some serious working out and provide a more practical and precise list.

VIII. Dano: consolidation without change

There is sometimes a perception that the newest cases, Dano, Alimanovic and Garcia-Nieto indicate a new restrictiveness on the part of the Court.[61] There does not seem to be any reason to think this. Dano, as discussed above, does possibly make a contribution to the meaning of lawful residence, but even if the more restrictive interpretation of the case is correct this change is unlikely to have many consequences.

Otherwise, Dano is as orthodox as can be, no more than an application of Martinez-Sala or Grzelczyk. The Court once again reiterates that the right to benefits is a consequence of the right to equal treatment which only applies if the migrant has a right of residence, which in turn depends on them having sufficient resources. A decision on this, it reiterates, must be the product of an assessment of their personal situation.[62]

If the case seems to have a restrictive aura, it is because the national court, unusually, had already found that the applicants did not have sufficient resources, and indicated this in its reference. The Court accepted that finding, which meant that in the light of its pre-existing law the outcome was inevitable.[63] Certainly, the Court is not above challenging a national court's finding of fact if it seems unfounded, but there was no reason to do so in this case, and it has been consistent throughout its case law that the ultimate decision on resources is for the national court.[64] If Dano is

[61] Case C-333/13 Dano; Case C-67/14 Alimanovic; Case C-299/14 Garcia-Nieto.
[62] Para 80, Dano.
[63] Para 81, Dano.
[64] See also Case 139/85 Kempf, para 12.

in some sense a restrictive decision on migrants and benefits, then that restrictiveness is coming from the national court, not the Court of Justice: the choice to make a prior finding on resources before sending the reference, and to signal that finding quite clearly and assertively, may well have been conscious and strategic.

IX. Alimanovic, Garcia-Nieto and individual assessment

Alimanovic concerned jobseekers who applied for social assistance. The directive explicitly states in Article 24(2) that jobseekers do not have any right to social assistance. However, the lawyers for Alimanovic argued, perhaps this exclusion could be set aside in the name of proportionality if the assistance sought would not be an unreasonable burden? Should there not be some personal assessment of whether it would be unreasonable to award a benefit to a jobseeker? Or alternatively, where the directive provided that the status of worker was retained for six months after the ending of employment, could that six-month limit not be made flexible, in the light of personal circumstances or proportionality? The hope was that a Grzelczyk approach would be extended to this new context.

It was not. The Court found that while it was appropriate to look at individual circumstances before expelling a migrant or denying their right of residence, it was not necessary when applying a rule as clear as that in Article 24(2), where the necessary weighing of interests had been done by the legislature and not deferred to either states or the courts.[65] The same applied to the six-month rule.[66]

The significance of Alimanovic depends entirely on how one views this decision. Is it a radical retreat from the (apparently) migrant-friendly person-centred flexible Grzelczyk approach, or is it merely a reflection that the situation and question in Alimanovic were so fundamentally different that the Grzelczyk approach did not fit?

The latter view is more persuasive. Expulsion or a denial of residence rights is based on a finding that a migrant lacks sufficient resources, and the directive explicitly says, following Grzelczyk, that this must be based on an individual assessment.[67] 'Sufficient resources' is moreover an inherently imprecise phrase. By contrast, the legislature did not introduce any such ambiguity or openness into the rights of job-seekers. Article 24 is uncompromising and non-contextual: they have no right to social assistance. Nor is there ambiguity in the length of time for which the status of work-seekers is retained in circumstances such as the Alimanovic's: six months is not a very open concept.

Of course, the Court could have introduced a personal assessment there: it might have said that a denial of social assistance to a job-seeker must always involve an assessment of their personal circumstances, Article 24 notwithstanding, and this would be no more startling than some of the other classic ECJ judgments of the last five decades. However, it would not have been following Grzelczyk, but doing something quite different: instead of resolving a text it would have been flatly contradicting one. In Grzelczyk the Court was faced with a directive in which the ideas of sufficient resources and unreasonable burdens were already present, in all their glorious unclarity, and individual assessment was introduced as a plausible interpretative response. However, the fact that open and ambiguous concepts require contextual judgment does not mean that precise and unambiguous ones also do.

The very different residence status of jobseekers is also important here. The directive provides that they cannot be expelled as long as they have a genuine chance of finding work, except for the high political reasons of public policy, health etc.[68] This is stronger than the right of the non-economic migrant, who must in principle have

[65] Paras 58-61 Alimanovic.
[66] Ibid
[67] Article 8(4) Citizenship Directive
[68] Article 14(4) Citizenship Directive

sufficient resources. However, that very strong right to stay in the host state goes necessarily together with a reduced right to benefits, unless the policy of the law is to be radically undermined. If Martinez-Sala and its spawn chose for a regime for non-economic migrants in which the right to be there was fragile, but once obtained the degree of equality was high, the directive takes the opposite approach for job-seekers: the right to be present is extremely strong, but precisely because of this (or vice versa) the rights to equality are limited. As O'Leary noted, this is not necessarily the less migrant-friendly approach.[69]

It is, moreover, the Court's own approach. The directive's provisions on work-seekers are a codification of Lebon and Antonissen, the culmination and summary of early case law on job-seekers.[70] In Lebon, a claim was made for social assistance by a work-seeker, but this was rejected by the Court, which explicitly found that the right to equal treatment, including in benefits, provided to workers did not extend to those seeking work.[71]

The issue came back in Antonissen, where the Court considered how long a job-seeker should be allowed to stay in a host state bearing in mind that the legislation at that time said almost nothing on the subject. Rejecting rather restrictive Council declarations as having no legal force it chose for an open-ended right of residence, as long as the job search was genuine and realistic.[72] However, of course, a primary objection of Member States to this was that such job-seekers might be a burden on social assistance. The Advocate General argued this was nonsense, since the Court had already dealt with that concern in Lebon.[73] The judgment in Antonissen does not say much about this particular point, but the Court does make clear it is following the Advocate General as a whole, and it does make some relevant remarks: several intervening Member States objected to allowing more than three months to stay and find a job, on the basis that this was how long a work-seeker was entitled to maintain unemployment benefit from their home state under the law then in force. Their fear, although not stated as such, was clearly that after three months the work-seeker would have no means of subsistence and fall into vagrancy or social assistance. The Court rejected their argument.[74] Following the Advocate General, it found that there was no necessary link between the right to benefits in the home state and a right to seek work in a host state.

Antonissen thus shows a strong commitment to a relatively open-ended right of residence for work-seekers, provided they have a real chance of finding work, but this generous approach is justified precisely by the fact that this residence right is unconnected to any rights to benefits. The work-seekers is given much freedom precisely because they are seen as 'on their own' and capable of looking after themselves, in a mirror image of the economically inactive migrant whose residence is closely controlled, precisely because that presumption of independence and self-reliance is not made.

Alimanovic is merely continuing this approach, maintaining the view that the Court has always had of job-seekers, who have always had a distinct status in the law.

Grzelzcyk then does not embody the radical purposiveness which is sometimes attributed to it: as argued above, it is a textually rooted judgment whose substance is in fact far more restrictive of access to benefits than at first seems, and the high rhetoric which it contains is justificatory rather than constitutive. Alimanovic, on the other hand, is not the leap back which it is sometimes though to be, but an equally

[69] O'Leary n 15 above.
[70] Case 316/85 Lebon; Case C-292/89 Antonissen
[71] Lebon, para 27.
[72] Antonissen, paras 17-22
[73] Advocate General's Opinion, Antonissen, para 38.
[74] Paras 19-20

textual judgment about a rather different bit of law. Its tone, as with Grzelczyk, is perfectly suited to its outcome.
A somewhat similar approach to Alimanovic was taken in Garcia-Nieto, where the question was whether non-economically active migrants in their first three months of residence had any right to social assistance. The directive explicitly and unambiguously says they do not. The Court found that there was no reason to introduce any individual assessments or ambiguity.[75] Similarly to the situation of work seekers, the exclusion of benefits is logically linked to the nature of their residence rights. Persons in their first three months of residence cannot be required to possess any particular level of resources. Even the poor are entitled to move for short periods. The exclusion from a right to social assistance is a corollary of this.[76]

X. The working poor

The situation regarding workers is simpler. They have long enjoyed a robust right of residence, and full equality regarding public benefits and other services. Legal tangles about access to public support therefore take place within the concept of worker: who does it apply to?[77]
The Court took a principled stand on this several decades ago, deciding that the status of worker could also be enjoyed by part-timers, even those earning too little to live on, providing their work exceeded a certain *de minimis* threshold. There has never been any concrete guidance on how much this is, but in Kempf the Court showed little surprise at a national court finding that 12 hours per week teaching the piano was sufficient to be a worker, even though this required Ms Kempf to claim social assistance in order to meet her basic needs.[78] An assumption that somewhere around one or two days per week is a reasonable cut off line seems to be quite common, and prima facie a defensible interpretation of the case law.[79]
The policy problem is that part time work has become more common, while benefits to those in low-paid employment have also become more widespread and generous. The worker who needs social assistance is far more common than they once were, and in some contexts almost normal.[80] So-called 'in-work benefits' were a major concern of the British in their negotiations with the EU preceding the Brexit referendum, and that partly reflects certain aspects of the UK and its benefit system: London, a magnet for migrants, is an extremely expensive city in which workers doing essential jobs, from transport to cleaning to nursing, often cannot live from their salaries, and in particular cannot find adequate accommodation that is affordable. Many will receive 'housing benefit', a payment enabling those on low-incomes to afford accommodation offered on the free market. The British government was unhappy about large numbers of European migrants taking jobs at low wages in the knowledge that the UK government would essentially pay their rent. It would have preferred that market forces push wages up, but as long as there was a supply of migrants ready to work for low wages, this did not happen, so that the UK government became a subsidiser of businesses and basic functions in the capital city, by supporting their low-paid service workers.
The actual facts of this are of course contested – whether there were really so many migrants, and whether they really affected wage levels and used so many benefits –

[75] Garcia-Nieto, paras 46-49.
[76] Ibid, para 45.
[77] See Case 53/81 Levin; Case 39/86 Lair.
[78] Case 139/85 Kempf, para 12
[79] See also Case C-46/12 LN
[80] O'Brien xx

but the potential issues are well displayed by the debate.[81] In locations where many low-paid jobs are found, or costs are high, the state may find that even workers are a significant burden on public finances. That was not envisaged at all when free movement of workers was constructed, in a time when it was evident that a person in employment would be a net contributing member of society.

Of course, that may still be the case: when governments pay in-work benefits they are really subsidising businesses, and rather than accepting their complaints about migrants, perhaps one should challenge them for their indirect state aid to clusters of industry. Maybe it is the foreign employer in another state which has the most to complain about UK in-work benefits, wishing that he had a government that would allow him to pay so little, that would essentially pay part of his wage bill.

However, while these larger-scale policy issues are genuine and complex, it is also understandable that states are concerned about the number of people to whom they have to pay social assistance, and the consequences of Kempf are in excess of what was envisaged at the time it was decided.

Moreover, those consequences are quite alien to the policy of the legislation, and are not even a logical consequence of the case law and the Court's ideals. At least three questions have got tangled up with each other in both case law and legislation while in fact they deserve distinct answers.

The first is who should be treated as a worker for the purpose of workers' rights: rights within employment, specific privileges associated with employment, trade union membership, pensions, and so on. The second is when work should be the basis of a right to reside in another Member State. The third is when a person working in another Member State should have a right to social assistance.

Both legislature and Court have been far more concerned with the first two questions. In the Kempf judgment the Court is not really interested in whether Ms Kempf should get her benefits but rather in whether she should have the status of worker, and one of its arguments that social assistance is irrelevant to this status is that help might equally have come from family members.[82] It is clear that the policy issue concerning the Court is whether a small, but not negligible, degree of economic activity should be recognised within EU law, and a factor in this decision is that if it is not, then such people will have no right to go to other Member States and either seek or take such limited employment.[83] This, it considers to go too far, and one may well agree with it: the idea that Europeans should have the right to look for and accept part-time employment in other Member States is not particularly controversial.

Similarly, when it adopted early legislation on free movement of workers the EU legislature was undoubtedly of the view that workers were economic assets to a society.[84] The Kempf situation would be the exception. There was never any consideration that whole sectors of employment might in fact be net reliers on public support, and that migrating workers might therefore be a drain on public finances. There has never been consensus political support for the idea that free movement of workers is something states may have to subsidise, rather than it being a policy contributing to their coffers.

Of course, one may seriously doubt the extent to which migrant workers really are a drain on public finances – empiricists argue – and one may also well argue that if it is the case, it is primarily due to defective national policies, and it is for Member States

[81] For an overview of the facts and problems see M. Sumption and S. Altorjai 'EU Migration, Welfare Benefits, and EU Membership' an Oxford Migration Observatory Report, 04/05/16, available at http://www.migrationobservatory.ox.ac.uk/sites/files/migobs/Report-EU_Migration_Welfare_Benefits.pdf

[82] Kempf, para 14.

[83] Ibid, paras 14-15.

[84] E.g. regulation 1612/68; Directive 68/360.

to solve this problem. Perhaps the UK should raise its minimum wage (as it in fact has done, partly in response to this issue).[85]

Yet given the intentions of the policy it seems defensible to incorporate this limit better into the law. Yes, there should be a right to work for even small amounts in other Member States, but there is no particular reason why this should entail a right to social assistance. Under the current law, work can become a tactic to gain access to benefits – the student who works part-time less for the money than for the associated rights, or the migrant who accepts the low-paid part-time job mainly because it will get him public housing.[86] There may not be many such people: perhaps they are largely a fantasy of the paranoid. However, this use of work and worker status was never the intention, and so it is reasonable to frame the law so that it cannot happen.

The most obvious solution is to take the category of 'workers' out of the law on residence rights. All migrants, whether working or non-working, should enjoy the right of residence if they are self-sufficient, as suggested above. It really should not matter whether they get their means from work or savings or family. Then there is the question of social assistance, and the simplest approach would be to treat workers and non-economic migrants the same here: the gradated proportional approach proposed above for non-economic migrants. Alternatively, if work is considered to entail some higher moral status, one could grant workers enhanced social assistance rights, perhaps more and earlier, although there is something both contradictory and socially regressive in this: if workers are special, it is precisely because they contribute and participate and support themselves, which would seem at odds with an enhanced right to assistance. Moreover, if a person is self-sufficient but not through work then the chance is present that they are contributing in some other way: perhaps in a household, where they do unpaid or informal work, such as raising children, and are thereby supported materially, either by a partner or another. There is a danger of fetishizing paid employment at the expense of other important social roles.

The amendment to regulation 492/2011 which the Commission would have proposed if the UK had voted to remain in the EU took an approach similar to the above, but less far-reaching.[87] In allowing Member States to limit in-work benefits if the impact of migrant workers on the benefits system was sufficiently serious, it essentially decoupled the questions of residence, of the right to work and equality in work, and of benefits, as proposed here. There was no question of reducing the right of Union citizens to work or live in other Member States, but the degree to which they are entitled to public support was to be potentially limited, and in a gradated way, so that rights to benefits increased the longer they were lawfully resident.

This was a somewhat minimalistic approach, which assumed that a problematic impact on public finances caused by workers is an exceptional situation, not requiring any structural reform, and so addressable via the relatively ad-hoc emergency-style measures which the Commission envisaged. Time will tell if this is correct.

It should be noted that if dumping the status of worker is a step too far, there are other ways of addressing their financial impact. Notably, the broad equality rights which they enjoy can be maintained, but with a higher threshold for the amount of work that they do. Perhaps, for the purposes of social assistance rights and a special residence status, a worker should be someone who earns at least 80% of the full-time minimum wage, or at least the 'social assistance' level. That does not take away

[85] See Sumption and Altorjai, n 81 above.
[86] See Case C-46/12 LN at para 46. See also Levin, paras 21-22.
[87] See Section D, paragraph 2(b) of the 'Draft Decision of the Heads of State or Government, meeting within the European Council, concerning a New Settlement for the United Kingdom within the European Union' EUCO 4/16, 2 February 2016, available at http://www.consilium.europa.eu/en/press/press-releases/2016/02/02-letter-tusk-proposal-new-settlement-uk/

the right of others to do less work, but it does exclude them from the more privileged degree of integration into the host state.

XI. Conclusion

One may regret that there is no real European Citizenship: that there is little real desire for solidarity between states, and little readiness to accept migrants in need of public support. How regrettable this is, and the extent to which Citizenship of the Union is a false label for an inadequate bunch of market-based rights is a lively and important debate.[88] However, the starting point of this article is that there has never been a political consensus for such a redistributive citizenship, and the article's argument is that the Court has never pushed in that direction either. It has been both consistent and cautious in its case law on non-economic migrants and benefits. Only where workers are concerned is there a potential challenge for public finances, but the relevant law has been stable for thirty years and only recently become a political issue in the UK, as a result of alleged and contested consequences which the Court probably never imagined or intended.

Why then is there sometimes a perception of a Court that interpreted Citizenship rights radically and purposively in early cases, and then retreated in the face of a changing political mood? This perception comes from too much attention to outcomes and rhetoric, and not enough to reasoning. Certainly there was a group of cases in which the migrant broadly won, and more recently a group of cases in which the migrant broadly lost, but that says more about the learning capacity of states and administrations than it does about the Court. Having finally internalised the first wave of case law, Member States probably have a better idea of what they can and cannot do, and accordingly do better in court.

They are helped by assertive national judges. Their role is underplayed in discussion of the law. It is striking that Kempf was essentially decided by the referring Dutch court, which had already found that her work was genuine and effective, a finding that the Court then accepted. Similarly, in Dano it was the national judge who had already decided that the applicants did not have sufficient resources, which the Court also, quite correctly, did not question. If national judges take an active view on the application of the open norms with which this branch (and other branches) of EU law is riddled, their capacity to control cases is at least as powerful, perhaps more so, than the interpretative role of the Court.[89] It may well be – it is an empirical question – that national judges are becoming more confident, more assertive, and more strategic in their references and the questions they ask, and this may certainly lead to trends in the case law of the Court.

Why then is the law on migrants and benefits controversial, if it allows as much space to national administrations and courts as this article argues that it does? There may be many reasons, of which political opportunism may not be the least, but at least one factor is that it is hard to comply with. There are too many open concepts and over-complicated legal structures. This is hard to defend from any angle: whether it should be generous or strict, a field of such individual and social importance as rights of residence and access to social assistance should be characterised by precision and clarity, both so that individuals can know their rights and so that administrations can, and can be compelled to, correctly apply the law.

In practice there are probably many cases of unjustified exclusion, as a result of national authorities oversimplifying their approach to resources or the status of worker, and using rules that are too rigid and perhaps too strict.[90] But there are

[88] See Spaventa, Nic Shuibhne, n 10 above; O'Brien n 44 above.
[89] See G. Davies 'Activism Relocated: The Self-Restraint of the European Court of Justice in its National Context' (2012) 19(1) JEPP 76.
[90] See O'Brien, n 44 aboveb at 953-61.

probably also many cases of 'accidental generosity', where migrants obtain social assistance because the process of revisiting and reassessing residence status is too slow or complex for national benefit authorities.[91] It may be that only the immigration authorities are allowed by national law to do this, as was the case in the Netherlands, so that the institutional division of powers creates a loophole for migrants.[92] Alternatively, it may be that the issuing authority lacks the information or resources or even the will – depending whether they are a benefit or an immigration authority or perhaps a municipal administration – to check whether the conditions for lawful residence are still complied with. The consequence may be that once a card is issued it effectively buys 5 years' lawful residence almost irrespective of the migrant's actual resources and use of benefits. Blauberger and Heindlmaier have shown that some of these processes and problems occur in at least some states.[93]

It is the legislature and national administrations which have largely failed. The citizenship directive is, above all, a directive: it is a general framework, and it is the responsibility of Member States to actively and responsibly translate this into clear national law, and to ensure their institutions are capable of coherently applying it. One wonders whether they have all done this, or whether they have half-heartedly copied a few unworkably vague phrases, thereby subverting the work of their own institutions, or, even worse, adopted some over-simplified parody of the law which cannot be regarded as a serious attempt to implement it correctly. If Member States do not play their role within the EU legal system, then it will never work.

Yet the EU legislature has failed more spectacularly. It could, and should, have done more to explain and elaborate. Courts are not well-suited to laying down detailed rules, and that Court judgments are often somewhat abstract is in the nature of its role. It is the function of the legislature to take these abstractions and translate them into more precise and workable rules. That instead they have been cut-and-pasted, without any significant independent input from the legislative process, is a failure of imagination, administration and politics within the EU. It shows a legislature that is simply failing to do its job,[94] with political and legal consequences that are alas all too easy to see.

[91] The phrase is from M. Blauberger and A. Heindlmaier 'Enter at Your own Risk: How EU Member States Administer the Free Movement of EU Citizens.' Paper presented at the ECPR-SGEU 8th Pan-European Conference, Trento, June 2016.

[92] D. Kramer, 'Verdiend verblijf: EU-burgers en de sociale bijstand', SEW Tijdschrift voor Europees en economisch recht, 2016 (2), pp. 60-69; D. Kramer, 'Earning Social Citizenship in the European Union: Free Movement and Access to Social Benefits Reconstructed', Cambridge Yearbook of European Legal Studies (forthcoming 2016).

[93] Blauberger and Heindlmaier, n 90 above.

[94] See G. Davies 'the European Union Legislature as an Agent of the European Court of Justice' (2016) 54(4) JCMS 846.

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