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Citizenship: A Balancing Exercise?

Annette Schrauwen*

The previous two papers in this volume identified and commented upon a turn in case law towards narrowing down social rights for EU citizens while giving more attention to (nationalist) protective reflexes of Member States. Both papers criticize the type of solidarity that results from this case law; it marginalizes the weakest members of society, and excludes them from free movement rights. The case law raises doubts on the relevance of the citizenship provisions in the EU Treaties and the fundamental nature of the status of EU citizenship, and accordingly on the role of the Court of Justice of the European Union in the debate on welfare tourism.

This paper concentrates on the latter. It will rely on and refer to the previous two papers where relevant. The questions underlying this paper are: Is the Court sensitive to the political context of fear for benefit tourism?¹ Is the Court giving up its role as an engine for further integration by following the lead of the EU legislator?² The paper will take a closer look at the arguments of the Court in the cases *Brey*, *Dano* and *Alimanovic*³ with the purpose of finding out whether it is possible to detect arguments underscoring the Court's sensitivity to the political climate.

The changing role of proportionality is the backdrop for the identified shift in the case law on citizenship. As the proportionality principle's function is,

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¹ Besides Paul Minderhoud & Sandra Mantu, and Eleanor Spaventa in their contributions to this volume, several authors hint at the possibility that the wider context of austerity policies and Member States' focus on control of their public spending have induced the turn towards narrowing down social rights, see e.g. Niamh Nic Shuibne, 'Limits Rising, Duties Ascending: the Changing Legal Shape of Union Citizenship' (2015) CMLR 889, 902 and 927, and Urška Šadl and Mikael Rask Madsen, 'Did the Financial Crisis Change European Citizenship Law? An Analysis of Citizenship Rights Adjudication Before and After the Crisis' (2016) EJR, 40 who conclude that the economic crisis 'had had limited impact on EU citizenship law and remained confined to the edges of the notion of EU citizenship.'

² See Eleanor Spaventa, "What is left of Union Citizenship?", point 22, in this collection

³ Case C-140/12 *Brey*, EU:C:2013:565; Case C-333/13 *Dano*, EU:C:2014:2358; Case C-67/14 *Alimanovic*, EU:C:2015:597.

according to some at least, to secure legitimacy for judicial decisions,⁴ a focus on the proportionality analysis in the mentioned cases may allow us to test the Court's sensitivity to the political climate and the legitimacy of the shift in case law. Nevertheless there are several ways in which the proportionality principle can be interpreted.⁵ It is a consequence of what is named 'structured discretion', forcing an approach in stages.⁶ Balancing in stages allows a Court to consider things in their time and place, but also allows commentators the possibility to contrast case law with a potential alternative which is just as valid from a legal-technical point of view as the one adopted – thereby presenting the standing case as merely one of the possible alternatives instead of a path taken that can not be abandoned.⁷ The different stages for balancing outlined below are inspired by the writings of Aharon Barak on proportionality in the context of constitutional rights and their limitations.⁸

The first stage consists in distinguishing between the scope of the individual right and the justification of limits on the realization and protection of that right. Articles 20 and 21 TFEU confer the right to move and reside in another Member State, with the qualification that this right is subject to conditions and limits defined by the Treaties *and by the measures adopted thereunder*. None of the other free movement provisions refer to limitations laid down in secondary legislation – which can explain why the instruments repealed by Directive 2004/38 'simply detailed' rights in EU law and are of a different nature than Directive 2004/38 itself.⁹ The scope of the free movement right under articles 20 and 21 TFEU hence should also be determined by reference to secondary legislation. This does not mean that the Union legislature could lay down conditions and limitations to such an extent that would render the rights under articles 22 and 21 TFEU obsolete: the recognition of the right at the level of the Treaty implies that

⁴ Tor-Inge Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) ELJ, 158

⁵ Meaning that 'the different results in cases where the proportionality principle is applied are not merely due to the cases' different facts', Tor-Inge Harbo, as cited, note 2, at 180

⁶ Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (CUP 2012) 461

⁷ For an example of such an approach, see Thomas Spijkerboer, 'Analysing European Case-Law on Migration: Options for Critical Lawyers' in Loïc Azoulay and Karin de Vries (eds), *EU Migration Law. Legal Complexities and Political Rationales* (OUP 2014), 188-218

⁸ See above n. 6

⁹ E. Spaventa questions the different nature in her contribution to this volume, point 10.

the essence of the right should be respected and allows no arbitrary or disproportionate intrusions of the right.¹⁰

The citizenship articles in the Treaties do not define grounds of justification for limiting the rights attached to citizenship. This stands in contrast with the economic free movement provisions that explicitly refer to public policy, public health and public security objectives. In *Baumbast*, the Court indicated that the justification for limitations and conditions in citizens' free movement rights must be understood as 'the legitimate interests of the Member States'.¹¹

The second stage concerns the proper purpose component of proportionality. Here, the question is whether the purpose in principle can limit a citizen's right to free movement and residence. Arguably, not all interests of Member States can. Directive 2004/38 elaborates which legitimate interests of Member States may limit citizens' free movement rights and specifically refers to citizens not becoming an unreasonable burden on the social assistance system of the host Member State – next to safeguarding public policy, public security or public health, and the possibility to require registration. Citizenship case law shows that the Court is of the opinion that the 'unreasonable burden' condition in the Directive is in itself not disrespecting the essence of the right to free movement and residence, nor is it an arbitrary or disproportionate intrusion of that right. However, the Court does not explain the motivation behind accepting the 'unreasonable burden' condition as a purpose that can limit citizens' rights. In *Grzelczyk*, the Court accepts that there is a limit to financial solidarity between nationals of the host state and nationals of other member states, implying that it is a legitimate interest of Member States to protect the national social benefit system from being overburdened by claims from citizens of other Member States.¹² In *Brey*, the Court is more explicit: "...the exercise of the right of residence for citizens of the Union can be subordinated to the legitimate interests of the Member States – in the present case, the protection of their public finances."¹³

The third stage concerns a test of the means chosen to attain the purpose. It concerns the familiar suitability and necessity questions that generally are considered to constitute the 'proportionality principle' under EU law.

¹⁰ Christiaan Timmermans, 'Martínez Sala and *Baumbast* revisited' 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*, (Hart Publishing 2010), 345-355, 350

¹¹ Case C-413/99 *Baumbast* EU:C:2002:493, para 90

¹² Case C-184/99, *Grzelczyk*, EU:C:2001:458, para 44

¹³ *Brey*, see above n.3, para 55

Under this stage, the decision not to grant social benefits to an individual should be assessed for being suitable and necessary to prevent an unreasonable burden on the social assistance system of the host Member State.

With this normative framework, the present paper intends to address the arguments of the Court in *Brey*, *Dano* and *Alimanovic*.

In the *first stage* of the proportionality analysis, with respect to the scope of the individual right of access to social benefits in the host Member State, the Court in *Brey* refers to Article 21 TFEU and Article 7 paragraph 1 (b) of the Directive; those EU citizens enjoy such access, who reside for a period longer than three months when economically inactive and have sufficient resources not to become a burden on the social assistance system of the host Member State and a comprehensive sickness insurance.¹⁴ In *Dano*, the Court refers to *Brey*, but adds references to Article 20 TFEU and Article 18 TFEU, while immediately qualifying the prohibition of discrimination as applying to situations falling “within the scope of the Treaties and without prejudice to any special provisions contained therein”.¹⁵ Since the conditions and limitations of Directive 2004/38 can be seen as laid down in “measures adopted under the Treaties” that are included in Article 20 TFEU or “measures adopted to give them effect” included in Article 21 TFEU, these conditions and limitations apply regardless of Article 18 TFEU. In other words, the conditions and limitations in Directive 2004/38 are included in the Treaty via Articles 20 and 21 TFEU, and therefore determine the scope of application of Article 18 TFEU. Article 24 of Directive 2004/38 provides for a general right to equal treatment for those *residing on the basis of the Directive* in the host Member State, with an exception contained in paragraph 2 relating to students and jobseekers. The difference in the analysis under the first stage between *Brey* and *Dano* can be explained by the preliminary question in *Dano*, which, by contrast with the preliminary question in *Brey*, explicitly refers to Article 18 TFEU next to the citizenship articles. It thereby demands that the Court distinguishes not only the scope of social benefit rights in the context of free movement and residence from the justification of limits to those rights, but also their scope in the context of the right not to be discriminated on the basis of nationality from the justification of limits to that right.¹⁶ In *Alimanovic*, the preliminary

¹⁴ *Brey*, see above n.3, paras 46- 47

¹⁵ *Dano*, see above n.3, paras 60-61

¹⁶ On the importance of the contents of the preliminary question see Timmermans, above n. 10, who writes: “It is not rare that it is the question as put forward by the national court and the way in which that question is drafted, which invites the Court to explore new avenues of interpretation and in a way unlocks the door to a new development in the interpretation of Community law”, 349.

question refers to social benefit rights in the context of equal treatment under Article 24 of Directive 2004/38 on the one hand, and on the other under Article 45(2) TFEU read in conjunction with Article 18 TFEU. Through the classification of the benefits at issue as 'social assistance' and not benefits connected to the labour market, the Court dismisses the need to determine the scope of the rights under Article 45(2) read in conjunction with Article 18 TFEU. It then turns to the scope of the right under Article 24 of Directive 2004/38 and, citing *Dano*, states that it is limited to those whose residence in the host Member State complies with the conditions of Directive 2004/38.¹⁷

Though the scope of the right is framed differently in these three cases, at the end of the day it all comes down to access to social benefits only for those who have sufficient resources not to become a burden on the social assistance system of the host Member State and have comprehensive sickness insurance. Arguably, the link of the Court's analysis of the scope of the right to the content of the preliminary question can be appreciated in the context of the preliminary reference procedure as cooperation between Union and national judge. Still, the differences in framing in this first stage also influence the analysis in the following stages.

In the *second stage* the proper purpose of limiting the right to social benefits is addressed. As stated above, in *Brey* this was identified as the protection of the public finances of the host Member State. No doubt the same reasoning applies to *Dano*, but again there is a shift notable in the arguments of the Court. In *Brey* the Court refers to the objective of Directive 2004/38 to facilitate and strengthen the rights of free movement of EU citizens while at the same time conditioning that right. It then refers to recital 10 of the Preamble of the Directive as explaining the purpose of the condition of financial resources, notably protection of public finances. In *Dano*, recital 10 is not considered as an explanation for the financial conditions, but as outlying an objective of the Directive.¹⁸ The Court then links the proper purpose of limiting equal treatment with respect to social benefits to recital 10 of the Directive, and argues that the financial resource conditions of Article 7 of the Directive can form a basis for refusing equal treatment to those citizens 'who exercise their right to freedom of movement solely in order to obtain another Member State's social assistance'.¹⁹ Here, the Court takes a second turn. It reads Article 24 of the

¹⁷ *Alimanovic*, see above n.3 para 49

¹⁸ *Dano*, see above n.3, para 74

¹⁹ *Idem*, para 78. Herwig Verschueren sees this phrase as evidence that the Court's ruling in *Dano* is limited to situations where the intention of mobile citizens is solely to profit from the benefit system of the host Member State, in 'Preventing

Directive in conjunction with its Article 7 and constructs protection of public finance not as justification for discriminatory treatment in a specific situation, but as verification whether a person resides in the host state on the basis of the Directive. Those who do not have sufficient resources do not reside in the host Member State on the basis of the Directive, and fall outside the scope of the equal treatment right of Article 24 of the Directive for the purpose of social benefits. Hence the examination of an individual situation concentrates on the question whether a person fulfils the financial *residence* conditions of the Directive and not on the question whether a person is an unreasonable burden for the public finance of the host Member State.²⁰ In the case of *Dano*, the referring judge had already established that the financial conditions of the Directive had not been fulfilled.²¹ As a consequence, the situation falls outside the scope of Article 24 of the Directive and fundamental rights do not apply in this situation.²² In *Alimanovic* the Court again has to address the proper purpose of limitations to equal treatment under Article 24 of the Directive. With a reference to *Dano*, it argues again that the proper purpose of preventing citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system of the host Member State justifies derogation from equal treatment of those who do not have a right of residence under the Directive. However, the Court does not refer to the financial resource conditions of Article 7 of the Directive, nor to the intention of obtaining another Member State's social assistance, as it did in *Dano*²³.

It comes as no surprise that the proper purpose for limiting the right to social benefits is protection of public finance of the host State. In *Dano*, that purpose is not so much seen as justification for a limitation of the right to equal treatment, but the purpose is blurred with the scope of the right to equal treatment. This is problematic from a legal point of view. The Opinion of Advocate General Wathelet in *Dano* offers an alternative argument, which better adheres to the structured discretion and an approach in stages under the principle of proportionality.²⁴ He

"Benefit Tourism" in the EU: a Narrow or a Broad Interpretation of the Possibilities Offered by the ECJ in *Dano*? (2015) 52 CMLR, 363-390 at 374-375.

²⁰ Or, in the words of Spaventa, above n. 2, economic independence becomes *constituent* to the enjoyment of the right to equal treatment in social benefits, point 9

²¹ *Dano*, see above n.3, paras 44 and 81

²² Contra, see Verschueren, above n. 19, at 387. Note that the referring judge asked the Court to rule on the application of the Charter with respect to substantive conditions to grant benefits and the extent of benefits. However, with respect to the other preliminary questions, the Court did not refer to the Charter

²³ See above, n. 19

²⁴ See Verschueren, above n. 19, for a good analysis of that Opinion, 371-372

distinguishes the purpose of the protection of public finance from the right to equal treatment, and assesses the right of the host State to demand the existence of a 'genuine link' between claimant and host State under the third stage of proportionality. The final outcome of the case would not have been different, however it would have secured legitimacy for the decision, which now is under attack from a lot of commentators.²⁵ The Court's confusion of scope and purpose in *Dano* makes the third stage of proportionality review redundant. Therefore, our analysis of the Court's application of the third stage of proportionality can only cover *Brey* and *Alimanovic*.

The *third stage* is the proportionality assessment commonly used in free movement cases: the suitability and the necessity of the measure limiting free movement rights for the attainment of the purpose. In *Brey*, the 'classic' route of an individual assessment of the situation of the claimant is followed. Member States have the power to assess, 'taking into account a range of factors in the light of the principle of proportionality', whether granting a social benefit in an individual case could place a burden on the Member State's social assistance system as a whole.²⁶ The Court adds that the mere fact that a national of a Member State receives social assistance is not as such sufficient to show that he constitutes an unreasonable burden on the system of the host State.²⁷ Member States should take into account the amount and regularity of the income of the claimant, the fact that he has been initially granted a certificate of residence, the period during which he would receive the grant and the extent of the burden the grant would place on the national system, taking into account the proportion of citizens of other Member States receiving that grant.²⁸ In *Alimanovic*, where the claimants - whose last employment in the host State had ended more than six months ago - resided in the host Member State as jobseekers on the basis of Article 14(4)(b) of Directive 2004/38, the Court rejects the necessity of an individual examination. The context of the assessment is Article 24 (2) of the Directive, which allows the host State to refuse social assistance to those whose residence is based solely on their status as jobseekers. The Court examines the proportionality of the refusal and states the Directive itself takes into account the individual situation of each claimant by granting a right to social assistance for a period of six months after cessation of employment. Furthermore, the six-month period guarantees a significant level of legal certainty and transparency and is considered proportionate. The Court could have stopped there, but it adds another argument. In paragraph 62 the Court states: "(...). However, while an

²⁵ See above, n.1

²⁶ *Brey*, above n.3, para 72

²⁷ *Idem*, para. 75

²⁸ *Idem*, para 78

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.”²⁹ The Court shows it is convinced by the ‘welfare magnet’ argument mentioned in the contribution by Sandra Mantu and Paul Minderhoud.

The difference between the Court’s approaches in *Brey* and *Alimanovic* can be explained by the relevance of Article 24(2) of the Directive in the latter case. The Court recognizes limits to social benefits rights explicitly agreed by the EU legislature, while at the same time testing it for compatibility with the demand for an individual examination that is implied in Article 8(4) of the Directive. From a legal perspective, this is defensible. The reference to transparency and legal certainty as an element of proportionality show the Court is inclined to take into account the national authorities’ difficulties with individual examinations. Case by case decisions might lead to legal uncertainty: where criteria for eligibility have been laid down in EU law, the Court opts for ‘a significant level of legal certainty and transparency’.³⁰

Some final remarks

The Court can be criticized for blurring the scope and the purpose of limits to EU citizens’ rights to social benefits in the host State. It is not only problematic in the specific case of *Dano*, but also in view of subsequent cases that might build on the Court’s reasoning in *Dano*. An example is the Opinion of AG Cruz Villalon in the infringement action against the UK on child benefits, where he links the sufficient resources condition of Directive 2004/38 to the granting of child benefit under Regulation 883/2004.³¹ On 14 June 2016, the Court followed its AG, and took the opportunity to clarify that checking financial resources may not be carried out systematically. Only in the event of doubt the authorities may verify whether claimants satisfy the financial conditions of Article 7 of Directive 2004/38.³²

The Court cannot be accused of blindly following the EU legislature. It examines the limits to equal treatment inherent in Article 24(2) of Directive 2004/38. The Court is showing deference to the EU legislature, but that does not mean the Court is giving in on its capacity to act as an engine of integration.

²⁹ My italics, A.S.

³⁰ See also Case C-158/07, *Förster*, para 57, from which para 61 of *Alimanovic* seems to have been copy-pasted and adapted to the relevant benefit

³¹ Case C-308/14, *Commission v United Kingdom*, ECLI:EU:C:2015:666, para 77; for an account of possible consequences in practice see Verschueren, above n.16, 378-381. The judgment is due 14 June 2016

³² Case C-308/14, above n. 30, para 84

The political debate and accompanying discourses are infiltrating the Court's jurisprudence. The Court accepts the 'welfare magnet' argument in *Alimanovic*,³³ even though research contests this argument.³⁴ But if the Court takes the political climate into account, it must make sure it does not copy false arguments. One could argue that demanding data collection from States could help to reframe the 'welfare magnet' argumentation. However, if it is true that the debate has moved beyond proof by numbers, data collection alone would not help. It would then be better to turn to the question why politicians focus on the national solidarity system if there is no evidence that these are under threat because of free movement? The European Parliament Research service suggests the core of the Member States' reluctance is based on the feeling of implicit loss of competences over their welfare system³⁵ – and that might be a better explanation of the current political debate on welfare tourism. Kees Groenendijk submits that it is about justifying the protective function of the state and sending out the message to the voters that the state is still able to protect its citizens and their social capital.³⁶ He sees this protection of 'our welfare system' as a proxy for protection of national identity. It is therefore crucial to make the debate on free movement more rational and evidence-based; at the same time we must find ways to address the fear of loss of national identity.

³³ *Alimanovic*, above n. 3, para 62

³⁴ See the contribution of Paul Minderhoud and Sandra Mantu to his volume

³⁵ E-M Poptcheva, *Freedom of movement and residence of EU citizens – Access to social benefits* (European Parliament Research Service 2014), 4

³⁶ Kees Groenendijk, 'Access for Migrants to Social Assistance: Closing the frontiers or reducing citizenship?' in E. Guild, S. Carrera and K. Eisele, *Social Benefits and Migration: A Contested Relationship and Policy Challenge in the EU* (CEPS 2013), 1-21, at 20-21