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UNIVERSITÀ DI PISA

EU Citizenship and Solidarity: the Entitlement of Migrant EU Citizens to Social Assistance in the Host Member State

PROF. LEONARDO PASQUALI

ASSOCIATE PROFESSOR – UNIVERSITY OF PISA

ACADEMIC COORDINATOR OF THE WINTER SCHOOL «SOLIDARITY IN EU LAW»

The entitlement of migrant Union citizens to social assistance in the host Member State: which kind of solidarity?

Social assistance is a very European concept. It was created and implemented in Europe and still nowadays Europe is, generally speaking, probably the region of the world with the **best social assistance systems**. The idea of social assistance is strictly connected to the idea of **solidarity** and the entitlement of an individual to welfare support depends basically from his right to claim **membership of a specific solidaristic community**. In general, two are considered the arguments to use in order to claim such a membership: **nationality** or **economic contribution**.

The concept of social assistance was defined by the CJEU as “all assistance schemes established by the public authorities, whether at national, regional or local level, to which recourse may be had by an individual who does not have resources sufficient to meet his own basic needs and those of his family” (Case C-333/13 *Dano*, paragraph 63)

Before EU citizenship: from no explicit obligation for host Member States to confer entitlement to social benefits to nationals of other Member States to a solidarity based on economic contribution

In the Treaty establishing the European Economic Community of 1957 there was **not an explicit obligation** for host Member States to confer entitlement to social rights to nationals of other Member States.

Some specific rights were progressively recognized to workers citizens of other Member States in the host Member State by EC secondary legislation, in order to guarantee them the **same treatment of national workers** (i.e. the same social and tax advantages as national workers, the same rights to access to vocational schools and retraining centers, the right to be inserted in the housing lists eventually existing)

In a first phase, the entitlement to social benefits of nationals of other Member States in the host Member State was essentially granted to those who, not being nationals, give all the same an **economic contribution** to public resources.

The sole category of economically inactive citizens of a Member State that were admitted to a freedom of establishment in other Member States in this first period (i.e. before EU citizenship) were workers' family members

Workers seekers vs workers no longer in employment

The impact of EU citizenship: towards a European solidarity based on citizenship?

The establishment of EU citizenship has actually lead to the substitution of this criterion of economic contribution with the criterion of "nationality" *lato sensu* (i.e., of citizenship)?

Art. 18 para 1 TEC: freedom of movement and establishment of the EU citizens to the limitations and conditions prescribed in EU primary and secondary legislation.

The newborn Union citizenship, though, extending the right of movement and establishment, had changed the general picture. This new situation found a response in the case law of the Court of Justice:

- Case C-85/96, *María Martínez Sala vs Freistaat Bayern*;
- Case C-184/99, *Grzelczyk*;
- Case 138/02, *Collins*.

Directive 2004/38/EC - articles 14(1) and 24(2)

The express attribution, for the first time, of the status of residents in the host Member State to temporary visitors by EU secondary legislation has been considered a confirmation of the Court's case law that had stated the applicability to them, *ratione personae*, of article 18 TEC, based on their freedom of movement and establishment within the Union.

According to article 14(1), EU citizens (but also their family members) have the **right to reside** in another Member State under article 6 inasmuch as they don't become an unreasonable **burden**. Article 24(2) is even more explicit, since it provides that during the first three months of residence (or during the eventually longer period in case of work seekers) the host Member State is **not obliged to accord social assistance.**

The limits of solidarity based on "nationality": which economically inactive migrant Union citizens are entitled to welfare benefit in the host Member State?

CJEU case law

- **Case 140/12*, Brey***. The CJEU ruled on the decision by Austrian authorities to refuse an economically inactive German citizen (who had moved to Austria with his wife wishing to settle there on a permanent basis) a pension supplement on the ground that, owing to his low retirement pension, he did not have sufficient resources to establish his lawful residence in Austria. In its judgment, after recognizing that also Directive 2004/38 envisages **"a certain degree of financial solidarity" between citizens of a host Member State and migrant EU citizens,** especially if their difficulties are temporary, the Court seems to abandon the criterion of the resources of the beneficiary of the right of residence in order to evaluate the eventual unreasonableness of the burden on the social assistance system of the host Member State and, in consequence, his entitlement to social benefits. It prefers, instead, another, different, criterion, based on deciding **if granting the benefit would lay a specific burden on the entire national welfare system,** also in the light of the personal circumstances of the person involved

- **Case 333/13, *Dano*.** Miss Dano, a Romanian citizen, had been living in Germany for about four years. Although she had a son born in Germany (but Romanian national) and the German authorities had issued her with a residence certificate of unlimited duration, her knowledge of German language was very limited, she had no professional qualifications, had never had a job and did not give any proof that she had been seeking for a job. In the light of that, German authorities refused her and her son the social assistance required considering that she had moved to Germany not to work, but solely in order to have access to Germany's social assistance benefits. This point of view was substantially shared by the Court . The Court interpreted article 7 of Directive 2004/38 in the sense that it allows Member States to **refuse social assistance** to economically inactive Union citizens who, not having the necessary resources to obtain the right of residence, decide to exercise their freedom of move **only to obtain another Member State's welfare benefits.**

- **Case 67/14, *Alimanovic*.** Miss Alimanovic, a Swedish national, had worked in Germany in temporary jobs, although for a period of less than a year. According to the CJEU, Miss Alimanovic, having been employed for less than one year, no longer enjoyed the status of worker (which she had retained for at least six months after her last employment had ended). Accordingly, she could not be entitled to the rights laid down in article 7 of Directive 2004/38. She could however remain in Germany on behalf of article 14(4)(b) of the directive, which provides that work seeking Union citizens cannot be expelled as long as they can prove that they are seeking for a job and have a possibility of being employed.

- **Case 299/14, *Garcia Nieto*.** The case is similar to Alimanovic, the main difference being that in the latter the migrant EU citizens requiring social assistance were **first time work-seekers**. The Court repeated the main findings from Alimanovic – such as the qualification of the benefits at issue as social assistance according to article 24(2) of Directive 2004/38 132 and not as financial benefits whose aim is to make access to the labor market of a Member State easier and the fact that one of the main aims of Directive 2004/38 is to prevent migrant EU citizens from becoming an unreasonable burden on the welfare system of the host Member State. Moreover the Court stated that in general the host Member State, pursuant to Directive 2004/38, before expelling a migrant Union citizen from its territory or judging that the burden of his residence on its welfare system is unreasonable should examine his individual situation.

Is a judicial review of the content of Directive 2004/38 necessary?

Article 24

Equal treatment

1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.

2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.

Art. 24 of Directive 2004/38 is apparently totally lawful, being normal in law to have a general rule and some exceptions or derogations. But the problem is that article 24(1**) is an application of a provision of the Treaty, namely article 18(1) of the TFEU, where the principle of nondiscrimination among Union citizens in reason of nationality is enshrined**.

Accordingly, article 24(2) of Directive 2004/38 **could possibly be declared illegal for infringement of the Treaties** (namely of article 18(1) of the TFEU). However, the Court has never done so. Actually, when referred with the question it seems to have refused to face it.

The solution proposed of a judicial review of the content of Directive 2004/38 presents some consequences:

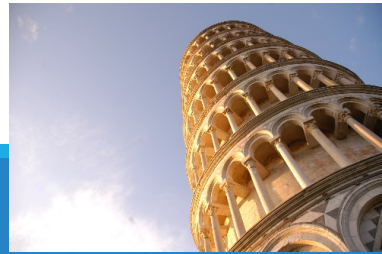
1. Solidarity between migrant Union citizens and domestic contributors penalizes more generous Member States: a Member State that accords better social assistance would risk, at least in theory, to be considered appealing by a large number of economically inactive nationals of other Member States, less generous in the field of welfare benefits;

2. The solidarity that the solution promotes risks to give rise to tensions in the national (or local) community, precisely because the migrant is not a member of the community neither on the basis of nationality *stricto sensu* nor of economic contribution.

Conclusions

In the light of what is at stake, the solution to the open question of the extension *ratione personae, ratione materiae* and *ratione temporis* of migrant Union citizens' right to social assistance in the host Member State can hardly be just a strictly legal one. A political one is needed. In other words the final solution should be found *de lege ferenda* rather than *de lege lata.*

In this historical moment it seems wrong – and to a certain extent also unfair- to put all the weight of such decisive choices for the future of the European integration on the shoulders of the Court. Moreover the same Court seems no longer to have the strength, or the will, or maybe simply the courage, that allowed its rulings to play a fundamental role in promoting European integration in the past decades.

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