

# ACCESS TO SOCIAL SECURITY AND FREEDOM OF MOVEMENT

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## Abstract

Union citizenship not only guarantees the enjoyment of various rights, such as the right to freedom of movement and residing in the territory of another Member State, but also implies the recognition of different prerogatives that are inherent to the idea itself of Union citizenship.

In this context, the conditions under which the Union citizens residing in the territory of another Member state can claim non-contributory social benefits have recently taken on particular importance.

With the Dano decision issued in 2014, the Court of Justice has been required to balance two different needs: on the one hand the equal treatment between Union citizens who have made use of their freedom of movement and residence rights and nationals of the host Member State with regard to the granting of social benefits; and on the possibility of the Member States, in certain particular situations, to refuse to grant social benefits.

According to the Court, the Directive on free movement of Union citizens and the regulation on the coordination of social security systems do not preclude domestic legislation which excludes nationals of other Member States from entitlement to certain 'special non-contributory cash benefits', although they are granted to nationals of the host Member State who are in the same situation, in so far as those nationals of other Member States do not have a right of residence under the Union principles in the host Member State.

The judgment of the Court articulates very important questions concerning Union citizenship, freedom of movement for Union citizens and the equal treatment in their access to social benefits.

## Keywords

*European Union; social security, fundamental rights, freedom of movement*

## 1 The judgment of the Court of Justice in joined case C-333/13

### 1.1 Factual and legal background

Two Romanian nationals, Elizabeta Dano and her son Florin, brought proceedings before the Social Court of Leipzig, Germany, against the decision of Jobcenter Leipzig, which refused to grant them basic provision benefits.

According to the findings of the referring Court, Ms Dano did not enter Germany in order to seek work there and, although she requested basic provision benefits, which were only available for jobseekers, it was apparent from the facts that she was not seeking employment.

She had not been trained in any profession and, to date, had not worked in Germany or Romania. Notwithstanding that, she and her son had been residing in Germany since November of 2010, living in the home of Ms Dano's sister, who provided for them. Ms Dano had received, until then, with regard to her son, child benefits as well as an advance on maintenance payments.

Taking into account the fact that German law in its Social Code provides that only a limited number of beneficiaries are entitled to basic provision benefits, excluding foreign nationals whose right of residence is only justified by the search for employment, Jobcenter Leipzig refused to grant the basic provision benefits to Ms. Dano.

The applicant contested this decision arguing that such a provision was in contradiction to EU law with regards to the free movement of EU citizens and the prohibition of discrimination on the grounds of nationality.

The Social Court of Leipzig decided to start the proceedings and to refer a series of questions to the European Court of Justice concerning:

- a) the scope *ratione personae* of Article 4 of Regulation No 833/2004 in order to assess if the prohibition of non-discrimination on the grounds of nationality, in this context, also applies to special non-contributory benefits;
- b) compliance with EU law of the exclusion by the Member States of EU citizens in need of access to social benefits, in order to protect their welfare systems;
- c) the compatibility of the limitation of the non-contributory benefits to the necessary funds for return to the home with the Charter of Fundamental Rights of the European Union.

## 1.2 The opinion of the Advocate General

The opinion of the Advocate General, Melchior Wathelet, started from the first question asked by the referring court on the sphere of application of Article 4 of Regulation No 883/2004, specifying that the scope *ratione personae* of that Article also includes persons claiming special non-contributory cash benefits.

The analysis continued on the second and third questions asked to the Court, namely, whether EU law precludes national legislation under which economically inactive nationals of another Member State are excluded in full or in part from accessing certain special non-contributory cash benefits within the meaning of Regulation No 883/2004, although such benefits would be granted to nationals of the Member State concerned who are in the same situation.

The Advocate General moved from this to an analysis of the Regulation No 883/2004 and Directive 2004/38, which are the «only instruments of relevance in answering the second and third questions».<sup>1</sup> In particular, according to the Advocate General, the second paragraph of Article 24 of the Directive expressly authorised the host Member State to refuse jobseekers entitlement to social assistance.

It followed that an interpretation by the Court of the Germany legislation as contrary to the Union law, would entail the paradox that «*a national of a Member State who has exercised his right to freedom of movement as a Union citizen without intending to integrate himself into the labour market of the host Member State would be in a more favourable situation than a national of a Member State who has left his country of origin in order to seek employment in another Member State*».<sup>2</sup>

As observed by Advocate General Wathelet, furthermore, the possibility to refuse the granting of social benefits by a Member State is justified also by the risk of individuals without sufficient resources becoming a burden on the public finances of Member State.

For the above mentioned reason, the Advocate General stated that a Member State could have the possibility of refusing to grant social benefits to an individual who moved into the territory of that Member State solely in order to benefit from that measure or to seek employment, such as in the main proceedings.

The opinion of the Advocate General Wathelet, on this specific issue, ended with an analysis on the principle of proportionality, based upon the degree of integration of the citizen who wanted to benefit from the social assistance of the host Member State.

In particular, with reference to the German regulations, it was pointed out that «*refusing basic provision benefits to persons who come to Germany solely in order to benefit from the social assistance system of that Member State and who do not seek in any way to integrate themselves into the labour market, the national legislation is consistent, in my view, with the EU legislature's intention*».<sup>3</sup>

In other words, entering into the territory of a Member State solely in order to seek employment or benefit from social assistance, demonstrates the absence of a degree of integration within the host Member State and, consequently, it should not lead automatically to such benefits.

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<sup>1</sup> Opinion of Advocate General 20 May 2014 § 91.

<sup>2</sup> Opinion of Advocate General 20 May 2014 § 116.

<sup>3</sup> Opinion of Advocate General 20 May 2014 § 131.

In this sense, referring to the main proceedings, the general criterion of the reason for entering the territory of the host Member State and the criterion of the absence of a genuine link with that State, are, according to the Advocate General, sufficient to justify national legislation which exclude nationals of other Member States from entitlement to a special non-contributory cash benefits.

Lastly, regarding the fourth question asked by the referring court, it was pointed out that the Court of Justice of the European Union does not have jurisdiction to answer.

### 1.3 The judgement of the court

The starting point of the judgment of the Court of Justice is from the notion of Union citizenship: Article 20 of the Treaty confers to any person holding the nationality of a Member State the fundamental status of citizen of the Union, enabling those persons who find themselves in the same situation to enjoy within the scope *ratione materiae* of the Treaty the same treatment in law irrespective of their nationality.

These situations include those relating to the exercise of the right to move and reside within the territory of the Member States.

However, the Court held that, as concerns access to social benefits, such as the German basic provision benefits, a Union citizen can claim equal treatment with nationals of the host Member State only if his residence in the territory of the host Member State complies with the conditions of Directive 2004/38 on free movement of Union citizens.

On this matter, the Court of Justice pointed out that, according to Directive 2004/38, the host Member State is not forced to concede social benefits to nationals from other Member States during the first three months of residence.

When the period of residence is longer than three months but less than five years, like in the Dano case, according to the directive, the right of residence is recognized only if economically inactive persons have sufficient resources for themselves and their family members. The directive intends to prevent economically inactive EU citizens from using the host Member State's welfare system to fund their own means of living.<sup>4</sup>

According to the Court, «to accept that persons who do not have a right of residence under Directive 2004/38 may claim entitlement to social benefits under the same conditions as those applicable to nationals of the host Member State would run counter to an objective of the directive, set out in recital 10 in its preamble, namely preventing Union citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system of the host Member State».<sup>5</sup>

The Court of Justice pointed out that the potential unequal treatment between Union citizens who have made use of their freedom of movement and residence and nationals of the host Member State with regards to the granting of social benefits is founded on the requirement to have sufficient resources as a condition for residence and the concern of not creating a burden on the social assistance systems of the Member States.

Consequently, the Member States must have the possibility of refusing to grant social benefits in a situation where an economically inactive Union citizen exercises their right to freedom of movement in order to obtain another Member State's social assistance and does not have sufficient resources to claim a right of residence.<sup>6</sup>

In these circumstances, the Court ruled that the legislation of a Member State may determine the conditions, restrict and exclude nationals of other Member states from entitlement of certain special non-contributory cash benefits, according to Directive 2004/38 and Regulation No 833/2004 on the coordination of social security, even though those benefits are "granted to nationals of the host Member State who are in the same situation, in so far as those nationals of other Member States do not have a right of residence under the directive in the host Member State."<sup>7</sup>

In this matter, the Member States are not implementing Union law and consequently, the Charter of Fundamental Rights of the European Union is not applicable.

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<sup>4</sup> Court of Justice of the European Union, Press release no 146/14.

<sup>5</sup> Judgment of the Court, 11 November 2014, § 74.

<sup>6</sup> Court of Justice of the European Union, Press release no 146/14.

<sup>7</sup> Judgment of the Court, 11 November 2014, § 84.

In conclusion, according to the Court, given the fact that Ms Dano and her son did not have sufficient resources, their right of residence in Germany does not comply with the conditions of the Directive 2004/38, and for that reason they were not entitled to claim equal treatment with nationals of the host Member State.