Driving a wedge between friends? The Court of Justice of the EU and its citizens in the case of welfare benefits

Adrienne Yong[*]

Abstract

It is widely acknowledged that the Lisbon Treaty entering into force at the end of 2009 sparked the beginning of a potential constitutionalisation of the EU fundamental rights rhetoric. This is mainly due to the Charter of Fundamental Rights of the European Union becoming binding on all Member States, and the way in which the Treaty set out accession to the European Convention of Human Rights. Integrating a rights discourse into the Court of Justice of the EU's decision-making initially appeared to be a normative possibility because of these constitutional changes. However, the reality has not been so positive, and arguably can now be considered a missed opportunity. A number of recent cases heard before the CJEU, for instance, have highlighted the relative weakness of the Lisbon Treaty's provisions on fundamental rights. This article evaluates how and why reality has differed from early projections by using the CJEU judgments on welfare benefits as case studies. The article argues that the high standard of rights protection as exhibited in a number of past cases raises questions in respect of the Court's judicial decision-making in the present day.

[*] LLB (Hons), LLM, PhD. Lecturer in Law at the University of Hertfordshire. All views and any errors are my own. Thanks to Ermioni Xanthopoulou and Henry Pearce for invaluable comments and edits on an earlier draft of this article.

1 Introduction

Prior to the Lisbon Treaty coming into force, commentators were both equally positive and negative about its likely effects.[1] These heated discussions, which focused mostly on the constitutional nature of the Treaty's failed predecessor, the Draft Constitution of the EU, eventually culminated in an agreement that one of the most significant changes the Treaty would bring about was an increased level of fundamental human rights protection.[2] In art. 6 TEU, the previously non-binding Charter of Fundamental Rights of the EU (hereafter, the Charter) was raised in equal status to the Treaties,[3] and the long considered accession to the European Convention on Human Rights (ECHR) was set out. Both developments appeared to hold special significance in the overall picture of the development of fundamental human rights protection in the EU.[4] Prior to this, it was only through judgments of the Court of Justice of the EU (hereafter, the Court or CJEU) that the enforcement of fundamental rights could be secured for the intended beneficiaries – EU citizens.

The citizens of the EU, a community of all nationals from the 28 EU Member States,[5] became a central focus of the EU institutions and Treaty drafters after 1993, where the Maastricht Treaty introduced social and political provisions to the Union. In particular, these individuals were granted citizenship of the Union and its requisite rights under arts 18-20 EC (now arts 20-22 TFEU). After 1998,[6] the Court further developed the concept of EU citizenship by interpreting it as a provision

[1] See Michael Dougan, 'The Treaty of Lisbon 2007: Winning minds, not hearts' (2008) 45 CMLR 617; Jean-Victor Louis, 'The Lisbon Treaty: The Irish 'No'.: National Parliaments and the Principle of Subsidiarity–Legal Options and Practical Limits' (2008) 4 European Constitutional Law Review 429; Gráinne De Búrca, 'Reflections on the EU's path from the Constitutional Treaty to the Lisbon Treaty' [2008] Fordham Law Legal Studies Research Paper 1124586.
[2] Article 6 TEU.
[3] TEU and TFEU.
[4] In this article, the term 'fundamental human rights' will be used interchangeably with 'fundamental rights' and refer to EU specific human rights, mainly found in the Charter. This will differ from European human rights, which refer broadly to rights under the Charter but also including the provisions in the ECHR.
[5] Soon to be 27 Member States. Article 20 TFEU states, 'Every person holding the nationality of a Member State shall be a citizen of the Union.'
[6] *Martinez Sala* (C-85/96) [1998] ECR I-2691.

which granted substantive rights to non-economically active citizens.[7] Long before this, however, the Court's jurisprudence on fundamental rights also indicated an early interest and commitment to protecting fundamental rights. *Stauder v Ulm* in 1969 was the first case to establish that fundamental rights could, and would, broaden the remit of the Treaty,[8] then in 1970, the Court in *Internationale Handelsgesellschaft* confirmed that fundamental rights protection was a general principle of the EU.[9] Slowly but surely, fundamental rights became instrumental in more of the Court's final decisions;[10] in this way, it began to develop a relationship with its citizens. It is argued that in these cases, the Court was attempting to build an identity for individuals in the EU by highlighting the rights they enjoyed from an increased the level of protection of fundamental human rights. This was further enhanced by virtue of their EU citizenship. The introduction of EU citizenship status was one way of ensuring the citizen became the primary focus of matters heard before the Court.

The argument here is that the initial picture painted of citizens' rights in the EU by the Court – protecting their fundamental rights and protecting their status as citizens in the EU – suggested there was potential to foster a greater sense of belief amongst EU citizens in their identities as citizens with EU citizenship and who enjoyed fundamental rights protection. Simply put, this would have been one way to positively impact upon an individual's life directly, bringing direct attention to the rights to which they were entitled.[11] From this, the Court developed a new paradigm under which it declared that citizenship was 'the fundamental status of nationals of the Member States'.[12] Arguably, the potential effect of this declaration read with the constitutional guarantee that fundamental rights were protected as a general principle of EU law was to ensure that the citizen was at the heart of the Court's jurisprudence. In EU citizenship law, the Court began to readily recognise and protect various types of

[7] These included welfare benefits, rights to one's name and identity, rights to reside for family members; see *Trojani* (C-456/02) [2004] ECR I-07573; *Carpenter* (C-60/00) [2001] ECR I-6279; *MRAX* (C-459/99) [2002] ECR I-6591; *Garcia Avello* (C-148/02) [2003] ECR I-11613; *Zhu and Chen* (C-200/02) [2004] ECR I-9925; *Grunkin and Paul* (C-353/06) [2008] ECR I-7639; *Metock and Others* (C-127/08) [2008] ECR I-6241.
[8] *Stauder v. Ulm* (C-29/69) [1969] ECR I-0419.
[9] *Internationale Handelsgesellschaft* (C-11/70) [1970] ECR I-1125.
[10] *Wachauf* (C-5/88) [1989] ECR I-2609; *ERT* (C-260/89) [1991] ECR I-02925.
[11] See Carole Lyons, 'A Voyage Around Article 8: An Historical Evaluation on the Fate of European Union Citizenship' (1997) 17 YEL 135; Sybilla Fries and Jo Shaw, 'Citizenship of the Union: First Steps in the European Court of Justice' (1998) 4 EPL 533; Jo Shaw, 'The Interpretation of European Union Citizenship' (1998) 61 MLR 293.
[12] *Grzelczyk* (C-184/99) [2001] ECR I-6193.

fundamental rights, the most prominent being equal treatment, mainly for welfare, and rights to private and family life.[13] Unfortunately, the reality of the current situation is not as positive as it once was because of recent developments specifically addressing concerns surrounding equal treatment to welfare benefits amounting to 'benefit tourism'. Three cases form the case studies for this article – *Brey* in 2013, *Dano* in 2014 and *Alimanovic* in 2015.[14] This article will argue that the developments early on suggesting a potential for greater rights protection are no longer indicative because of a new approach taken by the Court, which are seen in the latter two cases. Comparing all three will highlight the differences, and it is argued that this new approach has now undermined protection of fundamental rights.

The article begins by looking at the relationship between the Court and EU citizens. This is done by way of analysing observable patterns of the court's decision-making in to demonstrate that as citizenship and fundamental human rights has become more constitutionalised, the Court has strengthened its positive relationship with its subjects by reinforcing their rights as EU citizens. As the Court is the arbiter of rights in EU law for EU citizens, a positive relationship is defined as one in which the citizen is able to derive clear and tangible benefits from the judgments of the cases examined. The article then turns to the now deteriorating situation, as a result of which it has become evident that the Court has retreated from taking a previously observable liberal stance in regards to equal treatment in respect of welfare benefits. *Brey*, *Dano* and *Alimanovic* will be used as case studies to demonstrate the change in approach over time. The CJEU's recent approaches are argued to be legally and normatively difficult to reconcile with those which it has taken previously, particularly those relating to both the development of citizenship and the protection of fundamental rights. It is ultimately argued that because of the high expectations initially established by the Court in respect of a strengthened rights rhetoric, the unwillingness it is now showing to reapply a liberal interpretation has proven problematic in terms of the enjoyment of rights of EU citizens.

[13] See fn.7.
[14] *Brey* (C-140/12) 19 Sept 2013; *Dano* (C-333/13) 11 Nov 2014; *Alimanovic* (C-67/14) 15 Sept 2015.

2 The Court and its Citizens – a developing friendship?

In the early 2000s, it is argued that the Court went to great lengths to cultivate what could be described as almost a friendship with its subjects, the EU citizens. In particular, attention was paid to citizens who were non-economically active. It is important to draw particular attention to this point, as in the context of fundamental human rights, early cases guaranteeing the legal effectiveness of such rights are still largely contextualised in relation to the internal market, or in relation to exercising other rights related to the market.[15] Cumulatively over the years, in the context of settling disputed areas of citizens' rights, there has been a noticeable shift away from the Court only being prepared to consider the economic worth of its citizens, and towards accepting that fundamental rights protection, where such rights are of relevance, must also be considered. It was confirmed in 1991 that the EU itself 'cannot accept measures which are incompatible with observance of the human rights thus recognized and guaranteed.'[16]

Nonetheless, it is difficult to escape the confines of the internal market even when discussing distinctly non-economic rights in the EU. With the EU's historical background firmly rooted in developing a common single market, it is perhaps unsurprising that embedded initially in the Court's approach to fundamental human rights was a requirement of some form of financial reciprocity.[17] However, this did not obscure the fact that the Court recognised a separate constitutional need to protect the rights of its citizens. It was cautious at first when outwardly affording judicial weight to fundamental rights protection in its judgments, but later aligned a rights-based approach with the Union's growing political and social needs and objectives.[18] This was done originally through the right to equal treatment and non-discrimination on the grounds of nationality.[19] It is argued here that this is actually indicative of the Court's indirect recognition of the protection of fundamental rights as

[15] *Stauder v. Ulm* (C-29/69); *Internationale Handelsgesellschaft* (C-11/70); *Wachauf* (C-5/88).
[16] *ERT* (C-260/89).
[17] See *Baumbast* (C-413/99) [2002] ECR I-7091 and the unreasonable burden criteria. This was a political matter.
[18] The Maastricht Treaty was the first to introduce most of these types of provisions, with citizenship status one key example.
[19] Article 18 TFEU.

non-discrimination has now been recognised as a fundamental right in the Charter.[20] Given that the EU did not originally set out to protect fundamental human rights, the principle of non-discrimination is the best example of an indirect manifestation of these rights early on as a general principle of EU law.

In cases on both citizenship and fundamental human rights, the Court has been seen to interpret the rights under citizenship status in particular to the benefit of the individual claiming protection from the Treaty. Understanding these cases in this way is argued to be a contributing factor in the Court gaining favour amongst individuals who could now enjoy these rights,[21] as the scope *ratione materiae* and scope *ratione personae* of citizenship was broadened. It is argued that fundamental rights have played a role in this. In a number of cases, particularly on Union citizenship rights in the mid-2000s, equal treatment to welfare was sought by Union citizens who had moved to other Member States.[22] As noted, non-discrimination is how fundamental rights initially permeated the Court's jurisprudence and this has now evolved. What can be inferred from these cases is that the growing fundamental rights discourse appeared to influence the liberalisation of the Court's judgments in citizenship.

References to fundamental human rights can be seen in both an explicit and implicit manner in the Court's judgments themselves, and are especially prominent in situations involving interests other than those that are of an economic character.[23] Prior to the existence of the Charter of Fundamental Rights the Court frequently referred to the ECHR, a practice that persisted even after the Charter came into being. The *ERT* case in 1991, for instance, saw the Court argue that the compatibility of fundamental human rights under the ECHR had to be considered in all situations it was pertinent to do so. Here, despite the main question the case being primarily concerned with the free movement of services in the internal market, the Court found that it was necessary to consider the fundamental

[20] Article 20, Charter of Fundamental Rights of the European Union 83/02 [2010] OJ C-83/389.
[21] Agustín José Menéndez, 'European Citizenship after *Martínez Sala* and *Baumbast*' (2009) No. 11 ARENA Working Paper 1; Jo Shaw, 'The Many Pasts and Futures of Citizenship in the European Union' (1997) 22 ELR 554.
[22] *Sala* (C-85/96); *Grzelczyk* (C-184/99); *Bidar* (C-209/03) [2005] ECR I-2119; *Collins* (C-138/02) [2004] ECR I-11613; *Trojani* (C-456/02); *De Cuyper* (C-406/04) [2006] ECR I-6947.
[23] *Carpenter* (C-60/00); *Chen* (C-200/02); *MRAX* (C-459/99).

rights of the individual.[24] Following this decision, the case has been repeatedly cited in situations concerning various different areas of EU competence including competition law, immigration and citizenship, further constitutionalising fundamental rights.[25] What the Court can be argued to have been doing when assessing proportionality is simply adhering to the *ERT* doctrine. This then expanded the scope of fundamental human rights protection as interpreted judicially, and added to the constitutionalisation of such a rights discourse.

It would appear, therefore, that the fundamental rights *acquis* promoted by the Court through its decision in *ERT* served as the legal basis for the later slow, but steady, proliferation of fundamental rights in cases relating to areas of law in which it was most pertinent to protect such rights, notably the free movement of persons. This area of EU law concerns not only workers' rights, but also citizenship rights,[26] a concept which was introduced two years after *ERT* was decided. It has been noted that because of the EU's economic foundations, it is unsurprising that initial discussions in this area began at the by predominantly considering the rights of citizens who contributed to the economy, workers, rather than considering whether it would be proportionate and consistent with citizenship to confer citizens' rights to non-economically active individuals. For this reason, the Court, in the years following *ERT*, arguably made significant progress in the promotion and interpretation of fundamental rights by bringing the scope of the citizenship provisions into closer alignment to those of fundamental rights, thereby enhancing their status as citizens of the Union by way of providing additional substantive rights.

---

[24] *ERT* (C-260/89), para. 44.

[25] *A v Commission* (T-10/93) [1994] ECR II-0179; *Limburgse Vinyl Maastschappij and others v Commission* (T-305/94) [1999] ECR II-0931; *Cimenteries CBR and others v Commission* (T-25/95) [2000] ECR II-0491; *Cheil Jedang v Commission* (T-220/00) [2003] ECR II-2473; *UEFA v Commission* (T-55/08) [2011] ECR II-0271; *FIFA v Commission* (T-68/08) [2011] ECR II-0349; *Scaramuzza* (C-76/93) [1993] ECR I-5721; *Familiapress* (C-368/95) [1991] ECR I-2925; *Albany* (C-67/96) [1999] ECR I-5751; *Annibaldi* (C-309/96) [1997] ECR I-7493; *Brentjens* (C-115/97) [1999] ECR I-6025; *Drijvende Bokken* (C-219/97) [1999] ECR I-6121; *Connolly v Commission* (C-274/99) [2001] ECR I-1611; *Carpenter* (C-60/00); *Roquette Frères* (C-94/00) [2002] ECR I-9011; *Schmidberger* (C-112/00) [2003] ECR I-5659; *Orfanopoulos and Oliveri* (C-482/01 and C-493/01) [2004] ECR I-5257; *Omega* (C-36/02) [2004] ECR I-9609; *Karner* (C-71/02) [2004] ECR I-3025; *Commission v Germany* (C-441/02) [2006] ECR I-3449; *Parliament v Council* (C-540/04) [2006] ECR I-5769; *Laserdisken* 9 (C-479/04) [2006] ECR I-8089; *Sopropé* (C-349/07) [2008] ECR I-10369; *NS* (C-411/10) [2011] ECR I-103905; *Fransson* (C-617/10) 26 Feb 2013; *Iida* (C-40/11) 8 Nov 2012; *Berlington* (C-98/14) 11 June 2015; *Safe Interenvios* (C-235/14) 10 March 2016.

[26] See *Collins* (C-138/02); *Trojani* (C-456/02); *Vatsouras* (C-22/08) [2009] ECR I-4585.

In this manner, it was through the heightened status of citizenship that the right to equal treatment could be realised. This can primarily be attributed to the way in which the Court interpreted non-discrimination on the basis of nationality as a right under EU citizenship. Having established that equal treatment was, in effect, also a fundamental right, it can be argued that citizenship and fundamental rights go hand in hand. It is by virtue of being an EU citizen that various interpretations of rights to equal treatment could be conferred. Other fundamental rights were then later interpreted as also falling within the scope of citizens' rights, mainly those deriving from art. 8 ECHR, the right to private and family life.[27] As outlined above, the Charter then came into being and became binding, and included its own provisions on the right to respect for private and family life.[28] The logical assumption to be made as a result of this development was that EU citizens could now explicitly rely upon, and more readily invoke, the provisions of the Charter as a legal foundation for the protection of their fundamental rights.

It perhaps comes as a surprise, therefore, that the previously observable trend of fundamental rights protection in citizenship jurisprudence has apparently begun to so sharply turn the other over the course of the last three years. In this regard it is the Court's decisions in the area of welfare benefits that have sparked the most contentious debate since the passing of the Lisbon Treaty. These cases and the Court's reasoning in them can also be interpreted as the reason for an observable decline in the level of fundamental rights protection in the EU. This is despite the various constitutional drivers in the Lisbon Treaty which should have suggested instigated the opposite. The phenomenon of so-called 'benefit tourism' also raises questions of EU citizenship status and other associated rights. These issues are derived from the fact that, originally, benefits and equal treatment in respect of state welfare were reserved for individuals who contributed to their host Member State's economy after crossing borders to other Member States.[29] Due to the introduction and impact of fundamental human rights

[27] See fn.7.
[28] Article 7 Charter.
[29] And their family, see Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community OJ L257/2.

protection, case law indicated that it was no longer acceptable to discriminate on the grounds of nationality in relation to these matters. This brought the scope of non-discrimination in respect of citizenship rights closer to that of fundamental rights. It is here where the argument against the decline of fundamental rights protection can be seen most prominently.

3 A wedge between friends – the case of welfare benefits

In 2013, the Court issued its judgment in *Brey*.[30] This case is used here as the benchmark for how it has treated benefit tourism and welfare under the citizenship provisions in the Treaty after Lisbon. It is particularly relevant as a point of comparison for the current situation as to rights protection in the EU. Comparing this judgment to a number that have followed it, for instance, allows us to clearly discern the Court's change of heart. In *Brey*, the claimant and his wife were both German nationals living in Austria and claiming welfare benefit. When applying for an additional benefit to that which they were already receiving, their application was automatically refused because they were unable to prove they were economically active. This automatic denial was held to be against the general principle of non-discrimination, on the basis that if there were conditions placed on benefits being claimed by moving Union citizens by a host Member State, these conditions had to be compatible with EU law – in this case, non-discrimination, which, as noted above, was also considered to be a fundamental right. Specific reference was made to the notion of proportionality, and the language used by the Court appeared to favour a wide interpretation of the provisions governing cross-border welfare,[31] particularly to ensure that the citizens' rights were properly considered. Notably, it was remarked that 'the mere fact that a national of a Member State receives social assistance is not sufficient to show that he constitutes an unreasonable burden on the social assistance system of the host Member State.'[32] This liberal and approach to proportionality was ultimately beneficial to the claimant's enjoyment of welfare benefits.

[30] *Brey* (C-140/12).
[31] Ibid paras 70-77.
[32] Ibid para. 75.

The above excerpt from the Court's judgment is suggestive of its intention to condemn unfair differential treatment of those claiming welfare benefits; a sentiment which potentially emerged as a consequence of the Treaty's original exclusion of non-economically active citizens, a provision that can be considered inconsistent with the liberal rights *acquis* behind the promotion and substantiation of citizenship status we see today. More troublingly, though, to perpetuate such a prejudice would be inconsistent with the universal nature of fundamental human rights. It is for this reason that the *Brey* decision is heralded as a significant and positive step for the integration of fundamental human rights into the Court's jurisprudence relating to welfare benefits. Although no explicit mention of fundamental rights is made in the judgment, the previous section of this article's interpretation of the right to non-discrimination as a fundamental right makes this point highly pertinent. The expansion of the scope of citizens' rights, whether this was explicitly intended or otherwise, had the effect of aligning EU citizenship and its associated legal rules with protection of fundamental human rights, the latter of which is decidedly broader given its universal foundations. However, developments in CJEU jurisprudence that followed *Dano* have been received less enthusiastically.

Interestingly, neither the Court nor the claimant mentioned fundamental rights in *Brey*, unlike in *Dano* where one of the questions raised specifically queried whether fundamental rights could be invoked in the context of justifying the conferral of welfare benefits to the claimant. Excluding fundamental rights might be said to be political. For instance, the Court, by refusing to engage with fundamental rights specifically, would not need to entertain any questions on the application of such rights. The facts of the *Dano* case and the questions referred to the Court were similar to that of *Brey*. The claimant was a Romanian national living in Germany. She had attempted to claim benefits, but was denied due to her lack of economic activity. In both the Advocate General's Opinion and the judgment itself, the conclusions made by the Court were 'at odds'[33] with the decision reached in *Brey*. In *Dano*, for instance, the Court held it was acceptable to deny the claimant benefits because it would be desirable to 'prevent economically inactive Union citizens from using the host Member State's

[33] Adrienne Yong, 'Judgment (Grand Chamber) in Case C-333/13 *Elisabeta Dano v Jobcenter Leipzig* (11 Nov 2014)' (2014) 3 Cyprus Human Rights Law Review 217.

welfare system to fund their means of subsistence'.[34] This conclusion, however, appeared to exclude any consideration of equal treatment, which by the time *Dano* was decided, had become a binding right under art. 20 of the Charter. By apparently choosing to ignore point, the Court apparently took a significant backwards step in the development of EU constitutional fundamental rights protection.

The tone of the *Dano* judgment was, for instance, decidedly more cautious than that of *Brev*, with a stricter and apparently less liberal interpretation of EU citizens' rights.[35] Focus was placed on considering 'the financial situation of each person concerned',[36] which is suggestive of a retreat to placing significant emphasis on the original economic interests of the EU institutions that dominated the Court's reasoning in the early years of the (then) European Economic Community. The most telling indication of a deteriorating relationship between the Court and its citizens, however, is the response to the specific question referred to the Court that asked about fundamental rights under the now binding Charter. It is the fundamental rights element of the *Dano* case that has been the focus of the human rights literature,[37] for the evident sidestepping of the application of the Charter is difficult to reconcile with not only the legal implications of the art. 6 TEU, but also the normative trajectory of the rights discourse which has been developing since the beginning.[38]

Widely considered to be politically charged decision, in *Dano*, the Court were strict, narrowly interpreting what amounted to falling within the scope of the Charter under art. 51(1). Citing the importance of the principle of conferral and the text of art. 51(1) – that the Member State must be 'implementing Union law' to fall under the Charter – the Court refused jurisdiction to address fundamental rights.[39] However, inconsistencies emerge from this reasoning. In the past, the Court has had the jurisdiction to determine questions even in areas of exclusive competences if the exercise of

[34] *Dano* (C-333/13), para. 76.
[35] Ibid para. 76ff.
[36] Ibid para. 80.
[37] Daniel Thym, 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens' (2015) 52 CMLR 17, 48.
[38] The references to the ECHR in early cases is a good example and indication of this.
[39] *Dano* (C-333/13), para. 92.

that competence has involved or affects EU law.[40] This was the direction it was headed in especially after the developments made fundamental right protection. From recognising non-discrimination, to accepting rights to identity and name, to rights to respect for family life from art. 8 ECHR and its equivalent in art. 7 Charter. Other factors appear to have been considered in this decision which led the Court (and AG Wathelet in his Opinion) to decide to significantly narrow the scope of the Charter. It is thought, again, to be for political reasons.

The political situation surrounding the *Dano* decision, with an especially noticeable outcry from the UK government,[41] clearly points to the role this case played in sending a message to the Member States about the EU's liberal governance. In particular, because it addressed benefit tourism and equal treatment to welfare as a protected right under the Treaty provisions on citizenship and in the Charter, it could be considered 'an adequate answer to the problem'.[42] This may be an answer to suppress the growing concerns of intrusion into national autonomy that was rife amongst the right-wing Eurosceptics at the time. However, for the overall rights discourse and promotion of the status of Union citizenship as a guarantee for enjoyment of other fundamental human rights, the message is quite the opposite. What the *Dano* case seems to suggest is once again being able to consider an individual's economic activity (or lack thereof) to determine whether or not it is proportionate to deny or confer rights protected by the citizenship provisions and fundamental rights in the Charter. The Court also appears to be limiting the application of the Charter, leading to an overall decline in the level of rights protection for individuals, jeopardising what was slowly developing into a good relationship between the Court and EU citizens.

This relationship was further jeopardised by the *Alimanovic* case, decided a year after *Dano*.[43] The claimant and her daughter, both Swedes living in Germany, applied for welfare benefits after both

[40] Especially in citizenship; see *Rottmann* (C-135/08) [2010] ECR I-1449.
[41] See 'EU 'benefit tourism' court ruling is common sense, says Cameron' *BBC News* (11 November 2014) <http://www.bbc.co.uk/news/uk-politics-30002138> [accessed 9 June 2015].
[42] Herwig Verschueren, 'Preventing "Benefit Tourism" in the EU: a Narrow or Broad Interpretation of the Possibilities Offered by the ECJ in *Dano*?' (2015) 52 CMLR 363, 370.
[43] *Alimanovic* (C-67/14).

becoming unemployed. The question was whether denying them these benefits would be against free movement of workers' rights under art. 45 TFEU, as they were EU citizens who had moved across borders to work. The claimants' undoing were the fact that they were previously working, but now unemployed, therefore no longer eligible to invoke art. 45 TFEU. However, seeing that being an EU citizen still allowed non-economically active individuals to enjoy equal treatment rights, it was strange that in the judgment, EU citizenship rights and fundamental rights were not considered in lieu of workers' rights. Any reference to the *Brey* case is brief and dismissive; the Court stated that, 'no such individual assessment is necessary in circumstances such as those at issue in the main proceedings.'[44] Therefore, this suggests that the Court now preferred to engage in a broad-brushed assessment of the entire situation. As *Dano* had already clarified that it was acceptable to deny welfare benefits to non-nationals if they were non-economically active, it would be acceptable to do so again in *Alimanovic*, without looking at the specific facts and circumstances which may have justified a more liberal and generous approach under fundamental rights protection.

AG Wathelet in his Opinion on *Alimanovic* noted that '[t]he problem is sensitive in human and legal terms.'[45] However, this observation is interesting given that fundamental human rights neither features in his Opinion, nor in the judgment. This would be considered a backwards progression of the development made since the formal recognition and conferral of rights to non-economically active citizens as part of the protection offered by fundamental rights and its increasing relevance in the Court's jurisprudence. There is an argument to be made as well that there is an element of the right to private and family life, and that the rights of the Alimanovic children, who are all EU citizens, are not considered.[46] By refusing to engage with fundamental rights protection, the Court seems to insinuate that this is no longer a constitutional priority.

[44] Ibid para. 59.
[45] Opinion of AG Wathelet, ibid, para. 2.
[46] *Teixeira* (C-480/08) [2010] ECR I-1107; *Ibrahim* (C-310/08) [2010] ECR I-1065. See Maria Haag, 'C‑67/14 Alimanovic: the not so fundamental status of Union citizenship?' *DELI Blog* (29 September 2016) <https://delilawblog.wordpress.com/2015/09/29/maria-haag-c%E2%80%916714-alimanovic-the-not-so-fundamental-status-of-union-citizenship/> [accessed 26 August 2016].

Given the earlier discussions on the trend of citizenship and fundamental rights, it seems inconsistent for these cases to now be decided in such a disparate way, excluding any consideration of fundamental human rights and even going as far as to put equal treatment to one side for simply being non-economically active. The way the Court justifies its decision not to engage with a fundamental rights assessment is most troubling. It is evidence of a change in attitude towards the relationship the Court has with its subjects, the EU citizens, and seems to once again disregard the progress made and the rights protected as a result of the initial integration of citizenship status with fundamental human rights protection. These cases are salient examples of the slowly diminishing level of protection despite the various constitutional safeguards in place from the Lisbon Treaty.

4 Conclusion

As history has shown, for a time, there was a steady increase in the rights afforded to and enjoyed by EU citizens. It now appears, however, that citizenship status is no longer the "gateway" to fundamental rights protection, and it is perhaps doubtful as to whether it ever truly was. As a means of demonstrating this point, this article has highlighted how the progress made towards the expansion of the scope *ratione personae* and *ratione materiae* in citizenship law through fundamental rights protection has apparently been curbed by the CJEU adopting a narrower interpretation of the Charter. The examples of recent cases dealing with welfare benefits and the gradual decline in the level of fundamental human rights protection considered here is telling. By using the Charter and finding situations outside its scope, the Court may have found that excluding human rights protection was justifiable. However, due to the fundamental rights *acquis* developing alongside citizenship rights, it has been argued that this approach is difficult to reconcile with the previously prominent pro-rights discourse. Perhaps more disappointingly, however, the message the Court appears to be sending is that this more restrictive approach should be the one favoured in future cases. This cannot be considered a positive development for fundamental rights protection and citizens' rights.