THE LIMITS TO BENEFIT TOURISM

The Case of *Elisabeta Dano v Jobcenter Leipzig*

ADRIENNE YONG*

I. INTRODUCTION

On 11 November 2014, the Court of Justice of the European Union ('CJEU') issued a judgment attracting considerable media attention, as it touched upon the core of austerity measures, the financial crisis, and, more generally, the causes for scepticism towards the European Union ('EU') especially as to the rights of free moving citizens within the EU.[1] The *Dano* judgment highlights the limits to benefit tourism, and strikes an unusually stringent tone. The limits to benefit tourism will be the focus of this article.[2]

The case of *Dano* concerned the claim for social security benefits submitted by the unemployed Miss Elisabeta Dano, a Romanian national, who lived in Germany with her young son. In a somewhat unprecedented move, the CJEU confirmed that non-economically active citizens could not move to another EU Member State for the sole reason of claiming benefits. It addressed the difficult question of protecting Member States welfare systems from the risks of benefit tourism, and the Court's treatment of the matter led to Peers describing the ruling as 'stricter than usual'.[3] The judgment warrants a thorough consideration because the Court's approach seems to fall on the

* PhD Candidate at King's College London.

1 See Philip Oltermann and Rowena Mason, 'Germany Can Deny Benefits to Jobless EU Migrants, Court Rules', *The Guardian*, 11 November 2014; Andrew Grice, 'Landmark ECJ ruling boosts David Cameron's bid to clamp down on EU benefit migrants', *The Independent*, 11 November 2014; 'EU Court Ruling Backs Curbs on 'Benefit Tourism'', *BBC News*, 11 November 2014; Jason Beattie, 'The end for benefit tourism: European court rules unemployed EU migrants can be denied welfare payments', *Mirror*, 11 November 2014.

2 Case C-333/13 *Dano* (ECJ, 11 November 2014). 'Q & A: What benefits can EU migrants get?', *BBC News*, 3 November 2014.

3 Steve Peers, 'Benefit Tourism by EU citizens: the CJEU just says No', *EU Law Analysis*, 11 November 2014, <http://eulawanalysis.blogspot.co.uk/2014/11/benefit-tourism-by-eu-citizens-cjeu.html> last accessed on 8 January 2015.

conservative side of balancing free movement rights[4] against equal treatment of EU citizens under Union citizenship law.[5]

The *Dano* case required the Court to grapple with the classic problem of whether to prioritise the rights of moving (but non-economically active) EU citizens,[6] or interpret the citizenship provisions narrowly in order to mitigate the risk of persons exercising rights under the free movement provisions becoming burdens on national welfare systems. What the media failed to notice was the effect of the judgment for those, who unlike Dano, did not move between EU Member States with the sole intention of claiming benefits. The judgment focuses mainly on EU citizens in a similar situation as Dano. However, the Court did not discuss the situation of EU citizens legitimately exercising their right to free movement such as workers and ex-workers, work seekers and students. This article will address the wider implications of this judgment for free moving EU citizens more generally. To address these wider implications, one needs to consider the facts and judgment itself first.

II. FACTS OF THE *DANO* CASE

The claimants, Miss Elisabeta Dano and her son, Florin, were Romanian nationals residing in Leipzig, Germany. They had been there since 2010, living with the Dano's sister, on whom they depended. Dano had never worked neither in Germany nor Romania and there was no evidence that she had sought employment in Germany. Furthermore, she had little chance of finding employment in Germany given her limited ability to read and write in the German language. Dano received a child benefit for Florin, but challenged the decision of the Jobcentre Leipzig to deny her a 'special non-contributory cash benefit' due to her economic inactivity and status as a non-German migrant. The Jobcentre Leipzig's decision effectively suggested that they believed that Dano had moved to Germany for the sole reason of claiming benefits, which was categorically excluded by provisions in the German Social Code.[7]

There were four questions referred to the Grand Chamber of the Court of Justice. The first was whether the special non-contributory cash benefit sought by the claimant fell within the scope of Article 4, Regulation 883/2004 on equal treatment in the coordination of social security systems.[8] If so, the second question focused on whether Dano was entitled to it because of the requirement to be treated

4 Under Articles 56 and 45 Treaty on the Functioning of the European Union ('TFEU') on services and workers respectively.

5 Under Articles 18 and 20–21 TFEU.

6 As required by Union citizenship provisions under Articles 20–21, Consolidated Version of the Treaty on European Union [2008] OJ C115/13 (TFEU).

7 §23(1) Sozialgesetzbuch Zwölftes Buch ('SGB XII'). The Court translates this in *Dano* (n 2), para. 26.

8 Council Regulation on 883/2004/EC of 29 April 2004 on the coordination of social security systems [2004] OJ L 166/1.

equally to Germany's own nationals in the same situation.[9] If it did not, the third question considered whether she would be entitled it because of the rights under Article 18 TFEU (equal treatment) and/or Article 20(2)(a) TFEU (free movement and residency), and Article 24(2) Directive 2004/38 on citizens' rights (equal treatment).[10] The fourth question then considered whether the claimant's rights under the Charter of Fundamental Rights had been violated if the Jobcentre Leipzig were found justified in denying her these benefits.[11]

III. OPINION OF ADVOCATE GENERAL ('AG') WATHELET

In his Opinion, AG Wathelet carefully addressed each question referred by the German court. He underwent a detailed analysis of the technical classifications of the relevant benefit, considering its nature as a 'special non-contributory cash benefit' and whether this would play a part in Dano's claim to equal treatment being valid. Determining the correct legal basis for granting these benefits was central in his view to examining whether Dano should be successful in her claim. He focused particularly on the specific situations of claimants who were economically inactive and not seeking work.

The Opinion referred to the similar case of *Brey*,[12] which was decided almost a year earlier, in which the Court stated that non-economically active EU citizens could not be automatically barred from receiving a specific social security benefit for the sole reason of their economic inactivity. There had to be an overall assessment of the claimant's situation in light of the principle of proportionality. AG Wathelet found that the special non-contributory cash benefit in *Dano* clearly fell within the scope of Regulation 883/2004.[13]

AG Wathelet followed the distinction by the Court drawn in *Brey* between Regulation 883/2004 and Directive 2004/3,[14] and found that the special non-contributory cash benefit fell within the Regulation's scope. Considering the objective of the benefit rather than application of 'formal criteria',[15] he argued that the special non-contributory cash benefit was also a form of social assistance within the meaning of Article 24(2) of Directive 2004/38.[16] However, whilst AG Wathelet argued that the

9 *Dano* (n. 2), para. 45.

10 Council Directive on 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC 93/96/EEC [2004] OJ L158/77.

11 Charter of Fundamental Rights of the European Union 83/02 [2010] OJ C-83/389.

12 Case C-140/12 *Brey* (ECJ, 19 September 2013).

13 Opinion of AG Wathelet in *Dano* (n. 19), para. 57.

14 *Brey* (n17) para. 58.

15 Opinion of AG Wathelet in *Dano* (n. 19), para 62, 68.

16 Ibid, para. 73.

benefit did fall under the scope of the Regulation, it did not necessarily mean that the decision to deny it to Dano was wrong.[17]

With regard to whether Dano's right to equal treatment had been breached by being denied the special non-contributory cash benefit for not being a German national, AG Wathelet considered that Dano had entered Germany for over three months, did not and was not seeking employment, was clearly not a work-seeker and was not excluded by Article 24(2) of the Directive, which allows derogations from equal treatment for work-seekers. However, as a result, AG Wathelet argued that she had to comply with the conditions for residency of having sufficient resources and a comprehensive health insurance under Article 7(1)(b) of the Directive instead so that she would not be an unreasonable burden on the host Member State.[18] Whether Dano had moved to Germany without any intention of seeking work was a factor to be considered in assessing the proportionality of the situation. She also had to demonstrate sufficient integration into the host State. AG Wathelet argued that Dano did not have a genuine link with the host society given that she had not sought employment, and had merely sought benefits instead. This justified the Jobcentre Leipzig's decision to deny her the relevant benefit.[19]

For this reason, AG Wathelet's conclusion is at odds with the *Brey* case. It is important to note the AG's discontent with facets of the Opinion in *Brey*, which argued that:

> [R]ules which make the right to reside conditional upon not having recourse to the social assistance system of the host Member State and which do not provide for an individual assessment of a Union citizen's economic capability are incompatible with ... the Directive.[20]

AG Wathelet considered that if Directive 2004/38 and Regulation 883/2004 were to be interpreted in line with case law decided prior to the Directive's implementation, it could create a 'paradoxical situation'[21] of granting more favourable treatment of citizens who moved only to claim benefits, against citizens who moved to work.[22] For this reason, he argued that the Jobcentre Leipzig was justified in denying benefits to such citizens.[23] When comparing *Dano* to *Brey*, AG Wathelet emphasised that the

17 Ibid, para. 85.

18 Ibid, para. 92.

19 Ibid, para. 135.

20 Opinion of AG Wahl in *Brey* (n. 20) para. 81.

21 Opinion of AG Wathelet in *Dano* (n19) para. 114. Many cases were decidedly in favour of the claimants; the Court granted equal treatment for rights they sought when they moved to another Member State mostly because of their status as an EU citizen. See *Brey* (n17), Case C-184/99 *Grzelczyk* [2001] ECR I-6193, Case C-138/02 *Collins* [2004] ECR I-11613.

22 Opinion of AG Wathelet in *Dano* (n. 19), para. 116.

23 Ibid, para. 105.

German Social Code specifically excluded those who moved to reside in Germany for the sole purpose of claiming benefits, which was not the situation in *Brey*.

AG Wathelet dealt briefly with the application of the Charter of Fundamental Rights. Article 51 of the Charter, which determines the scope of the application of the fundamental rights, is interpreted strictly in his Opinion. Stating that EU fundamental rights only applied to situations 'implementing Union law', AG Wathelet argued that the special non-contributory cash benefit and its conditions were a matter of German national law, did not implement EU law and were thus outside the scope of the application in the case at hand.[24]

IV. THE JUDGMENT IN *DANO*

The judgment follows much of what AG Wathelet suggested in his Opinion. The Court agreed that the special non-contributory cash benefit fell within the scope of Regulation 883/2004, focusing on which of the three provisions – Article 4, Regulation 883/2003, Article 18 TFEU read with Article 21 TFEU and Article 24, Directive 2004/38 – was the appropriate one for Dano to rely upon.[25]

The Court reiterated that 'the status of citizen of the Union is destined to be the fundamental status of nationals of the Member States',[26] subject to the limitations and conditions laid out in the Treaties.[27] It then considered the *Zambrano* case on Union citizenship, according to which if a claimant can prove an actual crossing of borders, he or she can rely on Directive 2004/38 on citizens' rights.[28] Article 24 of the Directive protects equal treatment of non-national Union citizens who had moved to reside in another Member State. This provision was considered a 'more specific expression' of the same rights under Article 18 and 21 TFEU, therefore the Court decided to only engage with the Directive.[29] However, Dano's situation was considered under Article 7(1)(b) of Directive 2004/38,[30] which required her to have sufficient resources and a comprehensive health insurance before being able to claim equal treatment for benefits.

The Court noted that Article 7(1)(b) of Directive 2004/38 applied to non-economically active citizens and held that it was intended to protect Member States from benefit tourism.[31] Dano, an economically inactive citizen who had moved to claim social assistance in another EU Member State without having sufficient

24 Ibid, paras. 147–8.

25 Ibid, para. 56.

26 *Dano* (n. 2), para. 58.

27 Article 21 TFEU.

28 Case C-34/09 *Zambrano* [2011] ECR I-1177, para. 39.

29 *Dano* (n. 2), para. 61.

30 Ibid, para. 71.

31 *Dano* (n. 2), para. 76.

resources to support her stay there, thus had no right to residence under Directive 2004/38. She was therefore not entitled to the special non-contributory cash benefit.

Finally, the Court denied recourse to the Charter of Fundamental Rights for lack of jurisdiction. It determined that the German Social Code's conditions for claiming benefits fell outside the Charter's remit of protection. In particular, under Article 51(1) of the Charter, Germany was not implementing EU law and under Article 51(2), the Court could not extend the competences of the EU beyond that enshrined in the Treaties.[32] No matter the importance of fundamental rights protection, the Court could not require a Member State to change the conditions of their own social welfare system.[33]

V. COMMENT AND ANALYSIS

Both the position adopted by the Court as well as AG Wathelet's Opinion reflect a legal culture that appears to have been influenced by the current political environment. In a recent article by Blauberger and Schmidt, they helpfully observe that '[w]hereas "welfare migration" was hardly an issue under the original free movement of workers, it has become more salient due to the incremental judicial extension of equal treatment to all EU citizens.'[34] Particularly in the UK, the atmosphere of Euroscepticism towards protection of the free movement of persons and its related provisions have recently come under much scrutiny by politicians ahead of the proposed EU referendum by the Conservative Party in 2017.[35]

The *Dano* case was welcomed by Eurosceptic political parties for it appeared that the Court limited the effects of 'benefit tourism'. The Court's previous generosity towards economically inactive citizens seeking benefits after moving from one Member State to another, especially within the context of the rights of EU citizenship,[36] seems to have been replaced by a hard-lined approach relying on a strict and narrow interpretation of the relevant guarantees.[37] There was a particular emphasis in the judgment as to the limitations that were in place, as well as the fact that the intention behind the provisions was never to allow or encourage such blatant benefit tourism. The Court's position will surely be appreciated by the Member States and appears to be improving the perceived legitimacy and value placed on the EU. However, the *Dano* judgment only concerned a small part of the large population of free moving citizens in the EU.

---

32 Ibid, paras. 87–88.

33 See on the interpretation and application of Article 51, Case C-399/11 *Melloni* (ECJ, 26 February 2013) and Case C-617/10 *Fransson* (ECJ, 26 February 2013).

34 Michael Blauberger and Susanne K. Schmidt, 'Welfare migration? Free movement of EU citizens and access to social benefits' [2014] Research and Politics 1, 2.

35 'Cameron steps up general election fight as parties trade blows', *BBC News*, 4 January 2015.

36 See Case C-85/96 *Sala* [1998] ECR I-2691, *Collins* (n30), Case C-456/02 *Trojani* [2004] ECR I-7573, Case C-22/08 *Vatsouras* [2009] ECR I-4585.

37 See cases on EU citizenship rights, where the claimants were also involved in criminal activity, C-378/12 *Onuekwere* (ECJ, 16 January 2014), C-400/12 *MG* (ECJ, 16 January 2014).

Whilst the *Dano* judgment makes clear that economically inactive migrant citizens have no right to claim benefits in their host Member States, the situation is not so clear for economically inactive migrants who are also job-seekers, ex-workers, or students. Article 24(2) of Directive 2004/38 specifically excludes the category of students for equal treatment in social assistance, and job-seekers and ex-workers have long been the subject of debate in the citizenship literature in terms of their access to rights by means of Article 18 and 21 TFEU.[38] Given the blatant exclusion in *Dano* of certain economically inactive migrants from social welfare in host Member States, there is a chance that the Court could take a similar position when it comes to job-seekers, temporarily unemployed, and students. This is despite previous case law that for the most part have required such persons to be afforded equal treatment to social welfare in their host Member States.[39] However, this is unlikely to be the case.

Thym notes that there is a need to 'evad[e] the pitfalls of scapegoating inherent in many policy responses to migratory phenomena.'[40] The Court's decision in *Dano* appears to resemble scapegoating, given the timing of the decision and the uproar it caused. It appears to have moved away from the Court's case law on citizenship rights. How similar issues will be decided in the future remains to be seen.[41]

The fact that the Court did not discuss its judgment's implications on the remaining categories of potentially affected persons identified above may also suggest that the decision in *Dano* was not meant to change the effects of the Court's previous case law for job-seekers, ex-workers and students who would be able to rely on Articles 18 and 21 TFEU for protecting their rights. Instead, the *Dano* judgment should be seen as a response to the criticism by politicians of free movement guarantees. If a claimant blatantly moves to reside in another Member State for the sole purpose of claiming social benefits, he or she will not be able to rely on EU law; the *Dano* case confirms that this most obvious form of benefit tourism is not allowed. The Court 'presents us with a noteworthy shift of emphasis, which accentuates Member State interests, while side-lining countervailing constitutional arguments that could have justified a different outcome.'[42] Therefore, whilst granting benefits to claimants in Dano's situation is clearly not required under EU law, it remains to be seen what the situation will be with regard to students, ex-workers and other workers whose rights as EU citizens will need to be respected.

---

38 See Michael Dougan and Eleanor Spaventa, 'Educating Rudy and the (non-)English Patient: A Double-Bill on Residency Rights under Article 18 EC' [2003] European Law Review 699.

39 See *Collins* (n 30), *Vatsouras* (n 49), Case C-209/03 *Bidar* [2005] ECR I-2119 cf. Case C-158/07 *Förster* [2008] I-08507.

40 Daniel Thym, 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens' (2015) 52 CMLR 17, 20.

41 See Eleanor Spaventa, 'Earned Citizenship: Understanding Union Citizenship Through its Scope' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: the Role of Rights* (Cambridge University Press 2015 forthcoming).

42 Thym (n. 53), 25.