Social assistance and the right to reside at the European Court of Justice – Dano v Jobcenter Leipzig

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Case Analyses


Introduction

This case involves an important decision of the Grand Chamber of the Court of Justice of the EU (CJEU) in relation to when Member States may refuse benefits to non-nationals who do not have a right of residence under EU law. The Court held that art.24(1) of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States and art.4 of Regulation 883/2004 on the co-ordination of social security systems did not preclude a national law under which nationals of other Member States are excluded from entitlement to certain “special non-contributory cash benefits” under Regulation 883/2004, although those benefits are granted to nationals of the host Member State in the same situation, insofar as those nationals of other Member States do not have a right of residence under Directive 2004/38 in the host Member State.

The facts

Ms Dano and her young son (born 2009)—both Romanian nationals—came to Germany in November 2010. 1 Ms Dano was granted a residence card of unlimited duration in July 2011. She did not work in Germany (or apparently in Romania) and lived with and was supported by her sister. Indeed, there was no evidence that she had looked for work. She received child benefit (Kindergeld) in respect of her son and also received an “advance on maintenance payment” in respect of him.

Ms Dano claimed a subsistence benefit under the German Social Code (SGB). This forms part of the benefits for jobseekers and is listed as a special non-contributory benefit (SNCB) under Regulation 883/2004. 2 However, as the Court had ruled in Brey, 3 SNCBs are generally categorised as “social assistance” within the meaning of Directive 2004/38. 4 This benefit was refused to Ms Dano

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1 It appears that Ms Dano had been there previously and that her son was born in Germany.
2 Although all the parties accepted this categorisation, Advocate General Wathelet reviewed whether this was correct, concluding that it was (Dano v Jobcenter Leipzig (C-333/13) EU:C:2014:341 at [42]–[57]). The Court did not expressly consider the issue.
4 Dano (C-333/13) EU:C:2014:2358; [2015] 1 C.M.L.R. 48; [2015] All E.R. (EC) 1 at [63]. The Advocate General (opinion at [62]–[75]) specifically considered and distinguished Vatsouras, in which the Court had held that benefits of a financial nature which, irrespective of their status under national law, are intended to facilitate access to the labour market could not be regarded as constituting “social assistance” within the meaning of art.24(2) of Directive 2004/38. In that case, which also involved a benefit under SGB II, the Court expressed the view (at [43]) that “A condition such as that in Paragraph 7(1) of the SGB II, under which the person concerned must be capable of earning a living, could constitute an indication that the benefit is intended to facilitate access to employment”. See Vatsouras v Arbeitsgemeinschaft (ARGE) Nurnberg 900 (C-22/08 and 23/08) [2009] E.C.R. I-4585; [2009] All E.R. (EC) 747.
on the basis that she was a non-employed foreign national who had come to Germany to seek employment and/or to seek benefits. Eventually the issue was referred to the CJEU by the Sozialgericht Leipzig, which was uncertain whether EU law, in particular art.4 of Regulation 883/2004 on “equality of treatment”, the general principle of non-discrimination resulting from art.18 TFEU and the general right of residence resulting from art.20 TFEU, precluded the relevant provisions of German law.

The decision

In its first question, the referring court asked whether art.4 of Regulation 883/2004—which requires equality of treatment—applied to special non-contributory benefits. Both the Advocate General and the Court concluded that it did. This led on to the heart of the issue.

In its second and third questions, which the Court considered together, the Sozialgericht (as rephrased by the CJEU) asked whether art.18 TFEU, art.20(2) TFEU, art.24(2) of Directive 2004/38 and art.4 of Regulation 883/2004 must be interpreted as precluding legislation of a Member State under which nationals of other Member States who are not economically active are excluded from entitlement to a special non-contributory cash benefit although those benefits are granted to nationals of the home Member State who are in the same situation.

The CJEU pointed out that although art.18(1) TFEU prohibits any discrimination on grounds of nationality within the scope of the Treaties, art.20(2) TFEU expressly states that the rights conferred on Union citizens by that article are to be exercised “in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder”. Article 21(1) TFEU also provides that the right of Union citizens to move and reside freely within the territory of the Member States is subject to compliance with the “limitations and conditions laid down in the Treaties and by the measures adopted to give them effect”. Thus, the CJEU pointed out that the general principle of non-discrimination, laid down in art.18 TFEU, is given specific expression in art.24 of Directive 2004/38 and art.4 of

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5 The CJEU states that the Sozialgericht Leipzig considered that Ms Dano was not entitled to the benefit “by virtue of point 2 of the second sentence of Paragraph 7(1) of SGB II and Paragraph 23(3) of SGB XII”. Paragraph 7(1) of SGB II provides in the relevant part that “[t]he following are excluded [from benefits under SGB II]:

1. foreign nationals who are not workers or self-employed persons in the Federal Republic of Germany and do not enjoy the right of freedom of movement under Paragraph 2(3) of the Law on freedom of movement of Union citizens, and their family members, for the first three months of their residence,
2. foreign nationals whose right of residence arises solely out of the search for employment and their family members,

Since it appears that Ms Dano did not seek employment in Germany, it is not clear how this could have applied to her.

Paragraph 23(3) of SGB XII states that “[f]oreign nationals who have entered national territory in order to obtain social assistance or whose right of residence arises solely out of the search for employment, and their family members, have no right to social assistance.”

6 The Court (Dano (C-333/13) EU:C:2014:2358) broadly followed the approach of the Advocate General and, therefore, reference is made to the opinion (Dano (C-333/13) EU:C:2014:341) only insofar as it expands on or differs from that of the Court.


The Court noted that art.24(1) of Directive 2004/38 provides that all Union citizens residing on the basis of the Directive in the territory of the host Member State are to enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The CJEU concluded from this that, as concerns access to social benefits, a Union citizen could claim equal treatment with nationals of the host Member State only if his or her residence complied with the conditions of Directive 2004/38; and specifically with the requirement that he or she have “sufficient resources” for himself or herself and his or her family members. The Court stated that:

“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.”

The Court ruled that a Member State must be allowed to refuse to grant social benefits to economically inactive Union citizens (who do not have sufficient resources) who exercise their right to freedom of movement solely in order to obtain another Member State’s social assistance. It pointed out that

“any unequal treatment between Union citizens who have made use of their freedom of movement and residence and nationals of the host Member State with regard to the grant of social benefits is an inevitable consequence of Directive 2004/38.”

Ms Dano did not have sufficient resources (according to the referring court) and, therefore, could not claim a right of residence under EU law. It followed that she could not invoke the principle of non-discrimination in art.24(1) of Directive 2004/38.

Nor did art.4 of Regulation 883/2004 preclude a refusal of benefits. That Regulation allowed SNCBs to be granted “in accordance with [national] legislation”; and the Court had consistently held that there was nothing in EU law to prevent the granting of social benefits to Union citizens who are not economically active being made conditional upon those citizens meeting the necessary requirements for obtaining a legal right of residence in the host Member State. Unlike the Advocate General, the Court did not explicitly consider the proportionality of the German rule (or even refer to the concept of proportionality). The Advocate General considered it to be

“necessary to examine the relationship between the general criterion used by the German legislation and the existence of a ‘genuine’ link between the persons falling within its scope and the host Member State.”

He concluded that

“the national legislation is consistent ... with the EU legislature’s intention. It serves to prevent persons exercising their right to freedom of movement without intending to integrate themselves from becoming a burden on the social assistance system. It also falls within the discretion accorded to the Member States in the matter. In other words, it serves to prevent abuse and a certain form of ‘benefit tourism’.”

In addition, he considered the condition chosen to be proportionate to the objective legitimately pursued by the national law as, before refusing the grant of basic provision benefits, the Member State authorities had had, to a certain extent, to examine the applicant’s personal situation.

The Court refused to answer a question as to the Charter of Fundamental Rights on the basis that the Member State was not implementing EU law and, therefore, it had no jurisdiction to do so.

Discussion

It is perhaps not very surprising that a young, poorly educated, Roma woman who had never worked, had not looked for work in Germany, and had a limited grasp of the German language was found not to have a right under EU law to a subsistence benefit in Germany.

If the actual decision received considerable media attention, one can only imagine the media (and political) reaction had the Court come to a different conclusion. Putting it at its most neutral, this was—from a claimant perspective—probably the worst possible test case one could imagine.

What is noteworthy is the legal approach which the Grand Chamber took to resolving what was always a very straightforward case (leaving aside the issue of the categorisation of the benefit). The Court might have addressed the narrow issue raised by the case, i.e. a rule refusing to grant social benefits to an economically inactive Union citizen who exercised her right to freedom of movement in order to obtain another Member State’s social assistance. It might have ruled that Ms Dano’s lack of (any) connection to the labour market concerned or—more relevant

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14 Opinion (Dano (C-333/13) EU:C:2014:341) at [126].
15 Opinion (Dano (C-333/13) EU:C:2014:341) at [131].
16 Opinion (Dano (C-333/13) EU:C:2014:341) at [136]–[137].
17 Opinion (Dano (C-333/13) EU:C:2014:341) at [85]–[92].
18 As the Advocate General noted it is, of course, entirely irrelevant that Ms Dano had a criminal record for crimes against property, receiving a suspended two-year term of imprisonment.
19 One might speculate that the Sozialgericht’s decision to refer was influenced by the uncertainty as to whether the benefit at issue was an unemployment benefit and, therefore, covered by the Vatsouras ruling. Discussion as to whether the Court was correct (sub silentio) to distinguish that case is best left to an expert in German social law.

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here—her very limited social and economic integration into German society justified a refusal of benefits. But it did not do so.

The fact that such a straightforward case was referred to the Grand Chamber suggests that the Court wanted to make a point about rights of residence. This hypothesis is supported by the fact that the Court gave a much broader answer than was necessary to answer the questions referred.

It is also important that, rather than looking generally at principles of equal treatment or seeing the refusal of benefits as a barrier to free movement, the Court focused specifically on the secondary legislation: Directive 2004/38 and Regulation 883/2004. The Court had already held—in Brey—that art.4 of Regulation 883/2004 did not prevent Member States from having a residence requirement for benefits.

It has now ruled that a Union citizen can claim equal treatment with nationals of the host Member State only if his or her residence complied with the conditions of Directive 2004/38 and specifically with the requirement that he or she have “sufficient resources” for himself or herself and his or her family members. There is some inconsistency in the Court’s approach here, as it states that

“The principle of non-discrimination, laid down generally in Article 18 TFEU, is given more specific expression in Article 24 of Directive 2004/38 in relation to Union citizens who, like the applicants in the main proceedings, exercise their right to move and reside within the territory of the Member States.”

Yet the Court goes on to hold that the applicant cannot claim a right to equal treatment under art.24(1) as she has no right of residence. This appears to suggest that a person such as Ms Dano has no right to equality of treatment at all under EU law. This is a long way from (pre-Directive 2004/38) cases such as Martínez Sala, Grzelczyk, or Trojaniv where the Court ruled that a citizen of the EU, legally resident in the territory of a host Member State, could rely on art.18 TFEU in all situations which fell within the scope ratione materiae of EU law, including access to social assistance.

The Court’s approach would appear to extend the explicit terms of art.24(2) of Directive 2004/38, which provides that Member States do not have to provide certain benefits in certain cases, to a further (large) category of persons in that it

23 The only debatable issue in the case—whether the benefit was “intended to facilitate access to the labour market”—was not even explicitly discussed by the Court.
30 For example, art.24(2) provides that “the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence”.

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suggests that Member States are not obliged to confer entitlement to social assistance to any person without a right to reside under art.7 of the Directive. One might have thought that had the EU Council wished to include such a provision, it would have done so explicitly.

However, whatever one’s criticisms of the Court’s purposive reading of Directive 2004/38, this ruling may at least lead to a greater level of certainty on the vexed issue of social benefits and the right to reside. In the light of Dano, it would appear that an economically inactive person (resident on the territory of another Member State for a period of longer than three months) will only have a right to a social assistance benefit under EU law where he or she has a right to reside under art.7 of Directive 2004/38, including the requirement that he or she has “sufficient resources”. This at least clarifies the position and is arguably much clearer than requiring a case-by-case approach to whether a person had a sufficient link to the host labour market or was sufficiently integrated into the host society.

The Court’s ruling would appear to confirm the Supreme Court’s decision (if not its exact line of reasoning) in Patmalniec." Indeed, Lady Hale, in that case, argued for the approach here adopted by the Court, i.e. that there should be a link between the right to reside under EU law and the right to claim benefits.

The Court has thus opted for a “bright line” approach—contrary to the predictions of at least some commentators." Of course, the facts in this case were exceptionally weak, and one can imagine cases where a person could show a significant degree of integration into the host society but is not entitled to an EU right to reside. The fact that the Court did not apply a proportionality analysis in this case" does not mean that it will never do so in the future. However, the approach adopted would suggest that this would only make a difference in rather exceptional cases. Having said that, one notes the Court’s consistent tendency to take a step in one direction only to make two in the opposite direction (or vice versa); so confident predictions as to the Court’s future path are perhaps unwise at this point.

It should be noted that this case concerned a special non-contributory benefit (or social assistance benefit under Directive 2004/38) and not a benefit classified as “social security” under Regulation 883/2004. In the case of the UK, the EU Commission has pending infringement proceedings against the UK in relation to the right to reside. The Commission argues that, in the case of child benefit and child tax credit (CTC), the right to reside condition is in breach of Regulation 883/2004. It is noteworthy that the Commission appears to have correctly predicted the outcome arrived at in Dano in that the focus of the complaint is on the compatibility of the right to reside requirement with Regulation 883/2004 (rather than broader Treaty principles) and the proceedings now relate only to child benefit

33 If it had, it would no doubt have agreed with the Advocate General that the measure was proportionate on the facts of this case.
34 European Commission v United Kingdom of Great Britain and Northern Ireland (C-308/14).
and CTC rather than the broader range of SNCBs referred to at an earlier stage in these infringement proceedings.\textsuperscript{35}

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\textsuperscript{35} IP/13/475, 30 May 2013.