BENEFITS FOR EU CITIZENS: A U-TURN BY THE COURT OF JUSTICE?

THE recent judgment of the Court of Justice of the European Union in the case of *Dano* (ECLI:EU:C:2014:2358) clarified some important points as regards access to social welfare benefits by EU citizens who move to another Member State. Furthermore, the judgment could have broad implications for any attempts by the UK Government to renegotiate the UK's membership of the EU, which is likely to focus on benefits for EU citizens coming to the UK. This note is an updated and expanded version of my analysis on the EU Law Analysis blog: http://eulawanalysis.blogspot.co.uk/2014/11/benefit-tourism-by-eu-citizens-cjeu.html.

Mrs. Dano is a Romanian citizen who applied for job-seekers' benefits in Germany. She has not worked in Germany, and is not looking for work either. Her application was for a "special non-contributory cash benefit", as defined by the EU Regulation on coordination of social security rules for the purposes of free movement of EU citizens (Reg. 883/2004, OJ 2004 L 166/1). Issues also arose as regards the EU's Citizens' Rights Directive (Dir. 2004/38, OJ 2004 L 158/77), which provides (in Article 24(2)) that EU citizens are entitled to equal treatment regarding benefits on the territory of another Member State, except during their first three months of entry, if they are job-seekers, or if they are seeking student grants before five years' residence.

The CJEU said that these exceptions to the equal treatment rule in the citizens' Directive did not apply to Mrs. Dano, since she did not fall within any of the three categories of people who were excluded from that rule. However, the Court then ruled that she could nevertheless not invoke the equal treatment rule, for the more fundamental reason that she did not qualify to be covered by the citizens' Directive in the first place.

Some people have the impression that all EU citizens can move and reside in any other Member State without restrictions. However, the citizens' Directive sets some limits. In order to stay in another Member State for more than three months and for up to a period of five years, Article 7 of the Directive requires that the EU citizen must be a worker, a self-employed person, a student, or otherwise have sufficient resources. After five years of continuous residence in a host Member State, EU citizens exercising free movement rights acquire the right to permanent residence and these limitations no longer apply.

Article 8(4) of the Directive seems to provide for some flexibility as regards what might be considered as sufficient resources, specifying that Member States cannot set a fixed amount to determine such resources, and must take account of the situation of each individual EU citizen. However, the Court definitively ruled that Mrs. Dano did not have sufficient resources. Indeed, the Court ruled firmly that the requirement of sufficient resources "seeks to prevent economically inactive Union citizens from

using the host Member State's welfare system to fund their means of subsistence" (at [76]).

This is a departure from previous judgments (e.g. *Trojani* (ECLI:EU:C:2004:488) and *Martinez Sala* (ECLI:EU:C:1998:217)), which had relied upon the equal treatment rules in the *Treaties* (Article 12 TFEU) to suggest that impecunious EU citizens might still be entitled to benefits, on the basis that that any legally resident EU citizen can in principle claim equal treatment as regards such benefits. But, in *Dano*, the Court ruled that unequal treatment was an "inevitable consequence" of the EU rules, giving precedence to the EU legislator's definition of the conditions for exercising free movement rights instead of the Treaty references to citizenship and equal treatment.

Finally, the Court ruled that the EU's Charter of Fundamental Rights was not applicable, since it only applies to issues falling within the scope of EU law. In the Court's view, the rules on access to special social security benefits, as set out in the Regulation on coordination of social security within the EU, fell outside the scope of that regulation, and therefore the Charter.

The CJEU ruling came in the midst of a broad public debate about the level of free movement (often referred to as "migration") of EU citizens between Member States. In fact, the tone and content of the judgment appear to respond to that debate. In particular, as noted already, the Court's rejection of access to benefits for those who have not worked or looked for work is more categorical than in the past.

Instead of referring to the equal treatment rule in the Treaty, as in the prior case law, the Court interpreted the Treaty to mean that the EU legislature could set conditions on access to benefits by EU citizens, at least those other than workers or self-employed persons. So only the legislation applies, and that legislation was in turn interpreted quite restrictively as compared to prior case law. The requirement to look at each EU citizen on a case-by-case basis was not applied, despite the recent judgment in *Brey* (ECLI:EU:C:2013:565), which had insisted upon the importance of this rule.

The Court's approach has clear implications for changes to the rules on EU citizens' free movement. If access to benefits were still wholly defined by the Treaties, then only a Treaty amendment could change the relevant rules, requiring agreement of all Member States and ratification by national parliaments. However, since the Court gives full power to the EU legislature to rule on access to benefits by EU citizens, this means that it is relatively easy to amend the relevant rules, since amending the citizens' Directive would only need a Commission proposal and a qualified majority vote in the Council and agreement of the European Parliament. The judgment has therefore facilitated a possible renegotiation of the EU free movement rules on this issue, and more broadly a renegotiation of the UK's membership of the EU.

However, the *Dano* judgment only deals with a relatively small category of EU citizens applying for benefits: those who have not worked in their Member State of residence, and are not looking for work there either. What about those who are genuinely seeking work in the Member State concerned, who have already worked in that State, or who are already working there but seek access to in-work benefits?

As regards the former two categories, the CJEU may soon clarify the position when it rules in the pending case of *Alimanovic* (ECLI:EU:C:2015:210). The Advocate General's opinion in this case argues that the Court should retain its established case law as regards work-seekers, which provides that work-seekers have access to benefits linked to the labour market (although he interprets the meaning of that concept narrowly). Crucially, that right is based on the Court's interpretation of the *Treaty* (Article 45 TFEU), not EU legislation, so only a Treaty amendment could overturn it.

What about former workers? The Citizens' Rights Directive states that they retain worker status (and therefore access to benefits) in several cases, for instance if they have worked in the host Member State for a specified period (see Article 7(3)). But the CJEU has ruled as recently as summer 2014 that the provisions of the Directive on this point are a non-exhaustive list: the definition of "worker" is set out in the Treaty, as interpreted by the Court. So the Court ruled in the case of *Saint-Prix* (ECLI:EU:C:2014:2007) that women who had given up work due to pregnancy, but aimed to return to the labour market shortly after the baby's birth, could still count as "workers" and obtain benefits. In the pending case of *Alimanovic*, the opinion suggests that a person who loses a job after a short period in a Member State (shorter than the qualification period set out in the Citizens' Rights Directive) might possibly retain worker status on the basis of the Treaty (therefore access to benefits), on a case-by-case basis.

Furthermore, the *Dano* judgment does not specifically address the possible expulsion of persons in Mrs. Dano's situation, since that was not an issue in her case. Nor did it address the issue of denying re-entry to people in her position. In fact, the Citizens' Rights Directive has specific rules on expulsion of persons on grounds of having insufficient resources, so Mrs. Dano could rely on those rules even though the equal treatment rules do not apply to her. (See my analysis of this issue: http://eulawanalysis.blogspot.co.uk/2014/11/in-light-of-dano-judgment-when-can.html.)

On the whole, then, the Court's ruling makes it easier to amend the rules on benefits for a specific category of people: EU citizens who have not worked or looked for work. In fact, there is no need to amend those rules, since the UK and many other Member States are content with the result of this judgment. Arguably, the judgment also leaves it open to harden the EU rules on expulsion and entry bans for this category of EU citizens, since there is nothing in the Treaties to rule that out.

However, the judgment does not affect the position of the much bigger categories of people who seek work, who were formerly working, or who are working in a Member State and seek benefits. If the Court follows the *Alimanovic* opinion, it will confirm again that the legal position of the former two categories of people is regulated by the Treaty, not only the EU legislation. As for those who are currently working, the Treaties given them an express right to equal treatment (Article 39(2) TFEU). So for all three categories of people, and undoubtedly the third category, a Treaty amendment would be necessary to reduce the level of benefits which they currently enjoy under EU law. While the CJEU has ruled out the most flagrant cases of "benefit tourism", other aspects of the access of EU citizens to benefits which upset some people in host Member States, and which the UK seeks to amend, are unaffected by this judgment – and cannot be altered without Treaty amendment.

STEVE PEERS*

*Address for correspondence: University of Essex, Wivenhoe Park, Colchester, CO4 3SQ, UK. Email: speers@essex.ac.uk

GHOSTS OF GENOCIDES PAST? STATE RESPONSIBILITY FOR GENOCIDE IN THE FORMER YUGOSLAVIA

IN *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, the International Court of Justice ("ICJ" or "Court") dealt with a claim by Croatia that Serbia was responsible for the commission of genocide against ethnic Croatians in contravention of the Convention on the Prevention and Punishment of the Crime of Genocide ("the Convention"), and with Serbia's counter-claim that Croatia had committed genocide against ethnic Serbs also in breach of the Convention. In its judgment of 3 February 2015, the Court dismissed both the claim and counter-claim. While many of the acts complained of constituted the actus reus of genocide, there was no evidence that they had been perpetrated with the required mens rea, namely the intention to destroy, in whole or in part, the targeted group as such.

The judgment is the last of a long list of ICJ cases concerning legal issues arising from the break-up of the Socialist Federal Republic of Yugoslavia ("SFRY") during the early 1990s. The judgment touches upon numerous questions of international law but, as with many of the previous cases, some of its most interesting aspects concern the legal consequences of the sovereignty change in the territory of the former SFRY. In the present case, this issue concerned the responsibility of Serbia for events occurring prior to its coming into existence, namely events occurring before 27 April