

Free movement of EU citizens within the EU and
equal treatment for social benefits:
solidarity or ‘benefit tourism’?

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Overview

- Ambiguity in EU's policy goals
 - Restrictions to free movement vs. fight against poverty
- Access to minimum subsistence benefits for migrating EU citizens
 - Indigent migrant workers
 - Migrants with link to the status of 'worker'
 - Economically inactive migrant EU citizens
- Political discussion and case law on 'benefit tourism'

Ambiguity in EU's policy goals

- Free movement of EU citizens and the prohibition of discrimination on grounds of nationality
 - Fundamental rights: Articles 18-21 TFEU Treaty
- But the right to free movement subject to the EU citizens being economically active or having sufficient resources
 - Political discussion on 'benefit tourism'
 - Request of the UK to renegotiate the Treaties in this respect
 - Protective measures **by** Member States
 - Cases before the Court of Justice of the EU (CJEU)

Ambiguity in EU's policy goals

- The fight against poverty and social inclusion as central policy goal
 - References in the EU Treaties
 - Europe 2020 Strategy
 - Lifting at least 20 million people out of poverty by 2020
 - European Structural and Investment Funds
 - Combating poverty as a thematic objective
 - Statistics: in 2013: 16.7% of the EU population at risk of income poverty

Access to minimum subsistence benefits for migrating EU citizens

- What about the right to reside in the host State for indigent migrants?
- What about the right to equal treatment in host State?
- Distinction between economically active and economically inactive migrants remains dominant in EU law

Indigent migrant workers

- Article 45 TFEU; Regulation 492/2011
- Broad concept of workers in the case law of the Court of Justice
 - Limited amount of income not relevant (*Levin*)
 - Need for financial assistance no obstacle to be a 'worker' (*Kempf*)
 - part-time work accepted

Indigent migrant workers

- Being a ‘worker’ is sufficient to become entitled to social benefits
- However: recent case law seems to depart from this and allows MSs to apply a “sufficient link” test also to economically active migrants as well (*Geven, Giersch*)

Migrants having a link with the status of 'worker'

- First-time jobseekers
 - Entitled to social benefits for jobseekers
- Former migrant workers
 - Maintain status of 'worker' (and entitlement to equal treatment) in some cases of illness, accident or involuntary unemployment ([Article 7\(3\) Directive 2004/38](#))
 - Number of gaps and blind spots:
 - Long-term illness, temporary care for others or even pregnancy

Migrants having a link with the status of ‘worker’

- Members of the family of migrant workers or former migrant workers
 - Children of former migrant workers have the right to pursue and continue education, even if the parent ‘migrant worker’ has already left the host State
 - Includes the right to reside for their carers
 - Includes the right to equal treatment for social benefits
 - See *Ibrahim, Teixeira, Alarape*

Entitlement to social benefits under Regulation 883/2004

- Social security coordination, no harmonization
- Possibility to keep social security allowances when moving to another Member State
 - export of benefits (pensions; not unemployment benefits)
 - Aggregation of periods (facilitating the entitlement to benefits in another Member State)

Entitlement to social minimum benefits under Regulation 883/2004

- Social assistance excluded from this scope
- ‘Special non-contributory cash benefits’
 - Supplement other social security benefits in case of financial need
 - Only in Member State of residence
 - But subject to having obtained the right to reside under Dir. 2004/38 (*Dano; see further*)

Economically inactive migrant persons

- Right to reside depends on persons having sufficient resources so as not to become an unreasonable burden on the social assistance system of the host State
- Case law of the CJEU prior to Directive 2004/38
 - Citizenship as a ‘fundamental status’
 - Triggers equal treatment (*Grzelczyk*)
 - Derogations subject to a ‘genuine link’ and proportionality test, depending on the nature of the benefit applied for (*Bidar; Commission v. Austria*)
 - Critical comments

Economically inactive migrant persons

- CJEU's case law reflected in Directive 2004/38
 - First three months: not becoming an unreasonable burden; no entitlement to equal treatment for social assistance (Article 6 and 24(2))
 - Or even longer for jobseekers
 - But benefits meant to facilitate integration into the labour market are not 'social assistance' (*Vatsouras and Koupatantze*)
 - After three months: sufficient resources requirement, subject to proportionality test (Article 7(1)(b) and 14(3))
 - After five years: no longer any limitations
 - Permanent resident status (Article 16)

Discussion

- Provisions in Dir. 2004/38 are intended to seek a balance between the fundamental right to free movement and the concerns of the Member States to protect their public finances
- What is meant by?
 - ‘social assistance’
 - ‘unreasonable burden’
 - ‘sufficient link’

Judgment in *Brey* (19.9.2013)

- *Brey*: broad definition of ‘social assistance’
- imposes a double assessment (proportionality test)
 - The **individual burden** that a Union citizen lays on national systems
 - Looking at the period in which assistance is needed, regularity of other income, the duration of residence, the amount of aid granted,
 - The burden of all Union beneficiaries on the social assistance **system of the host State as a whole**

Judgment in *Dano* (11.11.2014)

- Economically inactive persons may only claim equal treatment for ‘social benefits’ if their residence on the territory of the host State complies with the conditions of Directive 2004/38
- In the period of residence between 3 months and 5 years:
 - ‘having sufficient resources for themselves and their family members’

Judgment in *Dano*

- Strict interpretation
 - Only in cases where the Union citizen moved to the host Member State in order to obtain social assistance
 - No intention to integrate
 - In other situations the proportionality test continues to apply
- Broad interpretation
 - Equal treatment for economically inactive Union citizen only if his residence in the host State complies with the conditions of Dir. 2004/38
 - One of which is having sufficient resources
 - Would apply to all 'social benefits'

Expulsion measures

- In the first five years of residence
 - Possibility to be expelled when economically inactive and relying on social assistance
 - Discussion on the un-reasonability of the reliance on social assistance
- Expulsion on grounds of public policy or public security
 - Must be based on the personal conduct of the individual concerned
 - Must take the personal situation of the EU citizen into account
 - May not serve economic ends
 - Rough sleepers?

Result for economically inactive migrants

- Right to reside and to equal treatment continues to depend on unclear criteria
 - Leads to divergent practices and case law in the Member States: mostly restrictive
 - The well-informed and well-off claimants will benefit more
- Political pressure to even reduce the rights of EU migrants to social benefits in the host State, including economically active migrants
 - See proposals of UK prime minister

Is it possible to disambiguate?

- Conflict between EU right to free movement and equal treatment and the territorial interpretation of interpersonal solidarity
 - *'the willingness to share with others within the same political community'*
 - Lack of EU competence as well as political will to create an EU-wide individual solidarity mechanism by distributing resources at EU level
 - Compare with the US rationale 'sink-or-swim-together'
- EU will continue to struggle with the ambiguity of its legal instruments and policy goals

Further reading

- H. Verschueren, 'Free Movement or Benefit Tourism: The Unreasonable Burden of *Brey*', *European Journal of Migration and Law*, 2014, 16(2), 147-179
- H. Verschueren, 'Preventing "Benefit tourism" in the EU: a narrow or broad interpretation of the possibilities offered by the ECJ in *Dano*', *Common Market Law Review*, 2015, 52(2), 363-390
- H. Verschueren, 'Free movement of EU citizens: including for the poor?', *Maastricht Journal of European and Comparative Law* 2015, 22(1), 10-34

Thank you for your attention

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