THE PROTECTION OF SOCIAL RIGHTS IN THE CASE LAW OF THE CJEU THROUGH THE CITIZENSHIP PROVISIONS OF THE TREATY

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In this short presentation I will focus my attention on the following issues:

1. According to the Treaty on the Functioning of the European Union (TFEU) (hereinafter "Treaty"), social policies are in principle outside the competence of the Union law but are regulated by the Member States.
2. The Jurisprudence of the Court of Justice made it possible that this almost exclusive competence of the Member States be encroached.
3. The Court has developed its rich jurisprudence on the protection of social rights mainly by making use of the provisions of the Treaty on the European citizenship in combination with those against discrimination.
4. The various, more progressive, stages of the case law of the Court on the protection of social rights reflect the approach of the Court towards a more positive and independent use of the citizenship provisions of the Treaty.

The progressive abolition of national borders and the ensuing increased mobility of European citizens were bound to raise high expectations as to the rights to be enjoyed by those citizens in particular with respect to the country where they decide to move. Such a process was also bound to bring about transformations and changes in the traditional regulatory structure of the nation state. This is also reflected in the case law of the ECJ. Whilst 30 years ago the Court kept itself busy with questions dealing with labeling, composition of products, import licensing, nowadays the Court is often requested to rule on the effect of EU law on traditional areas of Member State competence: Taxation, education, criminal law and of course the organisation of social security systems. One of the most spectacular developments in the Court's jurisprudence, is after all the development of the notion of European citizenship as a concept entailing the enjoyment of non-economic rights emanating directly from the status of *cives europeum.*

Part II of the Lisbon Treaty (TFEU), entitled "Non discrimination and citizenship of the Union", is placed just before the Community policies containing seven articles. The first paragraph of article 20 TFEU establishes the citizenship of the Union. Every person holding the nationality of a Member State shall be a citizen of the Union. This article clarifies that the Union citizenship is of complementary character to the national citizenship. The concept of a European citizenship had been introduced for the first time by the Maastricht Treaty in 1992 in an effort to bring together the nationals of Member States.

Initially, there was a conservative interpretation of these provisions by the Court. The Court made it clear in Land Nordrhein-Westfalen v Uecker and Jacquet[1] in 1997 that the citizenship provisions were not intended to extend the material scope of the Treaty to internal situations where Community law does not apply.

The Court was reluctant to apply the newly inserted citizenship provisions. For example, in Skanavi,[2] in 1996, the Court found that Article 43 EC (today Article 49 TFEU) on the freedom of establishment, applied on the facts, and consequently there was no need to consider art. 18 (1) EC.

Nonetheless, the case of Garcia Avello[3] in 2003 came to cast some doubt on the adopted approach that the citizenship provisions were not intended to extend the material scope of the Treaty. The citizenship provisions, as applied in this case, brought a number of situations within the ambit of the Treaty. In this case, the Court was willing to establish the right to equal treatment even in matters where the right to free movement and residence is not directly involved.

The most dramatic change in the approach of the ECJ came with the judgment in the Baumbast[4] case in 2002. It concerned the right of residence under article 18 EC (Article 21 TFEU). In this case, the ECJ held that a citizen of the Union who no longer enjoys a right of residence as a migrant worker in the host Member state can, as a citizen of the Union, enjoy there a right of residence by direct application of article 18 (1) EC. In addition, the Court confirmed the significance of the citizenship provisions for every national of a Member State, and particularly its implications for the non-economically active migrants.

On the facts of the case, the Court considered that article 18 EC applied even though the German national did not fulfill all the conditions of Directive 90/364[5] (now repealed and replaced by Directive 2004/38/EC), which made the right to residence in another Member State conditional on having sufficient resources and health insurance in the host state. The Court added that these limitations should be applied in conformity with the general principles of Community law and in particular with the principle of proportionality.

The refusal to Baumbast to reside in the UK on the ground that he was not covered by emergency treatment insurance in the host state, was a disproportionate interference with the right of residence which had derived directly from the Treaty.

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[1] Judgment of 5 June 1997, *Land Nordrhein-Westfalen v Uecker and Jacquet,* C-64/96 and C-65/96, ECLI:EU:C:1997:285

[2] Judgment of 29 February 1996, *Skanavi and Chryssanthakopoulos*, C-193/94, ECLI:EU:C:1996:70

[3] Judgment of 2 October 2003, *Garcia Avello*, C-148/02, ECLI:EU:C:2003:539

[4] Judgment of 17 September 2002, *Baumbast*, C-413/99, ECLI:EU:C:2002:493

[5] Directive (EEC) 90/364 of the Council on the right of residence

The judgment revolutionised the right of free movement, in that the right to reside in a host state was conferred to every citizen of the Union irrespective of whether the citizen is engaged in an economic activity.

This reasoning was followed in Grzelczyk,[6] where the ECJ reiterated that at the present state of EU law, the right of nationals of a Member State to reside in another Member State is not unconditional. However, as Grzelczyk was a citizen of the Union and was lawfully residing in Belgium, he fell within the scope of the Treaty and was therefore entitled to the prohibition of discrimination on grounds of nationality under article 12 EC (Article 18 TFEU). Even though the Member States could require students to fulfill the conditions in the Student Directive,[7] the host state could not refuse *per se* a welfare benefit to the citizen, because the student no longer had sufficient resources, and thus withdraw or refuse to renew the residence permit.

The Court held that the Belgian authorities had to provide some temporary support to the migrant student as they would for Belgian nationals. According to the Court, there was now a 'certain degree of solidarity' between nationals of one Member State and nationals of a host Member State. The right to this benefit though, is not unconditional. It is based on the premise that the migrant citizen does not become an 'unreasonable financial burden' for the host state.

In order to better understand how the jurisprudence of the Court has developed in this domain, namely that of social benefits in connection with the citizenship provisions, we have to bear in mind a few basic facts. There is an economic aspect that cannot be separated from the legal one. Indeed, the Union citizen derives rights from the application of EU law but, at the end, it is the Member State which secures and bears the cost of these rights. I dare touch upon this issue because it seems that it permeates some of the very important decisions of the Court that shaped the relevant jurisprudence. In the Baumbast case, the Grzelczyk case as well as in the cases to which I will make reference further below, the Court tried to give effect to the relevant citizenship provisions by granting to the Union citizen some welfare benefits, avoiding however to render the migrant citizen an unreasonable financial burden for the host state.

The importance of the citizenship provisions as regards the award of social benefits lies with the fact that social policies are in principle outside the competence of the Union law and are regulated by the national law of each Member State (Shared competence between the Union and the Member States under Article 4 TFEU). Through the provisions of Article 18 EC (Article 21 TFEU) in combination in particular with Article 12 EC of the pre-Lisbon Treaty (now Article 18 TFEU), which prohibited

[6] Judgment of 20 September 2001, *Grzelczyk*, C-184/99, ECLI:EU:C:2001:458

[7] Directive (EC) 2004/114 of Council on the conditions of admission of third-country national for the purposes of studies, pupil exchange, unremunerated training or voluntary service

discrimination on grounds of nationality, the Court made it possible to encroach on this almost exclusive competence of the Member States. The Court held that a citizen of the Union is entitled to certain benefits otherwise a refusal of such benefits would restrict his right to move and reside freely within the territory of the Member States and would be discriminatory on grounds of nationality.

The reaction of the Court to this issue came first with the case of Martinez Sala[8] in 1998, where the ECJ applied the citizenship provisions in relation to a child-raising allowance. The Court's reasoning was based on the fact that Mrs Martinez Sala was a Spanish national, living in Germany for quite some time. However, when she gave birth to her child and asked for the child-raising allowance she was not in possession of a residence permit. The German authorities refused the benefit on the ground that she was neither a German national nor in possession of a residence permit.

It was held that she fell under the scope of the citizenship provisions, as she was a national of one Member State residing in a host Member State. The Court also found that she was lawfully residing in Germany even though she did not hold a residence permit, a conclusion drawn by the fact that the national authorities had not asked her to leave the country.

Following the Martinez Sala case, there have been a number of cases before the Court concerning welfare benefits. It became clear that once a Union citizen is lawfully resident in a host Member State, he can rely on the principle of equal treatment to claim welfare benefits.

What was decided in the Grzelczyk case was subsequently applied in the Bidar[9] case of 15 March 2005 referred to the Court by a U.K. Court. It is another case concerning the grant of assistance to students who study in a host Member State. The Court stated that it is permissible for a Member State to ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become unreasonable burden which could have consequences for the overall level of assistance which may be granted by that state. It is then legitimate for a Member State to grant such assistance only to students who have demonstrated a certain degree of integration into the society of that State. The Court considered that such an integration could be established if the student has resided in the host Member State for a certain period of time, not necessarily for three years before the beginning of his studies, having at the same time received a substantial part of his secondary education in the host State.

[8] Judgment of 12 May 1998, *Martínez Sala*, C-85/96, ECLI:EU:C:1998:217

[9] Judgment of 15 March 2005, *Bidar*, C-209/03, ECLI:EU:C:2005:169

Another important judgment in this domain was delivered in 2002. This is the case of D'Hoop,[10] in which the Court was faced with the question of whether a Belgian national who had received her secondary education in France and then returned back to Belgium, was entitled to a tide over allowance. The Belgian authorities refused her this allowance as she had not received her secondary education in Belgium. The Court said that the case clearly fell under the personal and material scope of the Treaty as there was a cross-border element and a social benefit in question. D'Hoop is an important case in the sense that a Union citizen could use the citizenship provisions, and article 12 EC as well, against their own state. The national rule was found to be indirectly discriminatory as preventing a Belgian national from moving freely and avail herself of the rights she had as a Union citizen.

It has emerged from the jurisprudence to which I have referred that what is crucial for the award of social benefits to a European Union Citizen living in a host Member State is lawful residence. It is lawful residence that is the determining element to decide whether the Union Citizen does not become an unreasonable financial burden for the host State. The Residence Directive 2004/38 EC[11] came into force on 29 April 2004 and reflects extensively the jurisprudence of the Court on citizenship and social benefits matters. It also codifies and reviews, according to its preamble, existing community instruments dealing with workers, self-employed persons, students and other inactive persons.

The Preamble to the Directive provides for every Union citizen a right of residence for a period not exceeding three months without being subject to any conditions or any formalities other than the requirement to hold a valid identity card or passport (…). However, persons exercising their right of residence should not become an unreasonable burden on the social assistance system of the host Member State during the initial period of residence. Therefore, the right of residence for Union citizens and their family members for periods in excess of three months is subject to conditions, laid down by the Directive.

The Court has in numerous occasions declared that the rights conferred to a Union citizen through the citizenship provisions of the Treaty and of those on prohibition of discrimination have to be examined in the light of the provisions of the Residence Directive. I will limit myself to making reference to a recent decision of the Court of 11 November 2014, namely the Dano[12] case. In Dano the Court stated "that, so far as concerns access to social benefits…a Union citizen can claim equal treatment with nationals of the host Member State only if his residence in the territory of the host Member State complies with the conditions of Directive 2004/38".

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[10] Judgment of 11 July 2002, *D'Hoop*, C-224/98, ECLI:EU:C:2002:432

[11] Directive (EC) 2004/38 of the European Parliament and of the Council on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States

[12] Judgment of 11 November 2014, *Dano*, C-333/13, ECLI:EU:C:2014:2358

In this particular case the Court ruled that an unequal treatment between Union citizens who have moved and resided in another Member State and nationals of the host Member State with regard to the granting of social benefits is possible. Such unequal treatment is founded on the link established by Article 7 of the said Directive, between the requirement to have sufficient resources as a condition for residence and the concern not to create a burden on the social assistance systems of the Member States.

I am about to conclude this short presentation of mine by underlining two points:

First, the Court has interpreted the citizenship provisions of the Treaty in such a way, so as to facilitate the mobility of the Union citizen within the territory of the Member States by giving him the opportunity to enjoy social rights in the host Member State where he resides.

Second, it emerges from the jurisprudence of the Court that it has been quite cautious in keeping a just balance between the enjoyment of social rights by the citizen in the host Member State, while respecting at the same time the fact that the Member States have the competence to regulate their social policies and secure their financial stability.