The European precariat: the protection of precarious workers in the European Union

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Chapter 5: Non-economic Free Movement & Union Citizenship

1 INTRODUCTION

The classification of an individual as a worker under the *Lawrie-Blum* criteria only partially explains the system of social protection available to precarious workers.[1] It does not explain the situation of those not meeting the *Lawrie-Blum* criteria, or the situation of migrants during periods of economic inactivity. Stronger social rights for non-workers would provide protection to precarious workers regardless of their status as workers, however, the division of competences between the EU and the Member States limits the Union's ability to provide social rights to non-workers. Member States are often highly sensitive to opening their national welfare systems for non-working migrants. This means that the extension of free movement law beyond economic activity has been difficult, haphazard, and still largely incomplete.

The following chapter will assess how Union Citizenship and non-economic free movement rights in general have affected the protection provided under the *Lawrie-Blum* criteria. It will first explain the development of non-economic free movement rights in the European Union, from the original 'Residency Directives',[2] through the establishment of Citizenship of the Union, and finally the amalgamation of the rights of workers and non-workers within Directive 2004/38 (the 'Citizenship Directive'), a unifying document for the rights and protections of all EU migrants.[3] It will then discuss how the Court interprets the rights of EU citizens under Directive 2004/38 in a strict manner that sticks to the wording of the Directive. It will further explain how the Citizenship Directive fails to establish a real form of social citizenship that is comparable to the nation state and would provide residual protection for migrant workers. Instead, there is a strictly conditional system based on an

[1] Case 66/85 *Lawrie-Blum* ECLI:EU:C:1986:284. As is discussed in more detail in Chapter 4.
[2] Directive 90/364/EEC of the Council of 28 June 1990 on the right of residence OJ L 180/26; Directive 90/365/EEC of the Council on the right of residence for employees and self-employed persons who have ceased their occupational activity OJ L 180/28; Directive 93/96/EEC of the Council of 29 October 1993 on the right of residence for students OJ L (23 November 2016) 317/59.
[3] Directive 2004/38/EC of the European Parliament and of the Council 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.

idea of earned citizenship. This sees time spent lawfully resident as the overriding factor when determining the status and rights of citizens. However, employment status is linked to this idea of time, meaning that economic activity still has a prioritised status within the legal system. The Chapter finally assess the impact that this development has had on the concept of market citizenship as explain in Chapter 4, specifically how the strict and conditional system created by the Directive is problematic for non-standard and precarious workers as it means that individuals will fall between the gaps created by this strict application of the law.

2 THE DEVELOPMENT OF NON-ECONOMIC RIGHTS: PRE-CITIZENSHIP

Under the EEC, there were very few protections for individuals that were not economically active through the internal market provisions.[4] However, during the 1980s the Union gradually sought to extend the protection provided under free movement law by encompassing more groups of persons. This extension of the protections afforded to market actors happened in two ways. The first is where free movement rights were extended through the internal market provisions to encompass more persons who were not engaged in employment *per se*, but who were protected under the market-building rationale of the internal market. The second are the Residency Directives, which began the process of granting residence and limited equal treatment rights to purely non-economic individuals, such as students and non-workers.

2.1 'Non-economic' Market Rights

Some individuals that do not meet the *Lawrie-Blum* criteria can nonetheless obtain certain protections under the freedom of movement for workers provisions. However, these are still based on economic activity, namely, the migrant's past or future economic activity in the host-state. Very early on the Court held that the worker provisions will continue to protect those previously possessing the status of worker, at least for a certain period of

[4] Prior to this, whilst certain economically inactive persons were entitled to certain rights (for example, family members of workers and self-employed migrants), these were derived rights conferred on the basis of the EU migrant's economic activity.

time.[5] Furthermore, the Court explicitly stated that the rights available to migrant workers "do not necessarily depend on the actual or continuing existence of an employment relationship",[6] and that workers will be considered as such under certain provisions of EU law.[7] This means that ex-workers are in a privileged position in contrast to first time jobseekers or economically inactive citizens.[8] This is because they are considered to have established a "sufficient link of integration" with the host-Member State, this link arising through the taxes they pay by virtue of their employment, thereby contributing to the financing of the social policies of that state.[9]

The Court has also held that the Treaty provisions allowed EU migrants "to look for … an occupation or activities as employed or self-employed persons".[10] Therefore, Member States cannot exclude the right to move freely and to stay in the territory of the other Member States to seek employment there.[11] To do otherwise "would jeopardise the actual chances that a national of a Member State who is seeking employment will find it in another Member State, and would, as a result, make that provision ineffective".[12] However, the Court also held that Member States may implement a 'temporal limitation' on this residence, as this will provide the person with "a reasonable time in which to apprise themselves, in the territory of the Member State concerned, of offers of employment".[13] *In casu*, the Court considered that the British six-month residence limitation for jobseekers appeared to be reasonable.[14] This decision explicitly confirmed the right of jobseekers to remain in a host-Member State for the purpose of seeking work, and for as long as they are genuinely there for this purpose.[15] In terms of the equal treatment rights of jobseekers, the Court has held that those who move in search of employment qualify for equal treatment "only as regards access to employment".[16] This means that

[5] Case C-75/63 *Unger* ECLI:EU:C:1964:19, pp. 185 – 186.
[6] Case C-39/86 *Lair* ECLI:EU:C:1988:322, para. 31.
[7] Ibid, para. 33.
[8] S. Mantu, 'Analytical Note: Retention of EU worker status – Article 7(3)(b) of Directive 2004/38' (2013) *European Network on Free Movement of Workers*, p. 10.
[9] Case C-379/11 *Caves Krier Frères Sàrl* ECLI:EU:C:2012:798, para. 53.
[10] Case C-48/75 *Royer* ECLI:EU:C:1976:57, para. 31.
[11] Case C-292/89 *Antonissen* ECLI:EU:C:1991:80, para. 10.
[12] Ibid, para. 12.
[13] Ibid, para. 13 - 14.
[14] Ibid, para. 21.
[15] O. Golynker, 'Jobseekers' rights in the European Union: challenges of changing the paradigm of social solidarity' (2005) 30(1) *European Law Review* 111.
[16] Case 316/85 *Lebon* ECLI:EU:C:1987:302, para. 26.

wider social protections, such as the all-encompassing concept of 'social advantages' under Regulation 1612/68, did not extend as far as to include jobseekers.[17]

Finally, as well as ex-workers and jobseekers, the Court has held that the freedom of service provisions allow an individual to receive economic services whilst in another Member State without being subject to restrictions, which includes tourists, persons receiving medical treatment, and persons travelling for the purpose of education or business.[18] This is because protecting individuals from harm on the same basis as nationals and residents in the host-state "is a corollary of freedom of movement".[19] Whilst this protection retains a market-rationale, it "significantly loosened" the link between free movement rights and economic activity.[20] This protection is based on the market rationale of the internal market: i.e., that the facilitation of the freedom of movement for workers, or service provision, requires barriers to trade to be eliminated, primarily through ensuring equal treatment between Member State nationals and EU migrants.

2.2 The Residency Directives

The first real measures that extended residence and equal treatment rights to fully economically inactive persons were the three Residency Directives that established a base of residence for students, ex-workers, and self-sufficient persons.[21] Unlike the free movement provisions, these Directives had a clear social aim and contributed towards the formation of Union Citizenship. That said, they also had an economic aim, insofar as they were introduced to further harmonize residence rights in order to promote the free movement of persons, which was seen as necessary for the completion of the internal market.[22] Specifically, the Commission White Paper on the SEA emphasised the need to extend the measures ensuring the free movement of persons to

[17] Ibid, para. 26-27.
[18] Case C-286/82 *Luisi and Carbone* ECLI:EU:C:1984:35, para. 16.
[19] Case C-186/87 *Cowan* ECLI:EU:C:1989:47, para. 17.
[20] F. Wollenschläger, 'The Judiciary, the legislature and the evolution of Union Citizenship', in P. Syrpis (ed.) *The Judiciary, the Legislature and the EU Internal Market* (2012) CUP: Cambridge, p. 306.
[21] Directive 90/364/EEC; Directive 90/365/EEC; Directive 93/96/EEC (n 2).
[22] As can be seen in the recitals to the Directives.

those outside the workforce, especially students, in whose hands "the future of the Community's economy lies".[23]

During the negotiations of the Residency Directives, concerns were raised by higher-wage States over the consequences of extending the free movement provisions to all Union citizens, as their generous welfare systems could become a magnet for nationals from poorer Member States.[24] Concretely, it was considered that they needed to exclude risks for the social systems in the Member States as a result of immigration of persons who might become a burden on these,[25] in order to protect against 'social benefit tourism'.[26] Consequently, all three Directives contained a similar limitation to granting a right of residence under EU law, contained in Article 1 of each. Whilst formulated slightly differently,[27] the aim was to ensure that the individual had sufficient resources to avoid becoming a burden on the social security system of the host-Member State during their period of residence.[28]

Defining 'sufficient resources' was (and still is) a controversial point for the EU legislator and judiciary, and the term is yet to be clearly defined. The only indication in the original Residency Directives was that the condition would be fulfilled if the resources were "higher than the level of resources below which the host-Member State may grant social assistance to its nationals".[29] The Court defined the concept of sufficient resources broadly. National measures restricting residence have to proportionate to the aim of protecting the host-State's finances;[30] Member States are precluded from limiting the

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[23] European Commission, *Completing the Internal Market* (White Paper), (1985) COM (85) 310 final, p. 26.

[24] A. van der Mei, *Free Movement of Persons within the European Community* (2003), Oxford: Hart, p. 44.

[25] K. Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42(5) *Common Market Law Review* 1245, p. 1245.

[26] F. G. Jacobs, 'Citizenship of the European Union – A Legal Analysis' (2007) 13(5) *European Law Journal* 591-610, p. 596.

[27] Ex-workers required a pension "providing sufficient resources", whilst students only needed to "assure" the national authorities by statement of their resources.

[28] See the Recital and Article 1 Directive 90/364 on the right of residence; Recital and Article 1 Directive 90/365 on the right of residence for employees and self-employed persons who have ceased their occupational activity; Recital and Article 1 Directive 90/366 on right of residence for students (amended by Directive 93/96).

[29] Article 1 Directive 90/364 on the right of residence.

[30] Opinion of Advocate General Ruiz in Case C-408/03 *Commission v Belgium* ECLI:EU:C:2005:638, para. 36 - 39.

migrants' means of proof which may be relied upon;[31] and a failure to provide documentation cannot automatically result in expulsion.[32] Most famously, the Court has stated that recourse to social assistance cannot result in the automatic expulsion of the Union Citizen,[33] and that even if individuals do not have sufficient resources as required under the Residency Directives, they can still be entitled to a right of residence if the burden they place on Member State finances is not unreasonable (as stated in the Directives).[34]

The sufficient resources condition can be seen as the ultimate limitation to the free movement of persons and a relic of its economic foundation. It demonstrates that, despite a shift towards protecting economically inactive persons, EU law will not confer a right of residence to someone that cannot support themselves financially, either through engaging in meaningful employment or through self-sufficiency. The condition represents a difficult balancing act the Court must perform between ensuring citizenship rights and facilitating free movement, whilst at the same time preserving welfare systems. By including economically inactive migrants within their 'scope of solidarity', the Member State in question is likely at some point to incur financial costs due to granting them that right. However, as Jacobs notes, after a certain period of lawful residence it becomes inappropriate to apply these conditions to individuals (even economically inactive ones) seeking to claim support from the host-state.[35]

3 CITIZENSHIP OF THE EUROPEAN UNION

The Residency Directives set the stage for the development of non-economic integration. However, the most important development in the protection of economically inactive persons came through the establishment of Citizenship of the Union in the Treaty of Maastricht. The following section will explain the concept of Union Citizenship, before explaining the main provisions in the Treaty and their interpretation by the Court of Justice.

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[31] Case C-424/98 *Commission v Italy* ECLI:EU:C:2006:192, para. 37.
[32] Case C-408/03 *Commission v Belgium* [2006] ECLI:EU:C:2006:192.
[33] Case C-184/99 *Grzelczyk* ECLI:EU:C:2001:458, para. 43 - 44.
[34] C. O'Brien, *United in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (2017) Oxford: Hart Publishing, p. 43.
[35] F. G. Jacobs (n 26), 596.

3.1 Citizenship of the European Union

Citizenship can be described as a legal concept that "describes membership of, and participation in, a defined community or state, carrying with it a number of rights and duties which are, in themselves, an expression of the political and legal link between the state and individual".[36] In other words, it is a legal status that permits the individual to access to the rights and protections that accompany the status of citizen. It presupposes a legal status of equals associated with political empowerment, the enjoyment of rights, and full membership of a political community.[37] However, it also determines which individuals do *not* enjoy membership and rights This means that it can be used as a tool of exclusion as well as inclusion, particularly in the context of Europe given the sensitivity and difficulty in conferring citizenship status and rights to Europeans akin to those that exist in nation-states.[38]

When explaining Union Citizenship, many commentators use start with T.H. Marshall, who outlined the progressive introduction of civil, political, and social rights since the industrial revolution, that replaced the previous divides of "class, function and family".[39] Whilst these rights are varied, it is suggested that Marshall's framework of rights is founded on two core concepts: equality and the right to justice.[40] However, there is no precedent to dictate what foundational rights must accompany the status citizen. Marshall himself conceded that there was no 'universal principle' determining which rights and duties citizenship should entail, but that these can shift and change over

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[36] S. O'Leary, *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship* (1996) Kluwer Law: The Hague, p. 13; see also N. Nic Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47(1) *CMLRev* 1597, p. 1601; S. O'Leary, *European Union Citizenship: Options for Reform* (1996) IPPR: London (see also Section 4.4.2 on market citizenship).

[37] D. Kochenov, 'On Tiles and Pillars: EU citizenship as a Federal Denominator', in D. Kochenov (ed.) *Citizenship and Federalism: The Role of Rights* (2015) CUP: Cambridge, p. 4.

[38] J. Shaw, 'The Interpretation of European Union Citizenship' (1998) 61(3) *Modern Law Review* 293, p. 305.

[39] Ibid, p. 297; T. H. Marshall, *Citizenship and Social Class* (1950), CUP: Cambridge, p. 151; D. Chalmers, *European Union Law* (2014) (3rd Ed), CUP: Cambridge, p. 469; C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (2010), OUP: Oxford, pp. 433 – 434; D. Bellamy, 'Evaluating Union Citizenship: Belonging, Rights, and Participation within the EU' (2009) 12(6) *Citizenship Studies* 597.

[40] E. Guild, *The legal elements of European identity* (2004) The Hague: Kluwer, p. 54.

time and space.[41] As it is not a nation-state, but rather a transnational trading block and incomplete democracy founded on the idea of economic integration, comparisons between Union and national citizenship are not always particularly useful. The rights and duties applicable to citizens are often defined by the political, historical, and social context of the state in question, and thus there is no reason for Union Citizenship to mirror that of the nation state in terms of the way it functions and its underlying principles.[42]

As the previous chapter explain, a market-based form of citizenship existed in the EU well before Union Citizenship. This provided many of the rights and protection associated with having the status of citizen of a community. The difference between the two forms of citizenship is that market-based citizenship is linked to economic activity, rather than political participation in a society. What Union Citizenship sought to contribute was an attempt to broaden the horizon of opportunities of individuals by empowering them with the help of rights not secured by reason of the economic status,[43] i.e., a form of European *social* citizenship, to complement the traditional market citizenship that already existed.

At the time of its establishment, Union Citizenship was not seen as a new constitutional settlement for the status and rights of economically inactive migrants, but rather as a "cynical exercise in public relations",[44] and a "pie in the sky" with very limited concrete role to play in European integration.[45] Its inclusion is suggested to be more the more the result of Spanish concerns about the cross-border policing of terrorism than about extending free movement rights.[46] This would explain the extremely limited provisions on Citizenship contained within the Maastricht Treaty.[47] Article 8 established

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[41] J. Manza, and M. Sauder, *Inequality and Society* (2009) New York: W.W. Norton & Co, pp. 149 – 150.

[42] N. Shuibhne, 'The Resilience of Market Citizenship' (2010) 47 *CMLRev* 1597, p. 1601.

[43] D. Kochenov, 'The Oxymoron of 'Market Citizenship' and the Future of the Union', in in F. Amtenbrink, G. Davies, D. Kochenov, J. Lindeboom (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (2019) CUP: Cambridge, p. 222.

[44] J. Weiler, 'Citizenship & Human Rights', in J.A. Winter, D.M. Curtin, A.E. Kellermann, and B. de Witte (eds.) *Reforming the Treaty on European Union* (1996) Kluwer: The Hague, p. 68.

[45] H.U. Jessurun d'Oliveira, 'Union Citizenship: Pie in the Sky?', in A. Rosas and E. Antola (eds.) *A Citizens' Europe* (1995) Sage: London, p. 141; F. Wollenschläger (n 20), p. 302.

[46] C. Powell, 'Spanish Membership of the European Union Revisited' (2003), in S. Royo and P. Manuel (Eds), *Spain and Portugal in the European Union: The first fifteen years* , London: Frank Cass and Company, p. 126 – 127.

[47] See Article 8, Treaty on European Union (29.7.1992) *OJ C 191.*

Union Citizenship as being an addition to Member State nationality. Article 8a provided the right "to move and reside freely within the territory of the Member States", although this was "subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect". Other rights included the right to vote and stand in municipal elections in a host-Member State (Article 8b), the right to consular protection in third countries (Article 8c), and the right to apply to the European ombudsman (Article 8d). With such limited provisions contained in the Treaty, it fell upon the Court to interpret the precise scope of such rights, as will be explained in the following section.

3.2 The (expansive) early Citizenship case-law on

Despite the apparently limited scope of the Treaty provisions on Union Citizenship, there was much speculation over its precise nature and scope, as well as its direction and ultimate destination.[48] Its unknown nature was gradually resolved through a series of decisions in the 1990s and 2000s that emphasised the conditional nature of accessing social protections, whilst significantly extending the residence and equal treatment rights of economically inactive persons.[49] The seminal case of Union Citizenship is *Martínez Sala*,[50] where the Court held that a Spanish national residing lawfully in Germany for over 20 years could not be denied equal treatment with regard to accessing child benefit,[51] solely because her national residence permit had expired and she was yet to receive a replacement. The case was ground-breaking insofar as the Court linked EU citizenship with the Treaty right to non-discrimination, as unlike the four fundamental freedoms Union

[48] For example, see J. Shaw 'The Many Pasts and Futures of Citizenship in the EU' (1997) 22(6) *European Law Review* 22 (6), pp. 554–572; J. Weiler, 'European Neo-Constitutionalism: In search of Foundations for the European Constitutional Order' (1996) 44(3) *Political studies*, pp. 517–533; D. Kostakopoulou, 'Towards a Theory of Constructive Citizenship in Europe' (1996) 4(4) *Journal Political Philosophy* 337–358.

[49] H. Verschueren 'Preventing "benefit tourism" in the EU: A narrow or broad interpretation of the possibilities offered by the ECJ in Dano?' (2015) 52(2) *Common Market Law Review* 363, p. 364.

[50] Case C-85/96 *María Martínez Sala* ECLI:EU:C:1998:217.

[51] Defined as a family benefit under Article 1(u)(i) Regulation 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 149, 5.7.1971, p. 2–50; see also Court of Justice, judgment of 12 May 1998, *Martínez Sala*, para. 24.

Citizenship did not contain any Treaty-based equal treatment provision.[52] *Martinez-Sala* excited many commentators about the prospect of a far-reaching Union Citizenship that could extend the right to equal treatment far beyond the realms of economic activity and ensure legal status purely on the basis of factual residence,[53] as it suggested that mobile EU citizen were covered by the principle of equal treatment even when concerning full access to all social benefits in a host-Member State.[54]

In *Baumbast*,[55] the Court held that the UK's decision to reject a derived right of residence to Mr Baumbast's Colombian wife was disproportionate, even though he arguably failed to meet the conditions laid down in Directive 90/364 which was applicable to him as a non-worker. This required him to have health insurance to cover *all* risks, however, his insurance did not cover emergency treatment in the UK.[56] Despite this, the Court held that Mr Baumbast could rely upon [Article 21 TFEU] directly to enforce his residence rights and derived rights for his family.[57] *Baumbast* demonstrates the importance the Court placed on the primary law right to move and reside under (now) Article 21 TFEU. This was rhetorically, as the Court claimed that "Union citizenship is destined to be the fundamental status of nationals of the Member States",[58] and also substantively, as the Court made the conditions and limitations contained in secondary legislation subordinate to the primary law right of free movement, which could be relied upon directly notwithstanding the applicability of Directive 90/364.

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[52] Articles 8(2) EC (now Articles 20 & 21 TFEU) and Article 6 EC (now Article 18 TFEU) respectively.

[53] J. Shaw 'A View of the Citizenship Classics: Martinez Sala and Subsequent Cases on Citizenship of the Union', in Maduro and Azoulai (eds.) *The Past and Future of EU Law – The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (2010) Oxford: Hart; see also C. Closa, 'The Concept of Citizenship in the Treaty of the European Union' (1992) 29(6) *Common Market Law Review* 1137–1169; C. Vincenzi 'European citizenship and free movement rights in the United Kingdom' (1995) *Public Law* 259–275; E. Meehan, 'Citizenship and the new European Community' (1993) 64(2) *Political Quarterly* 172–186.

[54] S. Giubboni, 'Free Movement of Persons and European Solidarity: A Melancholic Eulogy', in *Residence, Employment and Social Rights of Mobile Persons: On How EU Law Defines Where They Belong* (2018) Cambridge: Intersentia, pp. 75 – 88, p. 82.

[55] Case C-413/99 *Baumbast* ECLI:EU:C:2002:493.

[56] Ibid, para. 89.

[57] C. Timmermans, 'Martinez Sala and Baumbast revisited', in Maduro and Azoulai (eds.) *The Past and Future of EU Law – The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (2010) Oxford: Hart, p. 345–355.

[58] *Baumbast,* para. 82.

Zhu & Chen concerned a Chinese couple that had a child in Northern Ireland, which is formally part of the United Kingdom, however, under the Belfast Agreement, those born in the territory of Northern Ireland can choose to have Irish nationality instead of, or as well as, British nationality. Baby Chen's parents opted for her to have dual nationality, meaning she was technically an Irish national residing in the UK. The Court held that an Irish minor citizen was entitled to rely directly on [Article 21 TFEU], however, it also emphasised that under Directive 90/364 Member States could require that these persons have sickness insurance in respect of all risks and sufficient resources to avoid becoming a burden on the social assistance system of the host-Member State.[59] Despite the family situation not being covered by Directive 90/364 (which only provided a right to reside for dependant family members, not for carers of 'dependent' Union Citizens),[60] the Court held that the refusal of a residence right for a parent of a Union Citizen would "deprive the child's right of residence of any useful effect", meaning that the parent required a right to reside for an indefinite period, although the state can impose the same conditions as required for the Union Citizen.[61] *Zhu & Chen* confirmed that Union Citizenship as an "independent source of rights" not reliant on other provisions of law to give it further effect.[62] Moreover, it is another example of the Court reading beyond the wording of the Directive in order to provide protection to certain individuals.

Trojani concerned a homeless French national who was living and working at a Belgian Salvation Army centre in return for 'pocket money', food, and shelter. His application for the Belgian minimex social assistance benefit was denied as Belgium considered that he did not have sufficient resources as required under Directive 90/364. The Court conceded that Mr Trojani claimed the minimax precisely due to his lack of financial resources, which was an explicit requirement for a right of residence under Directive 90/364.[63] The Court also conceded that, unlike *Baumbast*, denying a right of residence would not go beyond what was necessary to pursue the objective of protecting the

[59] Case C-200/02 *Zhu & Chen* ECLI:EU:C:2004:639, para. 26 - 27.
[60] *Zhu & Chen*, para. 42 - 44.
[61] Ibid, para. 45 – 47: the Union Citizen "is covered by appropriate sickness insurance and is in the care of a parent who is a third-country national having sufficient resources for that minor not to become a burden on the public finances of the host Member State".
[62] F. G. Jacobs (n 26), p. 606
[63] Case C-456/02 *Trojani* ECLI:EU:C:2004:488, paras. 33 – 35.

Member State's social assistance system.[64] However, the Court then held that Mr Trojani was not necessarily prohibited from relying on the right to equal treatment under [Article 18 TFEU]. It outlined three situations where an application for social assistance must be granted.[65] The first two were if they (i) were engaged in genuine economic activity, or (ii) have resided in the host-state for a "period of time" (*à la* Martínez Sala). *Trojani* added a third situation: if a Member State granted a residence permit to the individual based on national law, any decision not to grant social benefits or recognise this residence could violate the principle of non-discrimination under Article 12 EC, regardless of the individual's status under Directive 90/364. The Member State would still be permitted to remove the individual if they no longer fulfilled the necessary conditions for a right to reside, however, this could not be the automatic result of a claim for social assistance.[66] *Trojani* pushed the scope of Union Citizenship to its limit: regardless of their status under EU primary or secondary legislation, if the individual was in possession of a *national* residence permit, this by itself could be used for an *EU* right to equal treatment, which could only be denied if the Member State actively rescinded their residence permit.[67]

The Court applied a similar broad approach in the case of students. In *Grzelczyk*, Belgium denied a claim for minimum subsistence payments for a French student in the final year of his studies. This was arguably in line with Directive 93/96, as Article 1 stated that students must assure national authorities that they were in possession of sufficient resources to avoid becoming a burden on the host-state's social assistance system during their studies, and Article 4 stated that they would have a right of residence as long as these conditions were met. A simple reading of this provision suggested that students who no longer fulfilled such conditions were not entitled to rely upon the Directive. However, the Court held that denying a right of residence could never be the 'automatic consequence' of a request of social assistance.[68] Moreover, the Member State must demonstrate "a degree of financial solidarity" with the migrant student, assuming the difficulties are temporary and the individual does not become an "unreasonable" burden on the host

[64] Ibid, para. 36.
[65] Ibid, paras. 41 – 44.
[66] Ibid, para. 45.
[67] N. Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52(4) *CMLRev* 889, p. 930 – 931.
[68] *Grzelczyk*, para. 43.

state.[69] The Court's reasoning introduced a subtle distinction between 'reasonable' burdens, which should be permitted, and burdens so 'unreasonable' that they break this bond of financial solidarity between host-state and migrant student.[70]

The Court also used the introduction of Union Citizenship to extend the scope of free movement provisions, as established earlier in its case-law. For example, in *Bidar*, the Court used Union Citizenship to find that the legal situation had changed since earlier cases, reversing those decisions, and holding that the principle of non-discrimination under [Article 18 TFEU] was also applicable in the case of maintenance grants for students.[71] However, Member States could still require a 'genuine link' between applicant and host-state, which could be expressed through a 'sufficient level' of integration, thereby permitting an economically inactive student to access student grants. The Court held that the UK rule, which required three years' residence to establish such a link, was in principle permitted.[72] However, as it made it impossible for nationals of other Member States to demonstrate 'integration' in any way other than three years' residence, the Court found that it was too restrictive.[73] As Mr Bidar had undergone a significant portion of his secondary education in the UK, this was sufficient to establish a 'genuine link' with the host society.[74]

The Court used a similar approach in the context of jobseekers. In *Collins*, it held that a 'genuine link' between the jobseeker and the employment market could be established through a 'reasonable period' of residence within which the candidate 'genuinely' sought work.[75] Furthermore, it held that the introduction of Union Citizenship added to the protection of jobseekers, and meant that Member States must grant social benefits "intended to facilitate access to employment in the labour market".[76] That said, Union Citizenship did not alter the case-law of the Court on service recipients, as cases such as

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[69] Ibid, para. 44.
[70] D. Kostakopoulou, 'European Union Citizenship: Writing the Future' (2007) 13(5) *European Law Journal* 623–646; C. O'Brien (n 31), p. 43.
[71] Case C-209/03 *Bidar* ECLI:EU:C:2005:169, paras. 39 – 39; *Lair*; Case C-197/86 *Brown* ECLI:EU:C:1988:323; see F. G. Jacobs (n 26), p. 603.
[72] *Bidar*, para. 52.
[73] Ibid, para. 61.
[74] Ibid, paras. 60 – 62.
[75] Case C-138/02 *Collins* ECLI:EU:C:2004:172, para. 69.
[76] Ibid, para. 63; see also Case C-258/04 *Ioannidis* ECLI:EU:C:2005:559, para. 22.

Bickel & Franz (which took place after its introduction),[77] were decided on the basis of them being recipients of services, meaning that it was unnecessary to consider them on the basis of Union Citizenship,[78]

The main examples of the Court applying the limitations and conditions contained in the Directives were at the expense of the Member States. For example, in *Commission v Netherlands*, the Court held that [Article 21 TFEU] provided a directly effective right to free movement, which could only be subject to limitations contained in the Residency Directives.[79] The Dutch rule, which required proof of sufficient resources for a period of one year, regardless of the actual length of stay was held to be "manifestly disproportionate" to the objective of protecting the Member State from unreasonable burdens.[80] The Court also held that a Belgian rule which meant that a failure to produce supporting documents necessary for a residence permit led to automatic order for deportation "impairs the very substance of the right of residence directly conferred by Community law", and as such was disproportionate restriction on Union Citizenship and Directive.[81]

These early cases significantly expanded the rights available to economically inactive persons, even if this nexus of rights was not as far-reaching as those available to workers.[82] The Court linked Union Citizenship and national residence with equal treatment under Article 18 TFEU; expanded the scope of equal treatment under EU law to include social benefits such as unemployment benefit for jobseekers and student maintenance grants;[83] established a right of residence directly under [Article 21 TFEU]; and dictated that any restriction based on secondary law had to be assessed in view of its proportionality.[84] This meant that the individual circumstances of the

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[77] Case C-274/96 *Bickel & Franz* ECLI:EU:C:1998:563.

[78] F. G. Jacobs (n 26), p. 594.

[79] Case C-398/06 *Commission v Netherlands* ECLI:EU:C:2008:214, paras. 27.

[80] Ibid, paras. 28 - 29.

[81] Case C-408/03 *Commission v Belgium*, paras. 67 - 68.

[82] This was the case even after the adoption of the 'Residency Directives': Directive 90/364/EEC of 28 June 1990 on the right of residence, OJ L 180, 13.7.1990, p. 26–27; Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, OJ L 257, 19.10.1968, p. 13–16; Directive 93/96/EEC of the Council of 29 October 1993 on the right of residence for students, OJ L 317, 18.12.1993, p. 59–60; See D. Kostakopoulou 'Nested "Old" and "New" Citizenships in the European Union' (1999) 5(3) *Columbia Journal of European Law*, 389–414, pp. 404–405.

[83] K. Hailbronner (n 25), p. 1249.

[84] N. Shuibhne (n 67), p. 931.

claimant would always be relevant in assessing the legitimacy of the authorities' action.[85] However, even during this era of expansive case-law, Union Citizenship was not a 'new' area of law, but rather an extension of some of the rights that were previously only available to market actors.[86] It was therefore an attempt to "generalise a status of social integration already widely acquired, although in a more limited way", with the extension of the right to non-discrimination being the main development.[87] Whilst there was a shift away from economic activity, which was no longer a prerequisite for protection under EU law,[88] Citizenship has always been a residual freedom, as the Court always begins its analysis under the economic freedoms if possible.[89]

4 One Directive to Rule Them All: Directive 2004/38

Directive 2004/38 had the purpose of unifying the fragmented legal landscape consisting of several Directives and Regulations into one coherent legislative instrument.[90] It repealed nine pre-existing Directives and amended the Worker's Regulation. For the economically active, the Directive changes little in terms of obtaining and retaining that status, particularly in the case of inability to work, unemployment, or higher education,[91] although it does codify many of the rights established through the case-law of the Court as well as adding new ones. For economically inactive persons, whilst the Directive is in part a response to Member States' concerns over the reach of Union Citizenship, it did not "turn back the wheel" in terms of social

[85] C. O'Brien, E. Spaventa, & J. De Coninck, 'Comparative Report 2015 The concept of worker under Article 45 TFEU and certain non-standard forms of employment' (2016) *DG for Employment, Social Affairs and Inclusion* FreSsco Contract: VC/2014/1011, p. 22.
[86] See the Opinion of Advocate General Sharpston in Case C-34/09 *Zambrano* ECLI:EU:C:2010:560, para. 3. This is opposed to the right to the genuine enjoyment of Union Citizenship under Article 20 TFEU, as developed in Case C-34/09 *Zambrano* ECLI:EU:C:2011:124 and later cases.
[87] S. Giubboni (n 54), p. 80.
[88] F. Wollenschläger (n 20), p. 302.
[89] To that effect, see Case C-193/94 *Skanavi and Chryssanthakopoulos* [1996] ECLI:EU:C:1996:70, para.22; see also *Trojani*, where the Court analyzed Mr Trojani's position as a worker before his position as a Union Citizen
[90] As stated in the Directive, it amends Regulation (eec) No 1612/68 on freedom of movement for workers within the Community and repeals 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 and 93/96/EEC.
[91] K. Hailbronner (n 25), p. 1259.

protection.[92] It did tighten the rules in certain respects, however, in others it further strengthened the right of residence of economically inactive persons, by adding various categories of residence and extending equal treatment rights.[93] The following section will provide an outline of the main provisions and protections contained within the Directive. This will provide a basic overview of the terms, rights, and limitations included within it, which will assist when explaining the Court's *acquis* following the adoption of the Directive.

4.1 The Right to Reside under Directive 2004/38

Directive 2004/38 fully regulates the rules on residence rights for both economically active and inactive EU Citizens. It divides residence into three categories based on the time spent in the host-state: (i) short term residence under Article 6; (ii) medium-term under Article 7; and (iii) long-term/permanent residence under Article 16.[94]

Under Article 6, EU citizens have a right to reside in a host-Member State for up to three months without any conditions or formalities, other than the requirement to hold a valid identity card or passport.[95] Whilst their residence is almost unconditional, they have very limited rights during this period. Recital (21) of the Directive states that "it should be left to the host Member State to decide whether it will grant social assistance during the first three months of residence", which suggests that, due to a virtual absence of solidarity, short-term residents enjoy very limited equal treatment protection, at least in terms of entitlement to social assistance.[96]

Under Article 7(1), individuals have a right to reside in a host-Member State for a period between 3 months and 5 years as long as they: (a) are a worker or self-employed person; (b) have sufficient resources for themselves and their

[92] F. Wollenschläger (n 20), p. 319.
[93] Ibid.
[94] Using the distinction as outlined by C. Barnard, 'EU Citizenship and the Principle of Solidarity' (2005) Oxford: Hart Publishing, p. 160; and A. Somek, 'Solidarity decomposed: being and time in European citizenship' (2007) *32 European Law Review* 787, p. 791.
[95] P. Minderhoud, 'Sufficient Resources and Residence Rights under Directive 2004/38', in *Residence, Employment and Social Rights of Mobile Persons: On How EU Law Defines Where They Belong* (2018) Intersentia: Cambridge, pp. 47-73, p. 48.
[96] A. Somek (n 91), p. 791.

family members not to become a burden on the social assistance system of the host Member State and have comprehensive sickness insurance; (c) are enrolled at a private or public establishment; or (d) are a family member accompanying the Union Citizen. The Directive states that all residents under Article 7 "shall have a right of residence as long as they meet the conditions set out therein".[97] Article 7(3) explains that individuals can retain the status of worker or self-employed if they are (a) temporarily unable to work due to illness or accident, (b) unemployed and register with a jobcentre following a period of over 12 months' employment, (c) are unemployed and register with a jobcentre following a period of under 12 months' employment (which can be limited to six months), or (d) embark on vocational training.[98] Article 7 therefore establishes a conditional right of residence for longer-term residents in a host-state, indicating a limited amount of solidarity between EU migrant and host-state that is conditional upon them abiding by certain criteria.[99] It should be noted that (in line with idea of market citizenship), assuming the individual obtains worker-status, the conditions of sufficient resources and sickness insurance do not apply to them.[100]

Article 16 provides the right of permanent residence: a new inclusion within the Directive which is stated to "strengthen the feeling of Union citizenship and is a key element in promoting social cohesion", and once obtained should be unconditional "in order to be a genuine vehicle for integration into the society".[101] Under Article 16(1), Union citizens residing "legally for a continuous period of five years" have the right to permanent residence. However, the Directive is silent on the precise conditions and limitations accompanying this status, including the meaning of the "legally" and "continuously". Permanent residence is not subject to the Chapter III conditions, which means that after five years, economically inactive citizens no longer have to possess sufficient resources or comprehensive sickness insurance. This means that permanent residents "partake fully in the blessings of national solidarity" as they are entitled to almost exact parity with Member State nationals (and EU migrant workers) under national conceptions of

[97] Article 14(2) Directive 2004/38.
[98] If the individual is *not* involuntarily unemployed, then this must be linked to the individual's previous profession
[99] A. Somek (n 94), p. 791.
[100] K. Hailbronner (n 25), p. 1259; P. Minderhoud (n 95), pp. 47-73, p. 48.
[101] Rectials (17) & (18), Directive 2004/38.

solidarity.[102] The only requirement on permanent residents in that they remain physically present in the host-state territory, which can be lost if absent from the host-state for a period exceeding two consecutive years.

Family members derive residence status from a Union Citizen that satisfies the conditions required for a right of residence under the Directive.[103] They are defined as a spouse, registered partner, direct descendant under the age of 21 and dependant, and dependant direct relatives in the ascending line.[104] Member States shall "facilitate entry and residence" for other family members that are dependent on a Union Citizen, or the partner of a Union Citizen with whom they are in "a durable relationship, duly attested".[105] They can also gain their residence status independently of the Union Citizen in the case of the death or departure of the Union citizen,[106] or the termination of the marriage or registered partnership.[107]

The Directive also provides a right of residence for jobseekers. Article 7(3) grants jobseekers the ability to retain the status of worker if seeking a job following becoming involuntarily unemployed. Furthermore, Article 14(4)(b) states that if the Union citizen enters the Member State in order to seek employment, then they "may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged". The Court has interpreted this provision as conferring a limited right of residence to jobseekers.[108]

4.2 Limitations on the Right to Reside

Directive 2004/38 directly transfers the requirement that economically inactive individuals must have "sufficient resources and sickness insurance" in order to "not become an unreasonable burden on the social assistance system of the host Member State" from the earlier Residency Directives. The Commission has stated that the idea of 'sufficient resources' must be

[102] A. Somek (n 94), p. 791.
[103] See Article 6(2), 7(1)(d), and 16(2) Directive 2004/38.
[104] Article 2(2) Directive 2004/38.
[105] Article 3(2) Directive 2004/38.
[106] Article 12 Directive 2004/38.
[107] Article 13 Directive 2004/38.
[108] Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597, paras. 56 – 57; Case C-710/19 *G.M.A.* ECLI:EU:C:2020:1037, para. 26.

interpreted in line with the Directive's objective of facilitating free movement, so long as this does not result in an unreasonable burden on the host Member State's social assistance system.[109]

There is a lack of clarity over the definition of this term, which is the result of difficult negotiations in the legislative process. Denmark, Germany, and the Netherlands considered that Member States should be able to unilaterally set the threshold, whilst the Commission considered that this would not be possible, given the range of cash and non-cash resources that should be considered, the origin of such resources, and that a person's situation will change over time.[110] The result was a typical compromise that included both considerations. Under Article 8(4), Member States "may not lay down a fixed amount which they regard as sufficient resources but must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which Member State nationals become eligible for social assistance". The Directive's language is confusing: it prohibits Member States from laying down fixed amounts, and yet goes on to set a minimum threshold based on social assistance benefits.[111] This apparent contradiction is indicative of the tension at the heart of the Directive regarding the granting of social benefits to economically inactive persons.

The Commission has also stated that Member States can only expel individuals if they cannot prove that they fulfil the conditions applicable to their residence status.[112] However, it is unclear whether simply not having sufficient resources, or claiming (and being denied) social assistance benefits is enough to justify this expulsion of the individual.[113] The Directive states that an expulsion measure shall not be the "automatic consequence" of the individual seeking recourse to social assistance in a host-Member State.[114] The normative reason behind this is that persons exercising their right to residence should not become "an unreasonable burden on the social assistance system of the host Member State".[115] This suggests that individuals should not be

[109] Commission Communication on guidance for better transposition and application of Directive 2004/38/EC, COM (2009) 313 final, p. 8.
[110] P. Minderhoud (n 92), pp. 50 – 51.
[111] Ibid, p. 50.
[112] Case C-215/03 *Oulane* ECLI:EU:C:2005:95, para. 55; Case C-408/03 *Commission v Belgium*, para. 66.
[113] K. Hailbronner (n 25), p. 1260.
[114] Ibid, p. 1261.
[115] Recital 10, Directive 2004/38.

expelled from the host-state so long as they do not represent an unreasonable burden on the host-state, even if for a limited period they may not have sufficient resources and therefore place a *reasonable* burden on the host-state.[116] Article 14 states that short-term residents have a right of residence as long as they do not become an *unreasonable* burden. For medium-term residents, this right to reside is dependent on them meeting the conditions contained therein and having sufficient resources not to become a "burden" on the host state.[117] This suggests that medium-term residents have a stricter limitation imposed upon them, as they cannot become any burden, even if reasonable.[118] This is strange, given that medium-term residents have a greater link of solidarity with the host-state. In other aspects the Directive makes no distinction between short-term and medium-term residents, and Article 7 residents are in fact in a stronger position as Member States are obliged to take into account the personal circumstances of the individual claiming social assistance.[119] As such, the precise scope of the sufficient resources or unreasonable burden limitations are still unclear.

4.3 Equal Treatment Rights & Limitations

Directive 2004/38 contains a general equal treatment provision under Article 24(1): "Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens (and family members) residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty". However, the Directive also includes limitations on this general right. Article 24(2) states that there is no obligation to grant social assistance to EU citizens during the first three months of residence, or a "longer period" for jobseekers. It furthermore restricts the granting of student maintenance grants and loans to persons who are not workers, self-employed persons, or those with permanent residence status. Whilst it is incorrect to

[116] D. Carter and M. Jesse, 'The Dano Evolution: Assessing Legal Integration and Access to Social Benefits for EU Citizens' (2018) 3(3) *European Papers* 1179-1208, p. 1186. D. Kostakopoulou (n 67); see Opinion of Advocate General Villalon in Case C-308/14 *Commission v United Kingdom* ECLI:EU:C:2015:666, para. 97; D. Kramer, 'Earning Social Citizenship in the European Union: Free Movement and Access to Social Assistance Benefits Reconstructed' (2016) 18 *CYELS* 270-301, p. 294-296.

[117] As contained in Articles 14(1), 14(2), and 7(1)(b) of Directive 2004/38.

[118] A. Somek (n 94), p. 798.

[119] Ibid, p. 799.

claim, as has been done, that this excludes social benefits from the scope of application of EU law,[120] it does definitely allow for stricter conditions to be imposed on the social assistance entitlement. The provision maintains the distinction between economically active and inactive persons, and whilst the former can obtain stronger equal treatment rights by gaining permanent resident status, the five years' residence requirement means that it is difficult to see how this can be obtained without engaging with the market during this period.[121]

5 The Case-law on Union Citizenship following the Adoption of Directive 2004/38

Directive 2004/38 significantly changed the legal landscape for both economically active and inactive EU citizens. It introduced new forms of residence, established specific equal treatment rights, and laid down new limitations and conditions. As the Court has defined these concepts and provisions more clearly, it has been harshly criticised for engaging in politics, abandoning its previously progressive trajectory, and even "dismantling" Union Citizenship.[122] The following section will explain the development of the *acquis* on Directive 2004/38 by looking at the general trends in the Court's approach towards its interpretation. It will then explain the consequences of this approach for precarious workers.

5.1 Early Case-law

One of the first cases indicative of the Court's approach towards the interpretation of the Directive is *Förster*.[123] Whilst the facts of the case took

[120] K. Hailbronner (n 25), p. 1252.

[121] Ibid, p. 1263.

[122] See, amongst others, U. Šadl and S. Sankari, 'Why did the Citizenship Jurisprudence Change?', in D. Thym, *Questioning EU Citizenship: Judges and Limits of Free Movement and Solidarity in the EU* (2017) Oxford: Hart Publishing; C. O'Brien, 'The ECJ sacrifices EU Citizenship in vain: *Commission v United Kingdom*' (2017) 54(1) *CMLRev* 209; S. Giubboni (n 54).

[123] Case C-158/07 *Förster* ECLI:EU:C:2008:630. For more information on the decision see O. Golynker, 'Case C-158/07, Jacqueline Förster v. Hoofddirectie van de Informatie Beheer Groep, Judgment of the Court (Grand Chamber) of 18 November 2008' (2009) 46(6) *Common Market Law Review,* pp. 2021–2039.

place prior to the adoption of Directive 2004/38, the Court's *obiter dictum* statements regarding the Directive demonstrate a shift in approach. *Förster* concerned a German student in Netherlands, who was working and receiving a study grant during her studies. However, she was asked to re-pay the money she received once her employment had ceased, as this grant was only available to workers and those resident for over five years. Ms Förster claimed that her link with the host-society meant that the host-state was obliged to assist her thorough financial solidarity, as was the case in *Bidar* and *Grzelczyk*.[124]

Advocate General Mazak applied a similar approach to earlier cases, finding that notwithstanding the fact that Member States are "under no obligation" to grant maintenance aid for studies prior to acquiring permanent residence, and "thus not before five years have expired", a proportionality assessment had to be placed upon the national rule.[125] However, the Court made a clear departure from the earlier decisions. It applied the same wording as previous cases but changed the substance of the test dramatically. Whilst in *Bidar* three years' residence was just one indicator used to consider if a genuine link existed, in *Förster* the Court accepted the Dutch rule defining five years' legal residence as the *only* way of proving a sufficient degree of integration with the host-state.[126] This condition was by itself held to be proportionate in pursuing the aim of guaranteeing a genuine link with the Member State.[127] Despite the non-applicability of Directive 2004/38, the Court gave weight to it in its reasoning. It emphasised the importance of the right to permanent residence under Article 16(1) Directive 2004/38, which also requires five years residence to acquire and in fact is a requirement for entitlement to student grants and financing under Article 24(2).[128]

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[124] On this issue, see M. Jesse, 'The Legal Value of 'Integration' in European Law' 17(1) *European Law Journal*, pp. 172–189; S. O'Leary, 'Equal Treatment and EU Citizens: A new chapter on cross-border educational mobility and access to student financial assistance' (2009) 34(4) *European Law Review*, pp. 612–627; see also A. Hoogenboom, 'CJEU case law on EU Citizenship: normatively consistent? Unlikely! A response to Davies "Has the Court changed, or have the cases?"' (2018) *Maastricht University Blog*, available at: https://www.maastrichtuniversity.nl/blog/2018/11/cjeu-case-law-eu-citizenship-normatively-consistent-unlikely-response-davies%E2%80%99-%E2%80%98has

[125] Opinion of Advocate General Mazak in Case C-158/07 *Förster* ECLI:EU:C:2008:399, para. 130 – 131.

[126] D. Carter and M. Jesse (n 116), p. 1189.

[127] *Förster*, paras. 52 – 54. D. Carter and M. Jesse (n 116), p. 1189.

[128] *Förster*, para. 55.

This shifted the Court's approach from a qualitative one based on an open list of factors, to a quantitative test that sets the 'sufficient level of integration' as five years' residence only, without changing the wording of the test at all.[129] Other factors, such as attending compulsory or higher education institutions, were no longer relevant. The Court also showed more deference to the EU legislature as it applied the understanding of integration based on economic activity or permanent residence as contained in Directive 2004/38, even though the Directive did not apply to the facts of the case. This suggested that, as long as the national measure complied with the Directive's limitations, the Court would not double guess it by applying the principle of proportionality.[130] As such, the *Förster* decision may have been a harbinger of a more formal approach towards citizenship cases based on a more literal reading of Directive 2004/38,[131] despite the Directive not actually applying in the case.

The first major cases where the Directive did apply concerned the newly introduced concept of permanent residence under Article 16(1). In *Ziółkowski & Szeja*,[132] the Court was asked whether residence granted on the basis of *national* law could qualify the individuals for permanent residence on the basis of Article 16(1), even if such residence was not in compliance with the Directive. In this case the applicants were residing purely on the basis of German national humanitarian law, were economically inactive, and had insufficient resources to obtain a right of residence under Article 7. The Court had already held in *Lassal* that only residence completed "in accordance with earlier European Union law instruments" should be considered when determining whether there has been five years residence under Article 16(1),[133] which already suggested a departure away from the Court's reasoning in *Trojani*, where national residence was held to give rise to rights under EU law.

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[129] M. Jesse (n 124); S. O'Leary (n 124), p. 622.

[130] D. Carter and M. Jesse (n 116), p. 1198; K. Hailbronner (n 25), p. 1253.

[131] N. Shuibhne, 'The Third Age of EU Citizenship: Directive 2004/38 in the case law of the Court of Justice', in P. Sypris (ed.) *The Judiciary, the Legislature and the EU Internal Market* (2012), CUP: Cambridge, pp. 331 – 362, p. 350.

[132] Joined Cases C-424/10 and C-425/10 *Ziółkowski & Szeja* ECLI:EU:C:2011:866.

[133] Case C-162/09 *Lassal* ECLI:EU:C:2010:592, para. 40; M. Jesse & D. Carter, 'Life after the *Dano*-Trilogy: Legal Certainty, Choices and Limitations in EU Citizenship Case Law', in N. Cambien, D. Kochenov, & E. Muir, *European Citizenship under Stress: Social Justice, Brexit and Other Challenges* (2020) Leiden: Brill Nijhoff, p. 146.

The Advocate General took an inclusive approach that was more in line with the Court's reasoning in *Trojani*. Using the Court's decision in *Dias*,[134] he argued that Article 16(1) was above all a tool to assist with the integration of EU Citizens in a host-state. This meant that length of residence on the basis of national law, as well as EU law, should be considered in addition to other 'qualitative factors'.[135] The use of *Dias* is arguably unhelpful, as the outcome of the case was that periods spent incarcerated should *not* count towards obtaining permanent residence under the Directive,[136] which would not seem to be comparable to *Ziółkowski*.

The Court did not follow the AG, instead applying a more textual/literal reading of the Directive. The Court held that the definition of 'legal' and 'continuous' residence for 5 years under Article 16(1) must be interpreted autonomously from national law.[137] There is no reference to national law in Articles 7 or 16(1), which suggests that for the purposes of these provisions, only residence under the Directive is relevant. Logically, this means that only residence in compliance with Article 7 can lead to permanent residence status under Article 16(1). That said, periods of residence completed before the entry into force of the Directive or even before the Member State's accession which *are* compliant with the Directive can give rise to permanent residence rights.[138]

The Court applied a similar approach in *Alarape & Tijani*.[139] Ms Alarape had worked briefly in self-employment and her son was in full-time education. Following her divorce in 2010 she claimed permanent residence status, however, this was rejected as the UK considered that the necessary conditions had not been met as she had only worked for two years. The Court was asked to consider whether residence based on Article 12 Regulation 1612/68, which granted a right of residence to primary carers of children pursuing studies in a host-state in order to not deprive the child of rights conferred by EU law,

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[134] Case C-325/09 *Dias* ECLI:EU:C:2011:498, para. 64; Opinion of Advocate Genera Bot in Joined Cases C-424/10 and C-425/10, *Ziółkowski & Szeja* ECLI:EU:C:2011:575, para. 53.

[135] Opinion of Advocate Genera Bot in *Ziółkowski & Szeja*, paras. 53–54; M. Jesse & D. Carter (n 133), p. 146.

[136] *Dias*, para. 64.

[137] *Ziółkowski & Szeja*, para. 47; M. Jesse & D. Carter (n 133), p. 146 - 147.

[138] Ibid, para. 63; see also M. Jesse, 'Joined Cases C-424/10, Tomasz Ziółkowski v. Land Berlin, and C-425/10, Barbara Szeja, Maria-Magdalena Szeja, Marlon Szeja v. Land Berlin' (2012) 49(6) *CMLRev* 2003.

[139] Case C-529/11 *Alarape & Tijani* ECLI:EU:C:2013:290.

must be taken into account for the purposes of Article 16(1) Directive 2004/38.[140]

The Court held that permanent residence for a third-country national is dependent on both the Union citizen and family member satisfying the conditions laid down in the Directive.[141] It used the reasoning in *Ziolkowski*, i.e., that Article 16(1) residence requires residence in compliance with Article 7 of the Directive, to find that only "periods of residence satisfying the conditions laid down in Directive 2004/38" may be considered for the purposes of permanent residence, meaning that residence based solely on Regulation 1612/68 cannot have any effect on acquiring a right of permanent residence under Directive 2004/38.[142]

These cases demonstrate the autonomous value of the Directive. An individual cannot rely on periods of residence based on national law or other EU legislation to obtain permanent residence under the Directive. In other words, a (permanent) right of residence under the Directive must be compliant with the conditions set out in the Directive itself. This effectively retreats from the Court's previous approach of combining national residence with EU-based rights, like in *Trojani*. This can be compared to *Förster* which established a closed system of residence, whereby the conditions for legal residence and accompanying equal treatment rights are defined and granted exclusively by Directive 2004/38. In *Förster* this link was less explicit than the permanent residence cases, although the Court endorsed a Dutch rule that transposed the Directive (and made a clear link between permanent residence and study grants).[143]

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[140] Opinion of Advocate General Bot in Case C-529/11 *Alarape & Tijani* ECLI:EU:C:2013:9, para. 25; see also *Baumbast*, para. 73.

[141] *Alarape & Tijani*, para. 33 – 34.

[142] Ibid, para. 35; see *Ziółkowski & Szeja,* paras. 46 – 47..

[143] In para. 55 of *Förster*: 'Directive 2004/38 […] provides in Article 24(2) that, in the case of persons other than workers, self-employed persons, persons who retain such status and members of their families (i.e. students) the host Member State is not obliged to grant maintenance assistance for studies […] to students who have not acquired the right of permanent residence'.

5.2 The Saga of the Special Non-contributory Cash Benefits

The main turning point in the development of the law is often suggested to be a line of cases concerning social benefits known as special non-contributory cash benefits (SNCBs) under Regulation 883/2004. These benefits were added to the Regulation in the 2004 revision to the Regulation 1408/71 and are in their own annex given that they do not fall under any of the categories listed in the body of the Regulation. This meant that, for the first time, there were benefits within the Regulation that had "characteristics both of the social security legislation … and of social assistance",[144] and therefore there were social benefits that could potentially fall under both the Regulation (which covers social security) and Directive 2004/38 (which covers social assistance). The SNCB 'saga' consists of four cases: *Brey*, *Dano*, *Alimanovic*, and *Garcia-Nieto*, with *Dano* (and the difference between it and the *Brey* decision) often framed as the most important.[145]

The first SNCB case is *Brey*, which concerned a retired German couple whose claim for an Austrian pension supplement was rejected due to their insufficient income (the pension supplement was designed precisely to top-up the low income of pensioners).[146] The Court rejected the argument of the Commission that the inclusion of the pension supplement as an SNCB under Regulation 883/2004 meant that it could not be classified as social assistance under Directive 2004/38.[147] It held that Regulation 883/2004 is a conflict of laws instrument that seeks to ensure that individuals are subject to, and protected by, one national legislative social security system only.[148] As such, it does not encroach on the competence of Member States to define the conditions necessary to claim social benefits.[149] Given the divergent purposes of the

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[144] Article 70, Regulation 883/2004.

[145] Case C-140/12 *Brey* ECLI:EU:C:2013:565; Case C-333/13 *Dano* ECLI:EU:C:2014:2358; *Alimanovic*; Case C-299/14 *Garcia Nieto* ECLI:EU:C:2016:114; see also D. Carter and M. Jesse (n 113), p. 1180.

[146] *Brey*, paras. 16 – 17.

[147] *Brey*, paras. 57 - 58; Opinion of Advocate General Wahl in *Brey*, paras. 55 – 57.

[148] *Brey*, paras. 40; see also Case C-2/89 *Kits van Heijningen* ECLI:EU:C:1990:183, para. 12; Case C-275/96 *Kuusijärvi* ECLI:EU:C:1998:279, para. 28; Case C-619/11 *Dumont de Chassart* ECLI:EU:C:2013:92, para. 38.

[149] *Brey*, para. 41; Opinion of Advocate General Wahl in *Brey*, paras. 50 – 53. In the context of other social benefits, see Case 110/79 *Coonan* ECLI:EU:C:1980:112, para. 12; Case 275/81 *Koks* ECLI:EU:C:1982:316, para. 9; *Kits van Heijningen*, para. 19; Case C-227/03 *van Pommeren-Bourgondiën* ECLI:EU:C:2005:431, para. 33; Case C-347/10 *Salemink* ECLI:EU:C:2012:17, para. 38; Case C-106/11 *Bakker* ECLI:EU:C:2012:328, para. 32; *Dumont de Chassart*, para. 39.

legislative instruments, it was considered that EU law required an autonomous definition of social assistance. It relied on the Opinion of Advocate General Wahl, who linked three Directives applying to different areas of law to create a comprehensive definition.[150] He considered that all three Directives contain an "imprecise and broad concept of social assistance", and an aim of limiting rights of residence from "a common desire to protect the public purse".[151] In doing so, he defined it as assistance claimed by someone who "does not have stable and regular resources which are sufficient to maintain himself and his family, and who is likely to become a burden on the social assistance system of the host Member State".[152]

The Court held that Member States retain the ability to determine the criteria for obtaining social assistance, and that "there is nothing to prevent the granting of social security benefits … being made conditional upon meeting the necessary requirements for obtaining a legal right of residence".[153] Mr Brey's eligibility for the pension supplement would suggest that he did not have sufficient resources to avoid becoming an unreasonable burden. However, the Court applied the limitation on automatic exclusions as used in *Grzelczyk*, finding that national authorities must first carry out "an overall assessment of the specific burden which granting that benefit would place on the national social assistance system as a whole, by reference to the personal circumstances characterising the individual situation of the person concerned".[154] When doing so, they need to consider "a range of factors in the light of the principle of proportionality, whether the grant of a social security benefit could place a burden on that Member State's social assistance system as a whole", and should demonstrate a "certain degree of financial solidarity" with the EU Citizen, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary.[155] This meant that as the Austrian rule *automatically* barred EU Citizens from claiming the pension supplement,

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[150] Opinion of Advocate General Wahl in *Brey*, point (4), paras. 58 – 66. Concretely, Directive 2003/86/EC on the right to family reunification *OJ L 251, in particular* Article 7(1)(c) therein; Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents *OJ L 16*; and Directive 2004/38.

[151] Opinion of Advocate General Wahl in *Brey*, para.50-53

[152] Case C-578/08 *Chakroun* ECLI:EU:C:2010:117, para. 48; see also Case C-291/05 *Eind* ECLI:EU:C:2007:771, para. 29.

[153] *Brey*, para. 44.

[154] *Brey*, para. 63 – 64.

[155] *Brey*, para. 72.

it violated both Articles 7(1)(b) and 8(4) of the Directive, as well as the principle of proportionality.[156]
The decision in *Brey* is reminiscent of the Court's approach pre-Directive 2004/38, as it applied a more purposive or teleological approach based on primary law and vague formulae in order to achieve its vision of justice in this particular case.[157] Despite nominally claiming that EU citizens require a right of residence to claim social assistance benefits, its reasoning suggests that the principle of proportionality means that every single claim must be assessed on its individual merits, assessing the effect that granting this benefit would have on the financial stability of the welfare system overall.

Perhaps the most well-known case of the SNCB saga is *Dano*.[158] The case concerned a Romanian mother living in Germany with her son and supported materially by her sister. She was issued with a "residence certificate of unlimited duration" and received child benefit and maintenance payments on behalf of her son. However, her claim for an SGB II benefit (basic provision for jobseekers) was rejected on the basis that she did not have a right to reside under the Directive, as national authorities had already held that she had insufficient resources to provide for herself, had not worked previously in Germany, and was not actively seeking employment. The Court held that as she was not a worker and did not have sufficient resources, she could not rely on the right to equal treatment under Article 24(1).[159] Simply put, *Dano* confirms that individuals cannot claim equal treatment under Article 24 unless they have a right to reside under Article 7 of Directive 2004/38 or hold the status of permanent residence.[160]

Despite receiving the most attention in the literature, the *Dano* decision is unsurprising. The Directive explicitly states that individuals shall have a right of residence provided for in (Article 7) as long as they meet the conditions set out therein.[161] Furthermore, if permanent residents must comply with the

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[156] *Brey*, para. 77.
[157] P. Minderhoud and S. Mantu, 'Back to the Roots? No Access to Social Assistance for Union Citizens who are Economically Inactive', in: D. Thym (ed.) *Questioning EU Citizenship – Judges and the Limits of Free Movement and Solidarity in the EU (*2017) Oxford: Hart Publishing, p. 197–198; N. Shuibhne (n 67); C. O'Brien (n 31), p. 49; see also C. O'Brien (n 119), p. 216.
[158] *Dano*.
[159] Ibid, para. 82; M. Jesse & D. Carter (n 133), p. 162 – 163.
[160] D. Thym, 'When Union citizens turn into illegal migrants: the Dano case' (2015) 40(2) *European Law Review* 249-262; N. Shuibhne (n 67); M. Jesse & D. Carter (n 133), p. 148.
[161] Article 14(2) Directive 2004/38.

conditions laid down in Article 7 to obtain permanent residence status under Article 16(1), then it stands to reason that they must comply with the conditions of Article 7 during the initial five-year period of residence if they wish to claim equal treatment and social benefits under the same Directive.[162]

Like *Ziółkowski*¸ the Court assessed legal residence and equal treatment rights exclusively within the autonomous framework created by Directive 2004/38 and did not consider any potential quantitative or qualitative factors or 'links' between Ms *Dano* and Germany outside of those laid down in the Directive.[163] The Court's decision in *Dano* is criticised for ignoring the obligation to assess the individual situation of Ms Dano, simply finding that her application for social assistance was proof of insufficient resources.[164] It is alternatively suggested that the Court applied an implicit proportionality assessment that determined Ms Dano had insufficient resources and/or was an unreasonable burden.[165] This is despite the fact that Ms Dano was more arguably self-sufficient and less of a burden than the applicants in *Brey*.[166]

The above said, it should be noted that the Court was not asked about the sufficiency of Ms Dano's resources. In fact, the facts of the case explicitly state that "the main proceedings concern persons *who cannot claim a right of residence in the host State by virtue of Directive 2004/38*" (emphasis added).[167] As such, the Court was unconcerned about the potential sufficiency of Ms Dano's resources, focusing solely on whether she could claim social assistance despite not having a right to reside under the Directive. As the Court stated: "according to the findings of the referring court the applicants do not have sufficient resources and thus cannot claim a right … under Directive 2004/38. Therefore … they cannot invoke the principle of non-discrimination in Article 24(1) Directive".[168] From this perspective, the *Dano* decision is less controversial. If the question is simply whether an individual without a right

[162] D. Carter and M. Jesse (n 113), p. 1192.
[163] M. Jesse & D. Carter (n 133), p. 148.
[164] P. Minderhoud (n 95), pp. 47-73, p. 48.
[165] D. Kramer (n 115), pp. 291 – 293.
[166] N. Shuibhne (n 67), p. 933; D. Carter and M. Jesse (n 113), p. 1203; G. Davies, 'Has the Court changed, or have the cases? The deservingness of litigants as an element in Court of Justice citizenship adjudication' (2018) 25(10) *Journal of European Public Policy* 1442 – 1460, p. 1454.
[167] *Dano*, para. 44.
[168] *Dano*, para. 8.

to reside can rely on the principle of equal treatment, the answer is "obviously not", and there is no precedent that would suggest anything different.[169]

The third decision in the SNCB saga, and probably the most important for precarious workers, is *Alimanovic*. The case concerned a Swedish mother and her daughter that worked intermittently in Germany for 11 months before lodging an application for social minimum subsistence benefits.[170] These were granted for a period of eight months before they were rescinded following a change in national law. Under Article 7(3)(c) Directive 2004/38, individuals retain the status of worker for at least six months if they become involuntary unemployed during the first twelve months of employment. The question was therefore whether the applicants could retain their status as workers beyond this initial 6-month period.

Advocate General Wathelet considered that a distinction should be made between first-time jobseekers and those that have been engaged in employment for less than a year and subsequently retained this status for a six-month period. He suggested that the limitation of six months retained worker status for the latter group would be an "appropriate, albeit restrictive", transposition of Article 7(3) as "its automatic consequences for entitlement to subsistence benefits under SGB II seem to go beyond the general system established by that directive".[171] The Court rejected this approach, in favour of more literal interpretation of the Directive. It held that under Article 7(3)(c) Union citizens can retain the status of worker for a minimum of six months, however, as this period had passed Germany was under no obligation to continue treating them as workers. The applicants still had a right to reside as jobseekers under Article 14(4)(b) of the Directive, however, the express derogation in Article 24(2) meant that they could be denied the social assistance benefit in question.

Like *Ziółkowski* and *Dano*, in *Alimanovic* the Court assessed residence and equal treatment rights solely under the Directive, with primary EU law playing little to no role. Unlike pre-Directive 2004/38 case-law, it ignored any

[169] G. Davies, 'Migrant Union Citizens and Social Assistance: Trying to Be Reasonable About Self-Sufficiency' (2016) College of Europe Research Paper 02 / 2016, p. 8.
[170] A good summary is provided by N. Shuibhne, 'What I tell you three times is true: Lawful Residence and Equal Treatment after Dano' (2016), pp. 911–913.
[171] Opinion of Advocate General Wathelet in Case C-67/14 *Alimanovic* ECLI:EU:C:2015:210, paras. 103.

possibility of finding a 'genuine link' between the individual and the Member State,[172] or any financial solidarity due to temporary difficulties. It also felt no need to test the national measure under the principle of proportionality, as according to the Court the system of retention of worker "takes into consideration various factors characterising the individual situation of each applicant for social assistance and, in particular, the duration of the exercise of any economic activity", meaning that the German rule adhering to the Directive guaranteed "a significant level of legal certainty and transparency … while complying with the principle of proportionality".[173] This suggests that, at least for the purposes of Article 7(3), the Court considers that the Directive itself undertakes an adequate proportionality assessment.[174] The Court also departed from the test laid down in *Brey* to determine what an 'unreasonable' burden is under the Directive. Instead of assessing the impact of each individual claim of social benefits on the social assistance system as a whole, the Court held that "while an individual claim might not place the Member State concerned under an unreasonable burden, the accumulation of all the individual claims which would be submitted to it would be bound to do so".[175]

Alimanovic continues the strict and literal interpretation of Directive 2004/38. As such, the final outcome of the case is unsurprising. That said, some of the Court's reasoning is questionable. It claims that Article 7(3) takes into consideration "various factors" characterising the situation of each individual applicant, when in fact it only takes into consideration one factor: time spent in genuine employment in the host-state. Furthermore, the claim that the accumulation of granting certain social benefits would be "bound to" result in an unreasonable burden on the host-Member State has no empirical evidence to support it, and arguably provides unlimited deference to Member States, who can deny any social assistance benefit to EU Citizens on the basis that it is "bound to" undermine the financial stability of the welfare system.

The final case of the SNCB saga is *Garcia Nieto*.[176] The case concerned a Spanish couple (that were not married or in a registered partnership) that moved to Germany in 2012. The mother moved in April with their common child to take

[172] P. Minderhoud (n 95), pp. 62-63.
[173] *Alimanovic*, para. 60 – 61.
[174] D. Kramer (n 115), p. 295.
[175] *Alimanovic*, para. 62. This approach was also applied in *Garcia Nieto*, para. 28 – 29
[176] *Garcia Nieto*.

up employment, whilst the father moved in June of the same year with his child from a previous relationship. The father applied for the SCG II benefit from July until September 2012, however, this was denied because he had not been residing in Germany for longer than three months.[177] The Court held that father and son were not entitled to this benefit as Article 24 Directive 2004/38 contained an explicit derogation that allowed the host-state to deny social assistance during the first three months of residence.[178] The Court and Advocate General both emphasised that this limitation, according to Recital 10 of the Directive, seeks to maintain the "financial equilibrium of the social assistance systems of the Member States".[179] The Court also made a link with the system of retention of worker status in *Alimanovic*, asserting that the German rule excluding such persons from social assistance claims guarantees a "significant level of legal certainty and transparency … while complying with the principle of proportionality".[180]

Whilst *Garcia Nieto* is unsurprising in the sense that EU citizens are not entitled to social assistance during the first three months of residence, the distinctions that the Court makes between family members are less understandable. The father and son were not considered as family members of an EU Citizen engaged in genuine employment, which would have granted them derived rights. To the casual reader, it may seem strange that the Court continually referred to the applicants as the 'Pena-Garcia' family, and yet treated Ms Garcia-Nieto's partner and his child as being (at least legally speaking) totally separate from her. This was despite her being in gainful employment, subject to German social security legislation, and supporting the family though her income.[181] Whilst the decision may seem morally unjust for the family in question, unmarried couples are not recognised as family members under the Directive.[182] There is an obligation on Member States to "facilitate entry and residence" of "the partner with whom the Union citizen has a durable relationship, duly attested".[183] However, this provision does not

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[177] It should also be noted that mother and common child were entitled to such benefits due to the mother's economic activity, however, father and son were not seen as 'family members' deriving rights under the Directive; see also M. Jesse & D. Carter (n 133).

[178] *Garcia Nieto*, para. 44. Opinion of Advocate General Wathelet in Case C-299/14 *García Nieto* ECLI:EU:C:2015:366, para. 70.

[179] Ibid, para. 45.

[180] Ibid, para. 49.

[181] Ibid, para. 28 – 29.

[182] Article 2(2) Directive 2004/38.

[183] See Article 3(2)(b) Directive 2004/38.

mean that they should automatically be granted entry and residence, but rather merely places "an obligation to confer a certain advantage, by comparison with applications for entry and residence of other nationals of third States" to these persons.[184] It is indisputable that the couple were in a "durable relationship, duly attested". However, given the weak obligation contained in this provision, it is unclear what protection it would provide to the Pena-Garcia family. Nonetheless, the case potentially undermines the Directive's claim that "in order to maintain the unity of the family in the broader sense", and that Member States should "examine" the situation of persons not included in the definition of family members under the Directive, taking into account "their relationship with the Union Citizen or any other circumstances".[185]

6 Evaluating Social Protection under Directive 2004/38

The system of social protection under Directive 2004/38 has come under intense criticism for effectively abandoning the traditional tenets of citizenship due to scepticism towards migration. The following section will briefly evaluate the legitimacy of the Court's approach and the protection afforded under the Directive, which will assist when suggesting realistic solutions to the problems faced by precarious workers. It will first outline the main criticisms directed at the Court and will then explain how many of these criticisms are based on a flawed understanding of the Court's pre-Directive 2004/38 approach. Instead, the Court's more recent approach can be justified by the greater legal value of the Directive and its stated aim of pursuing a literal approach to interpretation rules where possible.

6.1 Criticisms of the Court

The Court's approach towards Directive 2004/38 has been criticised, especially following the SNCB saga, for engaging in politics. Specifically, it is argued that the Court is restricting the free movement rights of EU migrants in order to quell the nationalist tide rising in Europe, part of which is seen as a

[184] Case C-83/11 *Rahman* EU:C:2012:519, para. 21; see also Opinion of Advocate General Wathelet in Case C-673/16 *Coman* ECLI:EU:C:2018:2, para. 94; Opinion of Advocate General Bobek in Case C-89/17 *Banger* ECLI:EU:C:2018:225, para. 57.
[185] Recital (6), Directive 2004/38.

scepticism of granting rights to EU citizens.[186] This, it is argued, constitutes a "dismantling project" of EU Citizenship by abandoning its inclusionary approach and gradual separation from its market-based confines.[187] This is suggested to be a "spectacular retreat from the magnificent and progressive destinies" of transnational solidarity, towards the original market-logic which has "overwhelmingly re-emerged" during times of crisis.[188]

The *Dano* decision is usually highlighted as the crucial moment for overturning the constitutional dynamic of the pre-Directive approach, that promoted economically inactive citizens' access to the welfare systems under the conditions of Member State nationals.[189] However, *Förster* is also claimed to represent a shift away from the "constitutional narrative" on Union Citizenship based on primary law, and an "undeclared backtrack" on this system that characterised the pre-Directive era.[190] The Court's reasoning is suggested to be "superficial" for its reluctance to assess the proportionality of the five-year rule, instead making a "rather dubious bow" before the Citizenship Directive.[191] That said, such criticisms tend to ignore the link between permanent residence and student financing, which was emphasised by the Court and is crucial to the political compromise leading to the Directive's adoption.[192] Even the Court's decision in *Brey* is also criticised for "preparing the ground" for a shift towards a strict functional interpretation and de-constitutionalisation of citizenship, thereby representing a "paradigmatic retreat to a sort of interpretative legalistic minimalism, according to which secondary law rules strictly determine the applicative limits of the Treaty".[193] This this claim is strange insofar as the *Brey* decision seems more like an outlier that is more reminiscent of the pre-Directive approach than preparing the ground for *Dano* and *Alimanovic*.[194]

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[186] U. Šadl and S. Sankari (n 122), p. 109; see also C. O'Brien (n 122).
[187] C. O'Brien (n 122), p. 210; N. Shuibhne (n 67); E. Spaventa, 'Earned Citizenship – understanding Union Citizenship through its scope', in D. Kochenov, *EU Citizenship and Federalism: The Role of Rights* (2017) Cambridge: CUP, p. 204.
[188] S. Giubboni (n 54), pp. 76 – 77.
[189] Ibid, p. 84.
[190] Ibid, p. 83; M. Dougan, 'The Bubble that Bursts: Exploring the Legitimacy of the Case Law on the Free Movement of Union Citizens', in M. Adams, H. de Waele, J. Meeusen and G. Straetmans (eds.), *Judging Europe's Judges. The Legitimacy of the Case Law of the European Court of Justice* (2013) Oxford: Hart Publishing, p. 141.
[191] F. Wollenschläger (n 20), p. 323.
[192] See M. Jesse (n 137), pp. 2003–2017.
[193] S. Giubboni (n 57), p. 83.
[194] D. Carter and M. Jesse (n 115).

In essence, the Court is argued to have shifted away from a "predominantly rights-opening to predominantly rights-curbing assessments of citizenship rights".[195] In doing so, it has "poured the content of the primary right to equal treatment into a statement in secondary law", which "turns the standard approach to conditions and limits on its head – the latter no longer temper equal treatment rights; they constitute the rights".[196] In other words, the Court has switched from the primary-law approach, i.e. secondary law is a tool to assist in the interpretation of primary law, to a secondary-law approach, which sees the Directive as having primary law status in itself.[197]

Outside influences can influence any court decision, given that they are decided upon by human beings (i.e., judges), whose biases and opinions can filter through despite their best intentions to remain objective.[198] As Advocate General Wathelet noted in *Alimanovic*, the *Dano* judgment had caused an "unusual stir" given the "importance and sensitivity of the subject".[199] However, to make an argument that the Court is "abandoning" EU Citizens, it must surely be shown that it has departed from its traditional methods of interpretation, thereby undermining legal coherency in order to reach desired outcomes in certain cases. However, as the following section shows, there is a convincing argument to suggest that this is not the case.

6.2 Unwarranted Nostalgia?

A point that is often forgotten in the literature on the SNCB saga is that the Court's pre-Directive approach can be (and was) criticised for precisely the same reason as it is now, namely for undermining the balance between primary and secondary law. The only difference is that in earlier cases, the Court was accused of ignoring the literal meaning of secondary legislation to reach 'just' outcomes in individual cases. For example, in *Baumbast* and *Grzelczyk*, a simple and literal reading of the applicable legislation would

[195] N. Shuibhne (n 67), p. 902.
[196] Ibid, pp. 909–910.
[197] Ibid, p. 915.
[198] A.C. Hutchinson and P. T. Monahan, 'Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought' (1984) 36(1/2) *Critical Legal Studies Symposium* 119-245, Stanford Law Review
[199] Opinion of Advocate General Wathelet in *Alimanovic*, para. 4.

permit the denial of residence rights. By ignoring the conditions contained in the Directive, the Court was accused of effectively deviating from secondary legislation without saying so.[200] In both cases, the Court used the principle of proportionality, or alternatively 'solidarity' (which seems to be synonymous),[201] to find that national measures transposing the Residency Directives violated EU law.

Hailbronner suggests that these decisions had "an absence of a convincing methodology and tendency to interpret secondary Community law against its wording and purpose", and that the Court used the "magic key" of proportionality to find the national measures in violation of the Treaty freedoms.[202] Instead, a simple reading of the applicable Directives suggests that, if a EU Citizen no longer fulfils its conditions, they should not be able to rely upon it.[203] Somek agrees, suggested that the legislation would grant "full authority" to qualify and limit the primary law right to free movement: "as long as Member States stay within the limits established by Community legislation, their own implementing measures are not subject to (proportionality)".[204] As such, the Court's pre-Directive approach arguably limited the scope of secondary law by neglecting the will of the Union legislature,[205] thereby undermining the ability of Member States to protect their welfare system from unreasonable burdens posed by EU Citizens.[206]

The point here is not to assert one approach over the other, but to demonstrate that the Court was, and continues to be, in a difficult position, and has to perform a delicate balancing act. It was asked to define the constitutional relationship between pre-existing secondary EU law,[207] and the Treaty provisions Union Citizenship and equal treatment.[208] Union Citizenship was placed on top of, rather than revising or replacing, secondary rules on residency. This meant that the Court was required to "fill out" the Treaty provisions on EU Citizenship and define their precise relationship with pre-

[200] K. Hailbronner (n 25), pp. 1250 – 1253.
[201] C. O'Brien (n 34), pp. 43-44.
[202] K. Hailbronner (n 25), p. 1251.
[203] Ibid, pp. 1251 - 1252.
[204] A. Somek (n 94), p. 795.
[205] F. Wollenschläger (n 20), p. 305.
[206] M. Jesse & D. Carter (n 133), p. 140.
[207] In particular, the Residency Directives 90/364/EEC; 68/360/EEC; and 93/96/EEC.
[208] See above steps 1 and 2.

existing secondary legislation.[209] As it amended its case-law to reflect the new legal situation, it is unsurprising that the Court opted for its classic teleological interpretation of the law, particularly as the Residency Directives did not contain specific equal treatment provisions.[210] It was also confronted with situations in which adhering to secondary legislation would result in some strange and unjust outcomes. A Spanish national residing in Germany for over 20 years would be denied a child benefit simply because the national authorities were tardy in replacing her residence permit. A student would have to sacrifice their 4-year degree in the final year due to temporary financial difficulties, despite having worked and therefore contributed to a host-society for three years. Thus, the story is not as simple as saying that the Court abandoned its previously perfect approach in favour of reactionary populist politics. Rather it has already been caught in a difficult relationship between primary, secondary, and national law since the establishment of Union Citizenship.

6.3 The Greater Legal Value of Directive 2004/38?

It can also be argued that Directive 2004/38 has a greater legal value than the previous Residency Directives, which justifies the Court giving it a higher legal value. Directive 2004/38 is a unifying document that explicitly seeks to remove the "sector-by-sector, piecemeal approach" to free movement and residence rights, which was a direct response to the confusing layers of primary and secondary law that governed the rights of economically inactive individuals exercising their free movement rights.[211] It reconfigured the legal landscape by repealing nine Directives and amending the Worker's Regulation.[212]

The Court's approach towards Directive 2004/38 can be seen as the mirror-image of its approach towards reconciling primary and secondary law in view

[209] K. Lenaerts, and J.A. Gutiérrez-Fons, 'To Say What the Law of the EU is: Methods of Interpretation and the European Court of Justice' (2013), p. 25.
[210] See for example, T. Nowak, 'The rights of EU Citizens: a legal-historical analysis', in Van der Harst et al, (ed.) *European Citizenship in Perspective* (2018) Cheltenham/Northampton MA: Edward Elgar.
[211] Recital 4, Directive 2004/38.
[212] Concretely, Directive 2004/38 repeals Regulation (EEC) No 1612/68, and repeals 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 and 93/96/EEC.

of Union Citizenship, but this time the Court is attempting to adapt to a new legal landscape created by Directive 2004/38. A key difference is that Directive 2004/38, unlike its predecessors, was not adopted through the flexibility clause, but rather has equal treatment, the freedom of movement for workers, and Union Citizenship as its legal bases. Furthermore, it governs the rights of *all* EU Citizens (including both economically active and inactive). Given its all-encompassing nature, which is different than the previous 'piecemeal' system, it is unsurprising that it has a different relationship with primary law.

Directive 2004/38 also included entirely new concepts from the EU legislator, such as the distinction between short-term, medium-term, and permanent residence, as well as a catch-all equal treatment provision.[213] Its rights, obligations, and limitations are more clearly defined and are the result of the EU's (albeit imperfect) democratic decision-making process.[214] As such, it is logical for the Court to shift towards a stricter reliance on the wording of the Directive and adhering to the choices of the EU legislator.[215]

Finally, the Court has stated that an objective of Directive 2004/38 is to create a legally certain and transparent system, whereby the situation is clear for applicants and Member states alike.[216] This is a reaction to the Court's previous approach, which can be criticised for creating vague and uncertain formulae that strengthened the position of individual applicants *vis-à-vis* the State.[217] Confusing terms such as 'unreasonable burden', 'automatic consequences', and 'temporary problems' meant that a reasonable interpretation of these concepts based on EU secondary law may be subsequently found to be unlawful due to another vague principle being established by the Court. The case-by-case assessments dictated by the Court's old approach are difficult for national administrators, especially from the perspective of legal certainty and workability.[218] They provide little guidance as to exactly when a Member State can legally deny a claim to protect the integrity of the national welfare system, something that has always

[213] Art. 16(1) Directive 2004/38, plus Recital (17); Article 24 Directive 2004/38.
[214] M. Van den Brink, 'The Court and the Legislators: Who Should Define the Scope of Free Movement in the EU?' (2019), p. 134.
[215] M. Jesse & D. Carter (n 205).
[216] See, for example, *Alimanovic*, para. 61; *Garcia-Nieto*, para. 49.
[217] For more on this point, see D. Carter and M. Jesse (n 113); M. Jesse & D. Carter (n 205).
[218] N. Shuibhne (n 67), p. 913.

been permissible under secondary rules.[219] In contrast, the current approach allows individuals to know "without any ambiguity, what their rights and obligations are", and as such guarantees "a significant level of legal certainty and transparency in the context of the award of social assistance".[220] Hailbronner refers to these as "generally applicable rules", which are beneficial for national administrators and applicants alike as everyone knows where they stand.[221] A Member State now knows that, assuming they comply with the ordinary meaning of the Directive's rules, this will not be second-guessed by the Court of Justice.

6.4 Literal & Teleological Interpretations of the Directive 2004/38

It can be argued that the Court's recent approach is in fact more in line with its explicit, albeit theoretical, approach to legal interpretation.[222] This is based on the classic textual, contextual, and purposive/teleological approach to interpretation that is common in legal systems.[223] Under this approach, assuming the ordinary meaning of a text is clear, the Court should stick to that interpretation, and should only go beyond this into contextual or teleological arguments if a textual reading is inadequate. The Court has historically been criticised for lacking consistency when it comes to the legal value given to textual and/or teleological arguments.[224] However, evidence suggests that in recent years the Court has increasingly focused on textual arguments.[225] The Court's recent approach to Directive 2004/38 can be seen as part of this trend.

It should also be noted that the *Tedeschi* principle suggests that a Treaty provision on free movement cannot be invoked if a restriction of that

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[219] S.K. Schmidt, 'Extending Citizenship Rights and Losing it All: Brexit and the Perils of 'Over-Constitutionalization', in D. Thym (ed.) *Questioning EU Citizenship – Judges and the Limits of Free Movement and Solidarity in the EU* (2017) Oxford: Hart Publishing, pp. 19 - 23; see also U. Šadl and S. Sankari (n 119), p. 98.
[220] *Alimanovic*, para. 61; *Garcia Nieto*, para. 49.
[221] K. Hailbronner (n 25).
[222] K. Lenaerts, and J.A. Gutiérrez-Fons (n 205).
[223] G. Beck, *The Legal Reasoning of the Court of Justice of the EU* (2013) Oxford: Hart Publishing, p. 281.
[224] Ibid, pp. 280–283.
[225] Ibid, pp. 285–287.

movement is permitted under EU secondary legislation.[226] The Court has explicitly stated that the right to non-discrimination under Article 18 TFEU only applies in situations where a more specific equal treatment provision does not.[227] Doing otherwise would effectively mean deciding the case twice, only the second time without any derogations contained in the secondary legislation. Whilst this may have been justifiable pre-Directive 2004/38 given the convoluted relationship between primary and secondary law, it is difficult to make this argument in light of Directive 2004/38. An overly purposive approach would effectively ignore the existence of secondary legislation entirely. This runs counter to the principles of legal certainty and inter-institutional balance enshrined in Article 13(2) TFEU,[228] and may result in a situation whereby potentially no social benefits could ever be denied from EU migrants.[229] That said, a purely literal interpretation will ignore the context and real-life consequences of individual cases, the social or historical circumstances behind the legislation, the weight given to multiple purposes associated with it, and the context in which the applicable word or phrase is placed.[230]

The distinction between literal and teleological interpretations is not always clear cut: some consideration of a rule's purpose is inherent when interpreting any legal rule.[231] As such, some purposive understanding of the law is always necessary. This is complicated by the fact that Directive 2004/38 has multiple purposes. For example, the Court has considered the purpose of Directive 2004/38 to be both preventing individuals from becoming an unreasonable

[226] Case C-5/77 *Tedeschi* ECLI:EU:C:1977:144; Case C-573/12 *Alands* ECLI:EU:C: 2014:2037. See A. Cuyvers, 'The EU Common Market', in E. Ugirashebuja, J. Eudes Ruhangisa, T. Ottervanger and A. Cuyvers (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (2017) Brill Nijhoff: Leiden, p. 299.
[227] Opinion of Advocate General Bobek in Case C-581/18 *RB* ECLI:EU:C:2020:77, para. 51; Opinion of Advocate General Richard de la Tour in Case C-709/20 *CG* ECLI:EU:C:2020:515, para. 46; Opinion of Advocate General Jacobs in Joined Cases C-92/92 and C-326/92 *Phil Collins and Others* EU:C:1993:276, para. 12.
[228] K. Lenaerts, and J.A. Gutiérrez-Fons (n 208), p. 7.
[229] M. Van den Brink (n 213), p. 134.
[230] P. Schlag, 'On Textualist and Purposivist Interpretation (Challenges and Problems)', in T. Perišin and S. Rodin, (eds.) *The Transformation or Reconstitution of Europe: The Critical Legal Studies Perspective on the Role of the Courts in the European Union* (2018), Oxford: Hart Publishing, pp. 19, 24–27; M. Jesse & D. Carter (n 133), pp. 152 – 153.
[231] Ibid.

burden,[232] and to facilitate and strengthen the right to free movement.[233] This does not represent a "switching" of the Directive's objectives as has been claimed.[234] It is not unusual for a Directive to have multiple objectives, in the case of Directive 2004/38 the Court has stated that whilst the *general* objective of the Directive is to facilitate and strengthen free movement, the *specific* objective of Article 7 is to prevent unreasonable burdens.[235]

7 Implications for Non-standard and Precarious Workers

The final section of this chapter will outline the implications of the system of social protection under Directive 2004/38 for non-standard and precarious workers. It will compare Union Citizenship to social citizenship as it is understood at the national level. Following this, it will explain the type of citizenship that is available under the Directive: namely, one based on 'earned' citizenship, with economic activity the only sure way to earn this status and accompanying rights. Finally, it will explain what this means for non-standard and precarious workers, looking at how (i) it creates an autonomous and precarious system of rights, (ii) it shifts the assessment of an individual's burden from an individual to a systemic one, and (iii) it reduces the level of social benefit entitlement to EU migrants.

7.1 No safety net of Social Citizenship

Union Citizenship was originally seen as an opportunity for the Union to depart from its market-oriented approach towards the protection of its citizens.[236] Expanding free movement rights beyond the limits of economic activity was suggested to be an important factor in "liberating" the Union from its economic preoccupation and preparing the way for a true community of citizens.[237] As Kochenov states, citizenship is fundamentally about

[232] *Dano*, para. 71.
[233] Case C-456/12 *O & B* ECLI:CU:C:2014:135, para. 41; Case C-165/16 *Lounes* ECLI:EU:C:2017:862, para. 36; Case C-483/17 *Tarola* ECLI:EU:C:2019:309, para. 23, 49.
[234] D. Thym, 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens' (2015) 52(1) *Common Market Law Review* 17–50, p. 25.
[235] Opinion of Advocate General Szpunar in Case C-93/18 *Ermira Bajratari* ECLI:EU:C:2019:512, para. 57.
[236] D. Kochenov (n 43), p. 217.
[237] Ibid; K. Hailbronner (n 25), p. 1245.

protecting human dignity and freedom from commodification, rather than making the scope of the available citizenship rights dependent on economic considerations: i.e., the poorest and most marginalised in society should have the same social protections as the rich and powerful, rather than lose out on social protections due to their marginal economic status.[238] Extending free movement rights to *all* European citizens, regardless of their economic status, would alleviate many of the problems faced by non-standard workers. It would mitigate against the gaps in the law by providing residual protection, even if their employment status is uncertain due to being in precarious employment. This is the idea of 'residential egalitarianism', whereby once an individual is residing in a host-state, they should be entitled to equal treatment with nationals of that state in every aspect of life.[239] This is opposed to the idea of 'market egalitarianism' (or market citizenship), whereby equal treatment is dictated by one's engagement with the market.

The problem is that the 'residential egalitarianism' promoted by some would put in danger the links of solidarity that maintain the legitimacy of the national welfare state.[240] The close relationship between welfare entitlement, the nation state, and the shared sense of identity and solidarity through joint participation in society is a key factor in providing the moral force required to justify and legitimise policies of redistribution and social solidarity.[241] Opposed to this, national conceptions of solidarity mean that those engaged in genuine employment are considered as forming part of the inter-dependence of society and shared identity of the state.[242] Such ideas of solidarity do not extend as far to those outside of employment, and the Court needs to be careful not to undermine this "fundamental aspect" of the nation-

[238] D. Kochenov (n 43), p. 220.
[239] D. Kramer (n 116), p. 279.
[240] S. Mantu, 'Concepts of Time and European Citizenship' (2013) 15 *European Journal of Migration and Law* 447, p. 458.
[241] M. Dougan, 'Expanding the Frontiers of Union Citizenship by Dismantling the Territorial Boundaries of National Welfare States? ' in C. Barnard and O. Odudu (eds), *The Outer Limits of European Union Law* (London: Hart, 2009); See also, M. Dougan and E. Spaventa, 'Wish you weren't here … New Models of Social Solidarity in the European Union', in M. Dougan and E Spaventa (eds), *Social Welfare and EU Law* (London: Hart, 2005); F. Pennings, 'EU Citizenship: Access to Social Benefits in other Member States' (2012) 28(3) *International Journal of Comparative Labour Law and Industrial Relations* 307.
[242] F. de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (2015), p. 81 - 82; D. Schiek, 'Towards More Resilience for a Social EU – the Constituently Conditioned Internal Market' (2017) 13(4) *European Constitutional Law Review* 611, p. 617.

state by doing so.[243] Whilst it is argued that Member State scepticism towards providing rights to economically inactive persons is not a good reason to dismiss a non-commodified idea of citizenship at the Union level,[244] the realpolitik of the situation suggests that stretching concepts of intra-European solidarity further than is welcomed by Member States and their populations could actually result in the retrenchment of the social protections currently available. As Giubboni pessimistically puts it: "a democratic and socially inclusive future of European citizenship is hardly compatible with the political dynamics currently dominant in the Union".[245]

In light of the above, it must be concluded that despite its contribution towards a more socially minded Europe, Union Citizenship in its present form does not offer a genuinely unconditional right to move and reside that would establish a meaningful social citizenship that could alleviate the problems caused by market citizenship. It does not replicate the kind of residual social protection that exists at the national level that would provide access to social security and welfare, and nor does it replicate civil and political rights that also exist.[246] In short, it does not provide the answer to the social injustices caused by a system based primarily on economic participation.[247]

7.2 'Earned' Union Citizenship with (continued) Market Dominance

Instead of a system of social citizenship based on residential egalitarianism, that available under Directive 2004/38 is one in which the individual must 'earn' their citizenship rights before they are entitled to the full range of rights and benefits available under Union Citizenship.[248] The ability to earn citizenship rights is based nominally on time: i.e., the longer the individual is lawfully present the more protection they obtain.[249] That said, economic activity is the only guaranteed way of obtaining the strongest protections available. This creates a stratified system of rights, with different categories of

[243] K. Hailbronner (n 25), p. 1265.
[244] C. O'Brien 'I trade, There I am: Legal Personhood in the European Union' (2013) 50 *CMLRev* 1643, p. 1679.
[245] S. Giubboni (n 54), pp. 76 – 77.
[246] D. Kramer (n 116), p. 274
[247] C. O'Brien (n 243), p. 1651.
[248] Using the terminology as applied in D. Kramer (n 116), p. 274.
[249] S. Mantu (n 239).

persons obtaining different levels of protection, including some that have a right to reside but can be denied social benefits.[250] This requires the individual to bear responsibility for their integration into the host-state, and only obtains the full benefits of citizenship once the required conditions have been fulfilled.[251] In other words, instead of assisting with the integration of the migrant, the individual has responsibility to integrate themselves into the host-state before they can obtain the full range of rights available under Union Citizenship.[252]

Under this system there is a built-in assumption that short-term residents will be self-sufficient, and as such they are not entitled to social assistance under Article 24(2) Directive.[253] This means that any claim to social assistance will render them an unreasonable burden and thus they lose protection under the Directive.[254] For medium-term residents, they must earn their social protection by complying with the conditions laid down in the Directive. They exist in a form of 'denizenship', insofar as they have limited rights for a specific period, until they are considered to have sufficiently integrated and therefore earn their full inclusion in society.[255] Long-term residents are entitled to full inclusion, and thus enjoy a form of social citizenship that is almost "in its full Marshallian meaning".[256] This is the "high end of proving belonging and worthy socio-economic behaviour",[257] and as opposed to other forms of residence, acts as a "genuine vehicle for integration" into the host-state.[258] It overrides any financial reservations of the Member State and confers a recognition that the citizen has integrated into the host-society to the extent that he or she deserves to share in the burdens and benefits of that society.[259]

[250] D. Kramer (n 116), p. 279.
[251] Ibid, p. 275.
[252] Ibid, p. 274 - 275.
[253] S. Mantu (n 239), p. 454.
[254] Ibid, p. 292.
[255] G. Standing, *The European Precariat: The New Dangerous Class* (2011).
[256] D. Kramer (n 116), p. 296.
[257] D. Kramer, 'From worker to self-entrepreneur: The transformation of *homo economicus* and the freedom of movement in the European Union' (2017) 23 *EurLawJ* 172, p. 185.
[258] Recital (18) Directive 2004/38; *Ziółkowski & Szeja,* para. 41.
[259] D. Kramer (n 116), p. 297.

This system is fundamentally based on time insofar as time acts as the formal precondition for the acquisition and retention of rights under the Directive.[260] This means that economic activity is no longer the *sole* producer of entitlement to EU citizenship and social rights.[261] In fact, permanent residence becomes the single most important factor for individuals 'earning' their social citizenship rights through integration.[262] It is stronger than worker status, which can be lost due to lack of (or engaging in the wrong kind of) economic activity. However, despite the Directive being fundamentally based on time, engaging in economic activity is still arguably the only way to obtain the most protected status under the Directive.[263] Workers are immediately entitled to all social protections, whilst mere residents must be lawfully resident for five years before acquiring the same level of social rights.[264] Moreover, the idea of time spent lawfully resident is ingrained with an integration through work philosophy.[265] It is questionable if EU citizens can obtain permanent residence status at all without engaging in economic activity at some point. If not economically active, the EU Citizen must be self-sufficient for an entire five-year period (including any time spent as a student) which requires them to demonstrate sufficient resources for an entire five-year period (or period of study). This makes obtaining permanent residence status all but impossible to anyone but the wealthiest of citizens, who in any event are unlikely to require to protections available under the Directive.

To conclude, the Directive does not act as a tool for positive citizenship, or receptive solidarity, which suggests that to achieve equality and realise social citizenship individuals, particularly the most vulnerable groups in society, require active and positive rights such as welfare entitlement to further their integration.[266] Instead, it merely recognises their integration by affording more protective status and protections to those that have already demonstrated their ability to reside on the basis of the Directive.[267] More secure forms of status such as permanent residence are therefore a recognition

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[260] S. Mantu (n 239), p. 454.
[261] Ibid, p. 455.
[262] D. Kramer (n 116), p. 296.
[263] S. Mantu (n 239), pp. 454 – 455; C. O'Brien (n 243), p. 1647.
[264] Ibid, p. 459.
[265] Ibid, p. 456.
[266] D. Schiek, 'Perspectives on Social Citizenship in the EU: From Status Positivus to Status Socialis Activus via Two Forms of Transnational Solidarity' (2017), p. 349; M. Jesse & D. Carter (n 133), p. 157.
[267] D. Kramer (n 256), pp. 185-186; see also D. Kramer (n 116).

of the economic contribution made over that period, rather than a "tool" for further integration.[268]

This creates a highly individualistic system of citizenship that places the emphasis on the individual to become self-sufficient, with the Directive's role limited to laying down the conditions allowing them to realise this.[269] It encourages (or dictates) market participation and discourages social benefit entitlement as this can disincentivise work and burden the welfare system.[270] As such, it adheres to the 'responsibility' model of welfare that focuses on activating labour market policies and imposes punitive measures for those not able to meet the requirements, thereby effectively making social protection subordinate to employment.[271] Under this perspective, gaps created by the Directive are unproblematic as any difficulties the individual encounters are attributable to their unwillingness to engage in work.[272] The market therefore becomes synonymous with morality: fairness is redefined in terms of labour market participation and competition between workers, rather than solidarity among citizens and between citizens and state.[273] As the following chapters of thesis show, this is often simply untrue, with gaps created by the Directive that can result in the individual losing protection despite them engaging (or seeking to engage) meaningfully with the market.

7.3 An Autonomous and Precarious System

The first consequence of this system is that it Directive 2004/38 is autonomous from other provisions of law, potentially creating a precarious system of residence rights for EU migrants. The Court's decisions explained in this chapter show that if an individual does not have a right to reside under EU law, then this will result in them falling outside the scope of application of Citizenship rules entirely. They no longer have the option of relying directly on Treaty provisions.[274] In recent cases the Court has re-affirmed the principle

[268] Ibid, p. 185.
[269] Ibid, p. 176.
[270] C. O'Brien (n 243), pp. 1672 – 1673.
[271] Ibid, p. 1647.
[272] D. Kramer (n 256), p. 176; D.W. Carter, 'Inclusion and Exclusion of Migrant Workers in the EU', in M. Jesse (2020) *European Societies, Migration, and the Law: The 'Others' amongst 'Us'* (2020) CUP: Cambridge, p. 317.
[273] C. O'Brien (n 243), p. 1647.
[274] See D. Thym (n 233), p. 21.

that Member States can refuse social assistance benefits to economically inactive citizens that do not have sufficient resources under Article 7.[275] It has also found that individuals residing on the basis of Article 7 must have comprehensive sickness insurance to avoid becoming "an unreasonable burden on the public finances of that Member State".[276] This means that whilst Member States must affiliate a citizen to its public sickness insurance system where that person is subject to the legislation of the host-state, they are entitled to charge the individual for this provision in order to protect against unreasonable burdens.[277] In these cases, the individual is unable to rely directly on Treaty provisions if they are excluded from protection through the Directive.

As well as primary law, Directive 2004/38 is also autonomous *vis-à-vis* other EU secondary legislation. However, this is not always at the expense of the individual. For example, a right of residence granted to carers of children in compulsory education under the Workers' Regulation does not need to comply with the sufficient resources and comprehensive sickness insurance requirements under Directive 2004/38.[278] The Court held that the EU legislature did not intend to impose restrictions on such persons under the Directive,[279] and therefore this provision must be applied independently of other the provisions of European Union law governing free movement rights, such as the Directive.[280] The Court has also held that the derogations contained in Article 24(2) Directive 2004/38 only apply to situations where the individual is residing on the basis of the Directive.[281] In this case, as an individual was not relying on Article 14(4)(b) for a right to reside but on the carers of children in compulsory education provision within the Workers Regulation, the derogation contained in Article 24(2) could not be used against them.[282] Advocate General Pitruzzella even considered that individuals whose residence was based solely on Article 10 Regulation 492/2011 (i.e., not based on Directive 2004/38) could not rely on equal treatment under Article 24(1) (as

[275] Case C-709/20 *CG* ECLI:EU:C:2021:602, para. 78.
[276] Case C-535/19 *A* ECLI:EU:C:2021:595, para. 55.
[277] Ibid, para. 58.
[278] Case C-480/08 *Teixeira* ECLI:EU:C:2010:83, para. 70; C-310/08 *Ibrahim* ECLI:EU:C:2010:80, para. 59.
[279] *Teixeira*, para. 53.
[280] Ibid, para. 57.
[281] Case C-181/19 *Jobcenter Krefeld v JD* ECLI:EU:C:2020:794, para. 65.
[282] Ibid, para. 69.

was the case in *Dano*).[283] However, the Court held that it would be paradoxical to exclude persons residing on the basis of Regulation 492/2011 from social assistance simply because they started looking for work: it would result in the situation whereby the parent or carer would end up having stronger social protection by *not* looking for work.[284]

The Directive is also autonomous *vis-à-vis* the Charter, meaning that individuals gain little by way of residual protection from it. Despite the Charter gaining increasing prominence in the Court's decision-making process since Lisbon, in Union Citizenship and Directive 2004/38 cases its importance is diluted as the Court is stricter in finding it to be applicable than in other areas of EU law.[285] Specifically, the Court has found that situations are outside the scope of EU law entirely (a requirement for the Charter to apply) if the individual does not meet the Directive's conditions. For example, in *Iida* a third country national could not rely on the Charter as he did not have a derived right of residence under Directive 2004/38, nor had he applied for long-term residence under Directive 2003/109,[286] despite him being eligible for long-term residency under the latter Directive.[287]

In *Dano*, the Court held that Regulation 883/2004 did not intend to lay down the conditions for eligibility to SNCBs, and the eligibility criteria for granting them could not be considered as 'implementing' EU law as is required under the Charter. This, the Court argued, was because Regulation 883/2004 is a coordinating conflict-of-laws instrument that ensures the individual is subject to one Member State legal system, and while it classifies certain social security benefits, it leaves the competence to determine the conditions for accessing these benefits to the Member States.[288] This is based on the principles that EU law does not detract from Member States' freedom to organise their social

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[283] Opinion of Advocate General Pitruzzella in Case C-181/19 *Jobcenter Krefeld v JD* ECLI:EU:C:2020:377, para. 46. It should be noted that Article 10 Regulation 492/2011 uses the precise same wording as did the former Regulation 1612/68 (Article 12).
[284] *Jobcenter Krefeld v JD*, para. 71.
[285] C. Barnard (n 39), p. 435; K. Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) *8(3) ECLR 375*, p.386-387.
[286] Case C-40/11 *Iida* ECLI:EU:C:2012:691, para. 78-79.
[287] S. Iglesias Sánchez, 'Fundamental Rights Protection for Third Country Nationals and Citizens of the Union: Principles for Enhancing Coherence' (2013) 15 *European Journal of Migration and Law* 137, p.144.
[288] See Opinion of Advocate General Wathelet in Case C-333/13 *Dano* ECLI:EU:C:2014:341, para. 146.

security systems,[289] and that the Charter does not in any way extend the competences of the European Union.[290] As such, it is logical that eligibility criteria do not fall under the Regulation.[291] Whilst this argument is convincing in the context of Regulation 883/2004, in the case of Directive 2004/38 it is less so. The Court claims that the conditions for social benefits eligibility "result neither from Regulation No 883/2004 nor from Directive 2004/38 or other secondary EU legislation".[292] However, Directive 2004/38 explicitly and precisely dictates at least some of the situations in which social assistance benefits are conferred to EU Citizens, which includes SNCBs.

This creates a situation where the individual can be excluded from relying on the Charter because the Member State has concluded that they do not have sufficient resources. However, surely by subjecting an individual to a right-to-reside test based on Article 7(1)(b), the situation inherently falls within the scope of EU law, even if the Member State rightly concludes that this assessment does not confer them a right to reside.[293] In other words, rejecting a right of residence on the basis of EU law is "within the scope" of EU law. Excluding individuals from relying on the Charter in these cases arguably undermines the Court's own *acquis* which suggests that when determining the conditions for the granting of social security benefits, "Member States must comply with (Union) law",[294] as well as decisions where the Charter has applied when Member States exercise discretion granted through EU secondary law.[295]

Directive 2004/38 is also autonomous from national law. This is a reversal from *Trojani*, where national residence status was sufficient to allow the individual to rely on the EU right to equal treatment.[296] This has created a

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[289] Case C-70/95 *Sodemare* ECLI:EU:C:1997:301, para. 27; Case C-238/82 *Duphar & Others* ECLI:EU:C:1984:45, para. 16; Joined Cases C-159/91 & C-160/91 *Poucet & Pistre* ECLI:EU:C:1993:63, para. 6.

[290] *Dano*, para. 88.

[291] See D. Thym (n 233), p. 48.

[292] *Dano*, para. 90.

[293] H. Verschueren (n 49), p. 387.

[294] Case C-208/07 *von Chamier-Glisczinski* ECLI:EU:C:2009:455, para.63; see also Case C-157/99 *Peerbooms & Geraets-Smits* ECLI:EU:C:2001:404, paras.45–46; H. Verschueren (n 49).

[295] For example, in the context of asylum claims under Regulation 343/2003. See Joined Cases C-411/10 and C-493/10 *N.S.* ECLI:EU:C:2011:865, paras.65–68; see also K. Lenaerts (n 281), p. 380.

[296] *Trojani*, para. 43; D. Thym (n 160), p. 258.

confusing situation regarding the status of national residence certificates that are based on Directive 2004/38. The Court has consistently held that whilst national residence permits do not give rise to concrete rights under EU law, they do "prove the individual position of a national of a Member State with regard to provisions of (Union) law".[297] What this means in practice has been the subject of debate. Advocate General Trstenjak considered that, by adopting Directive 2004/38, the EU legislator intended to create an independent right of residence based on EU law, and that recognising national residence would create unforeseen situations and disturb the balance between the financial and social interests.[298] However, Advocate General Kokott considered that national residence permits were relevant, highlighting previous cases where they were used, and argued that the origin of residence right is not important.[299] The Court has sided more with Trstenjak's perspective, holding that the declaratory character of national residence permits/certificates means that they cannot be used to either find an individual's residence either lawful or unlawful under EU law.[300]

That said, in *Brey* the Court held that national residence certificates can be used to determine the individual circumstances surrounding an applicant's claim in a specific case, even if they do not confer rights by themselves. In this case the national authorities granted Mr Brey a residence certificate (indicting that they considered him to be lawfully resident) after they had denied him the pension supplement.[301] As such, when determining the lawfulness of the individual's residence, Member States should consider "… the fact that those factors have led those authorities to issue him with a certificate of residence".[302] This suggests that, whilst national residence permits do not give rights under EU law, they can indicate that the individual satisfies the requirements under the Directive (this was how the referring Austrian court

[297] *Royer*, para. 31; Case C-459/99 *MRAX* ECLI:EU:C:2002:461, para.74; Case C-408/03 *Commission v Belgium*, para. 63; see also Opinion of Advocate General La Pergola in Case C-85/96 *Martinez Sala* ECLI:EU:C:1997:335, para. 22.

[298] Opinion of Advocate General Trstenjak in Case C-325/09 *Dias* ECLI:EU:C:2011:86, paras. 75-80

[299] Opinion of Advocate General Kokott in Case C-434/09 *McCarthy* ECLI:EU:C:2010:718, paras.51-53

[300] *Dias*, para.54

[301] Opinion of Advocate General Wahl in *Brey*, para. 93.

[302] *Brey*, para. 78.

interpreted the *Brey* decision).[303] This situation can be distinguished from *Ziolkowski*, as in *Brey* the applicants were issued with an "EEA citizen registration certificate", issuable under Austrian legislation to those persons who "enjoy the right of residence under EU law",[304] whereas in *Ziolkowski* the applicants' residence permit was based on national humanitarian law. *Dano* is more difficult to reconcile with this logic, given that she had been issued with a "residence certificate of unlimited duration for EU nationals, which was re-issued in 2013".[305] That said, the Court felt it unnecessary to consider Ms Dano's position under the Directive as the national authorities had already concluded that she did not meet the conditions required under Directive 2004/38 to obtain a right of residence.

7.4 Systemic in Place of Individual Assessments

Another consequence of the system of social protection under Directive 2004/38 is that there is less space for individual assessments when determining whether an individual has a right of residence/sufficient resources, is an unreasonable burden, etc.[306] Prior to the adoption of Directive 2004/38, the Court required Member States to make an individualised proportionality assessment of the Union Citizen's situation and whether they deserve financial solidarity.[307] Even in *Brey*, the Court held that national authorities must consider "a range of factors in the light of the principle of proportionality, whether the grant of a social security benefit could place a burden on that Member State's social assistance system as a whole".[308] However, in more recent cases the role of the individual assessment has been "radically downgraded", with little regard for the principle of proportionality.[309] This is most clear in cases such as *Alimanovic* and *Garcia Nieto*,[310] where the Court has adopted a systemic test that is based on the idea

[303] H. Verschueren, 'Free Movement or Benefit Tourism: The Unreasonable Burden of Brey' (2013) 16 *European Journal of Migration* 147, pp.174 – 175; see also Case C-408/03 *Commission v Belgium*, para.63

[304] Article 53 Austrian Settlement and Residence Act (NAG). The Austrian legislation seemingly conflating the situations of "EEA nationals" and "EU law".

[305] *Dano*, para. 36.

[306] As the Court formulated in *Grzelczyk* and other cases; see C. O'Brien (n 31).

[307] D. Kramer (n 113), p. 291.

[308] *Brey*, para, 64.

[309] N. Shuibhne (n 67), p. 913; see also G. Davies (n 165), pp. 51, 55.

[310] To use the terminology as applied by D. Thym (n 233), p. 28.

that a single application for benefits could "scarcely be described as an 'unreasonable burden', however, the accumulation of all the individual claims which would be submitted to it would be bound to do so".[311] In *Dano*, it is suggested that the Court made an implicit assessment of Ms Dano's situation by asserting that she moved to Germany "solely" in order to obtain social assistance and that would mean that she was an unreasonable burden.[312] However, the referring court had already established that she was unlawfully resident, and the Court did in fact claim that national authorities should consider her financial situation without taking into account the benefit claimed.[313] That said, even if an individual assessment was made, there is no reason that she should have been granted a right to reside: she could not claim a right of residence either as a worker or jobseeker, and she did not have sufficient resources as required under the Directive. In short, she is one of the clearest examples of an individual that is not entitled to residence rights or social assistance under EU law.[314]

The shift to a more systemic test and greater deference being granted to Member States will inevitably result in weaker social protections for those on the borderline between lawful and unlawful residence. The previous system was based on an *ex-post* assessment, whereby the Member State was in principle obliged under Article 18 TFEU to grant social assistance, although granting this would mean the individual could be placed on the "thorny path" of receiving the benefit but subsequently faces an expulsion order due to becoming an unreasonable burden.[315] This has been replaced by an *ex ante* assessment, whereby Member States may now withhold social assistance benefits from Europeans making use of their free movement rights without having to consider whether to formally expel the individual or not.[316] It should be noted that *ex post* assessments are not necessarily more protective than *ex ante* ones. Is it really more desirable to be able to claim a social benefit, only to subsequently find that this has resulted in an expulsion decision against the individual, rather than having a benefit claim denied but not facing an

[311] *Alimanovic*, para. 62.
[312] D. Kramer (n 116), p. 293; *Dano*, para. 78.
[313] *Dano*, para. 80.
[314] G. Davies (n 165), p.1454.
[315] D. Schiek (n 265), p. 361.
[316] Ibid; See also D. Kramer (n 256), p. 185.

expulsion order, seeing as the initial claim suggests that the individual would prefer to remain in the host-state?[317]

The increased deference granted to Member States arguably results in unjust outcomes. For example, in *Commission v UK*, the Commission claimed that the UK practice of checking individuals' residence status upon an application for social benefits amounted to "systematic checking" of individuals residence status, which is prohibited under Article 14(2) Directive 2004/38. The Court held that this testing was not systematic, as "it is only in specific cases that claimants are required to prove that they in fact enjoy a right to reside".[318] However, this system is argued to be wholly systematic and exclusionary as it effectively meant that no economically inactive EEA migrant applying for social benefits could ever have a right to reside, given that "any benefit application is deemed to dissolve any claim to self-sufficiency".[319] Furthermore, "there is no starting presumption of lawful residence, or starting position of citizenship-based eligibility that is then limited and, in some cases, checked".[320] In fact, as the individual's status is checked solely because they have a made an application, it is arguable that there is a presumption of illegality. By granting such deference to Member States, the Court risks endorsing national practices that systematically check individuals' residence status upon their application for social assistance, thereby pre-emptively finding that their social benefit application is "bound to" result in an unreasonable burden being placed on the host-Member State. In practice, this means that a mere application for social assistance is enough to demonstrate a lack of resources and therefore exclude them from lawful residence.[321] It also removes the distinction between 'reasonable' and 'unreasonable' burdens, thereby resulting in the situation where "any recourse to social assistance pre-empts legal residence status".[322]

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[317] A. Somek (n 94), p. 797.

[318] Case C-308/14 *Commission v United Kingdom* ECLI:EU:C:2016:436, para. 83.

[319] C. O'Brien (n 122), p. 212; M. Jesse & D. Carter (n 133), p. 165.

[320] Ibid; Ibid.

[321] Although, it should be emphasized that whilst Ms Dano was excluded from social assistance benefits, she continued (before and after the decision) to receive Child Benefit (social security) for her son, which was unaffected by her social assistance claim. See also, M. Jesse & D. Carter (n 133).

[322] D. Thym (n 233), p. 42.

7.5 Less Entitlement to Social Benefits

The final implication from the system of social protection under Directive 2004/38 is that it makes it more difficult to claim social benefits generally if the individual is not classified as a worker. Primarily, this results from inconsistency regarding the definitions relating to different kinds of social benefits under EU law, namely social security and social assistance.

Social security is unharmonised at the EU level, and is only coordinated through Regulation 883/2004.[323] While the Regulation's previous versions only applied to workers, the 2004 version applies to "non-active persons".[324] This suggests that it now applies to anyone subject to the legislation of a Member State, regardless of their economic status,[325] leading to claims that the new Regulation only required *factual* residence, rather than *legal* residence, to claim the social security benefits listed therein.[326] This would mean that Member States could not impose a legal right-of-residence test on such benefits.[327] However, the SNCBs in *Brey*, *Dano*, *Alimanovic* and *Garcia Nieto* were all also included in the Regulation, having the nature of both social security and social assistance, and thus fell under the concept of social assistance within Directive 2004/38 and could have a right-to-reside test applied to them.[328] In contrast, Directive 2004/38 only refers to 'social assistance' and makes no reference to social security benefits or welfare generally,[329] suggesting that it does not apply to social security benefits.

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[323] Except through the idea of 'social advantages' under Regulation 492/2011 (see section X)
[324] Recital (42) Regulation 883/2004 on the coordination of social security systems, OJ L 166, 30.4.2004, p. 1–98; See C. O'Brien (n 121), p. 222.
[325] Article 2, Regulation 883/2004; see also Article 11 of Implementing Regulation No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, OJ L 284, 30.10.2009, p. 1–42; see also Internal Labour Organisation (2010). Coordination of Social Security Systems in the European Union: An explanatory report on EC Regulation No 883/2004 and its Implementing Regulation No 987/2009. Switzerland: International Labour Office, p.7.
[326] H. Verschueren (n 302), pp. 147–79.
[327] E. M. Poptcheva, 'Freedom of movement and residence of EU citizens: Access to social benefits' (2014) *European Parliamentary Research Service* 140808REV1, pp.16–17.
[328] See Opinion of Advocate General Wahl in *Brey*, para. 48.
[329] The exception being Article 8(4) Directive 2004/38. This provisions is the *only* reference to social security, where it is stated that the threshold for determining sufficient resources shall not be higher than "the minimum social security pension paid by the host Member State".

Despite this apparent difference in the rules relating to social security and assistance, the Court has applied an inconsistent, confusing, and arguably cynical usage of the terms 'social security', 'social assistance', and 'social benefits', which it seems to use interchangeably.[330] The Court rejected the Commission's argument in *Brey* that there should be a strict delineation between social security and social assistance, with the Regulation only applying to the former, and the Directive only applying to the latter. It found that such an approach would impinge upon the Member State competence in the area of social security,[331] would create "unjustifiable differences" between Member State classification of social benefits, potentially undermining the effectiveness of EU law.[332] Instead, it used Advocate General Wahl's "imprecise and broad" yet all-encompassing concept of social assistance, which includes any benefit aimed at individuals that do not have "stable and regular resources" and who is likely to become "a burden on the social assistance system of the host Member State".[333] Therefore, any benefit meeting this assessment will be classified as social assistance under Directive 2004/38, regardless of its status under Regulation 883/2004. This applies not just to SNCBs, but social security benefits proper. *Commission v United Kingdom* concerned right-to-reside tests imposed upon applicants of Child Benefit and Child Tax Credits.[334] These were not SNCBs,[335] but fell under Chapter 8 of Regulation 883/2004 on family benefits, and therefore "must be regarded as social security benefits".[336] However, the Court found that there is "nothing to prevent, in principle, the grant of social benefits to Union citizens who are not economically active being made subject to (a right to reside test)".[337] This means that any social benefit, so long as it has some characteristics of social assistance such as being taxpayer funded or non-contributory in nature,[338] can be subjected to a right-to-reside through national law on the basis of Article 7

[330] Compare in *Brey*, paras. 44 (general reference to "social benefits"), and 77 (where the Court refers to social security benefits having an effect on the social assistance system).
[331] Opinion of Advocate General Wahl *Brey*, paras. 50 – 53.
[332] *Brey*, para.59
[333] Opinion of Advocate General Wahl in *Brey*, paras. 48 – 49; see also *Eind*, para.29. The Court followed the Advocate General precisely in this regard, see *Brey*, paras. 58–59.
[334] Case C-308/14 *Commission v. United Kingdom*.
[335] Indeed, the original complaint included special non-contributory cash benefits, but these were removed following the Brey and Dano decisions. See Case C-308/14 *Commission v. United Kingdom* ECLI:EU:C:2016:436, para. 27.
[336] Case C-308/14 *Commission v United Kingdom*, para. 60.
[337] Ibid, para. 68.
[338] Ibid, para. 58.

Directive 2004/38.[339] The Court relied upon paragraphs 83 of *Dano* and 44 of *Brey* to justify a restriction on granting social benefits in general, despite these cases only concerning SNCBs which have characteristics of both social assistance and security.

The Court's approach seems to ignores any potential differentiation of benefits under EU law and assumes that there is one general rule applicable to all social benefits.[340] This has been criticised for undermining the political compromise at the heart of both legislative instruments,[341] and creating an "improper hierarchical dominance" of the Directive over the Regulation.[342] That said, the Regulation is a coordinating instrument that does not determine "the life and death" of welfare restrictions.[343] As has been explained in this chapter, Directive 2004/38 is an all-encompassing instrument that governs the conditions under which Member States must grant social assistance, and where they can derogate from this. Whilst at a doctrinal level the Court's approach towards social benefits may be justified, the ability of migrants to claim social benefits is suggested to be crucial to any claims of Union Citizenship having a social nature, thereby making their entitlement to such benefits highly important for their social protection.[344] As such, by making them more difficult to access, the Court arguably makes the realisation of a more socially minded Europe more difficult to achieve.

8 CONCLUSION

EU migrants residing in another Member State and not meeting the *Lawrie-Blum* criteria have very limited rights under EU law. That said, as this chapter has explained, non-economic free movement integration has developed significantly since being included in the Treaty of Maastricht. This was initially based on limited Treaty provisions that were given a broad scope through teleological interpretations by the Court. However, since the adoption of the Directive 2004/38, the Court has been much stricter in its interpretation of the Directive's provisions, preferring to stick to the letter of

[339] C. O'Brien (n 122), p. 220; M. Jesse & D. Carter (n 133), p. 166.
[340] C. O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (2017) Oxford: Hart, p. 51.
[341] H. Verschueren (n 302), pp. 159–165; see also C. O'Brien (n 121).
[342] S. Giubboni (n 54), pp. 83 - 84.
[343] M. Dougan (n 240), pp. 152-158
[344] C. O'Brien (n 243), p. 1672.

the law wherever possible, and has granted much more deference to Member States when determining who has sufficient resources, is an unreasonable burden, etc. Despite criticisms of its recent case-law, the Court's approach towards Directive 2004/38 is in line with its theoretical method of judicial reasoning, which can be (at least for the most part) justified in light of the wording and objectives of its provisions. However, the Court's shift from its previous teleological approach to its recent literal one does create problems for precarious workers as it creates gaps in the law where such workers may lose legal protection. EU migrants cannot rely on other provisions of European or national law if falling outside the Directive's categories, meaning that those not meeting the *Lawrie-Blum* criteria may be pushed into a precarious legal situation. Furthermore, the strict interpretation of the Directive has resulted in less space for proportionality assessments and an overall reduction in the level of social benefits that can be claimed by non-workers, especially those seeking employment.

While Union Citizenship has contributed to the "humanising" of the system by adding to the protections that previously existed,[345] it has not created a genuine form of social citizenship that provides residual protection to precarious workers when they are not recognised as having the status of worker under EU law. Instead, it creates a precarious system based on the idea of 'earned citizenship', whereby the individual can only gain protections by demonstrating their integration into the host-state. Whilst this is nominally assessed on the basis of time, in practice the requirement to carry out economic activity is still the only way to gain the highest form of legal status. Moreover, the Directive is based on neoliberal concepts of 'responsibility' and 'activating' labour market policies that reinforce the sense of individualism and responsibility at the heart of the system and is liable to exclude individuals that are unable to meet the individualist demands required under it, and furthermore contributes towards a system where migrants are viewed with increasing scepticism and hostility.

[345] D. Kramer (n 256), p. 182.