



## **A few thoughts on the normative and constitutional implications of the ruling in *Jobcenter Krefeld*<sup>1</sup>**

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### **1. Preliminary remarks**

In a recent contribution Nicolas Renny claimed that: «[T]he law on the cross-border access to social benefits makes a forbidding impression» (N. Renny, *The Trilemma of EU Social Benefits Law: Seeing the Woods and the Trees*, in *CMLR*, 2019, p. 1549 ss.). *Jobcenter Krefeld v JD* (Case C-181/19) perfectly exemplifies the complexities of welfare legislation and confronts the Court of Justice with the task of combining Directive 2004/38, Regulation 492/2011 and Regulation 883/2004 – all applicable in the case at hand – without impinging on their effectiveness, and without hindering the fundamental right to education of the child, which, however, is not part of the reasoning of the Grand Chamber.

The facts of the case and questions put forward by the Landessozialgericht Nordrhein-Westfalen could have led a romantic EU lawyer to hope for a ruling touching upon topical questions such as: to what extent is it possible to oust an EU citizen – in particular a minor – who is receiving education in the host Member State from that welfare system? Among the many interesting issues raised by the judgement, I will limit myself to consider its constitutional and normative implications.

That being said, two further *caveats*: a) EU migrants do not generally move to other Member States just to obtain social benefits and normally do not receive more in benefits than they contribute in taxes; b) the restrictive approach which culminated with *Dano* (Case C-

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333/13) cannot be assessed without bearing in mind the sensitive area of social assistance and the effects of the economic crisis.

## 2. Some considerations on the reasoning of the Court

In *Jobcenter Krefeld*, the Court of Justice has effectively removed the apparent precedence accorded in *Dano* and *Alimanovic* (Case C-67/14) to the requirements stipulated in Directive 2004/38 and ultimately affirmed the right to equal access to social assistance by EU citizens, minors of a primary carer for their education who has no entitlement under that Directive.

In *Jobcenter Krefeld*, the highest attainable level of individual protection is ensured by (simply) applying Regulation 492/2011 instead of Directive 2004/38, which was also applicable *ratione personae* to Mr. JD on the basis of Art. 14(4)(b). In this regard, it is perhaps worth mentioning that whilst usefully invoked in *Ibrahim* (Case C- 310/08) and *Teixeira* (Case C-480/08), Regulation 492/2011 was not addressed in *Alimanovic* despite the fact that the applicant was also the primary carer of her two minor children in education and thus could benefit from Article 10, which, again, entitles the children of an EU citizen who have settled in a Member State to reside there in order to attend general educational courses regardless of whether the parent who exercised rights of residence as a migrant worker is no longer economically active. And it's precisely the ECJ's refusal in *Alimanovic* to follow the suggestion of AG Wathelet to address the Regulation *motu proprio* that triggered the questions of the referring judge (Opinion, case C-181/19, paras 117-122). This distinctive feature, to be honest, was also evoked by AG Pitruzzella in his Opinion in *Jobcenter Krefeld* (para 44).

At para 71 of the judgment, the Court underscores the importance for EU citizens of being able to rely on both the Directive and the Regulation, which are not mutually exclusive. To hold otherwise would mean that primary carers like Mr. JD might be discouraged from seeking work in a host Member State if they risked being excluded from the right to equal treatment. Here the Court could have perhaps made reference to the aim to combat social exclusion, foster wellbeing, ensure education and promote integration. I shall resume this argument briefly hereafter.

For the time being, I would like to insist on the subjective element of the case. It will be remembered that, in contrast with prior case law, *Dano* makes personal intention, attitude and professional qualification relevant when assessing entitlement to social assistance under Directive 2004/38 or Regulation 883/2004. As pointedly argued by Ségolène Barbou des Places, EU institutions «develop their understanding of “good” and “bad” citizens and extend less rights to the latter» (S. Barbou des Places, «Integration», in L. Azoulai, S. Barbou des Places, E. Pataut (eds.), *Constructing the Person: Rights, Roles, Identities in EU law*, Oxford-Portland, Oregon, 2016, p. 25 ss.). *Jobcenter Krefeld* supports this reading. Indeed, at para. 68 – in a perhaps unnecessary, but significant, distinguishing effort – the ECJ seems to value the fact that, contrary to Ms. Dano, Mr. JD will most likely not become an excessive burden for the German welfare system or, better, that for him the chances of being engaged in a working activity are reasonably acceptable; a quite comforting message for the Member States.

### 3. Constitutional and normative implications of the judgement

If *Dano* can be traced to the trend that Eleanor Spaventa has characterized as «an apparent retreat from the Court's original vision of citizenship in favour of a minimalist interpretation [...] firmly locating the responsibility for the most vulnerable individuals in society with the state of origin» (E. Spaventa, *The Impact of Articles 12, 18, 39 and 43 of the EC Treaty on the Coordination of Social Security Systems*, in Y. Jorens (ed.) *50 Years of Social Security Coordination. Past – Present -Future*, Luxembourg, 2010, p. 112 ss.), *Jobcenter Krefeld*, can be understood as setting the highest possible level of individual protection in the given circumstances while reassuring the Member States that no additional burden will be imposed upon their welfare systems.

Assuming that, save when the inactive mobile citizen has never worked in the host Member State, Regulation 492/2011 will always offer sufficient protection to the child in education (independently of the applicability of Directive 2004/38), the ECJ should always verify whether the conditions laid down in Art. 10 obtain. *Alimanovic* proves that the status of worker must be taken seriously if minors are to be effectively protected and offered the opportunity to pursue and complete their education in the same Member State. In truth, also in light of precedents like *Baumbast* (Case C-413/99), Art. 10 of Regulation 492/2011 can be seen as a provision implementing Art. 24(3) of the Charter – according to which «[E]very child shall have the right to maintain on a regular basis a personal relationship and *direct contact with both his or her parents*, unless that is contrary to his or her interests» (emphasis added) – and a provision that guarantees the effectiveness of the rights enshrined in Arts. 7 (family life) and 14 of the Charter (Right to education) through equal access to social assistance, protected under Art. 34 of the Charter. And, *en passant*, let me add that the solution envisaged in the Worker's Regulation (Regulation (EU) No 492/2011) seems to strike the right balance between the potential expenses for the welfare systems of the Member States and the right to remain in the host country since, on the one side, the latter only lasts until the child is in education, and, on the other, abuse of law cases are not covered by Art. 10 (*Jobcenter Krefeld*, paras. 75-76).

Discarding any federal solution to the problem, with uniform social standards, an EU funded unemployment benefit scheme or even a single social assistance system, it remains to be seen whether and how the EU Legislator will react. In this regard, *Jobcenter Krefeld* appears to contradict the stance adopted by the Commission in its proposal to revise the coordination of social security systems of 2016 (COM/2016/0815 final). Here, quite paradoxically, the Commission admits – precisely on the basis of the line of the German cases *Dano*, *Alimanovic* and *Garcia-Nieto* (Case C-299/14) – the exclusion of economically inactive citizens from all social benefits, irrespective of their qualification as social assistance or social security. This would be done by adding a second paragraph to the equal treatment provision contained in Art. 4 of Regulation 883/2004 by stating that: «[A] Member State may require that the access of an economically inactive person residing in that Member State to its social security benefits be subject to the conditions of having a right to legal residence as set out in Directive 2004/38/EC».

In truth, this normative solution would be difficult to combine with the Union's objectives to combat social exclusion (Art. 3(3) TEU, Arts. 9 and 151(1) TFEU) as well as with Arts. 7, 14, 24 and 34(3) of the EU Charter of Fundamental Rights. This constitutional dimension, however, does not emerge from *Jobcenter Krefeld*. In his Opinion AG Pitruzzella limits himself to mentioning family life enshrined in Art. 7 of the Charter as a hermeneutical parameter for

the purposes of applying Art. 10 of Regulation 492/2011 (para 70). The Grand Chamber, on its part, does not mention the Charter and leaves us with a number of open questions. Would it be correct to conclude that these provisions had no bearing on the solution of the case at stake? Would it be fair to claim that they were simply not necessary, because no ‘interpretative stretching’ was required to solve the case? Perhaps the answer is, very plainly, yes.

#### **4. Final remarks**

As Jo Shaw wrote in 1998: «At first blush, in view of the rather fragmentary “social dimension” of the EU, one might be tempted to conclude that the social rights of Union citizens are exceedingly sparse» (J. Shaw, *The Interpretation of European Union Citizenship*, in *MLR*, 1998, p. 293 ss, p. 301).

This might very well still be the case. *Jobcenter Krefeld* correctly applies Regulation 492/2011 instead of the (exception foreseen in the) Directive, but fails to address the ‘beating constitutional heart’ of the case. As already suggested, this was not a technical necessity. And yet I am left with the impression that this is a missed opportunity to advance the social component of European integration. The reluctance of the Advocate General and of the ECJ to consider the right to education, in combination with the rights of the child, is a bit disappointing – I confess – also given the formation of the Court.

What remains to be seen, now, is whether the EU Legislator will finally intervene to clear the mist surrounding citizens’ entitlement to social assistance, with a particular attention, of course, to the underlying fundamental rights of the child, and to the need to ensure that «a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States», is indeed guaranteed as part of the fundamental status of Union citizenship (*Rudy Grzelczyk*, Case C-184/99, paras 44 and 31).