RE-SHAPING THE PARADIGM OF SOCIAL SOLIDARITY IN THE EU: ON THE UK'S WELFARE REFORMS AND PRE- AND POST- EU REFERENDUM DEVELOPMENTS

RUFAT BABAYEV*

Abstract

The sense of social solidarity formed at Union level is manifested, broadly speaking, in the very interchangeability of national solidaristic communities in the Union that allows Union citizens to be affiliated with the one of their residence. Initially widely defined in light of Union citizenship, the prospect of such interchangeability has been narrowed down in a trilogy of the Court's recent rulings. With the primacy afforded to the black-letter provisions of Union secondary law without the need for further proportionality assessment, the interchangeability of national solidaristic communities seems to be confined to the extent of an economic contribution in a host Member State. The actual parameters of this factor as a criterion setting the threshold of membership in a national solidaristic community are, in turn, being defined by Member States themselves, often resorting to the narrow and exclusionary interpretation of Union citizens' rights. The welfare reforms introduced in the UK in the period leading up to the EU referendum vote, for instance, have re-shaped the extent of Union workers' and job-seekers' rights by re-balancing them around the factor of economic contribution and specifically targeting those who are not deemed to actually contribute in the UK. As a result, fixing the threshold of membership in a national solidaristic community in this manner, both at Union and national levels, has created much uncertainty about the fate of Union citizenship and Union citizens' rights derived from the Treaty.

Keywords: social solidarity, welfare benefits, economic contribution, welfare reforms, workers, job-seekers.

1. INTRODUCTION

This article aims to explore the sense of social solidarity at Union level and its transformation in the post-crisis austerity-driven economic environment and, more importantly, as a result of the developments brought by the EU referendum vote in the UK. With the Union's lack of tax and welfare policies, the sense of social solidarity formed at Union level is effectively realised

* Dr Rufat Babayev is a Lecturer in EU Law at Leicester Law School, University of Leicester. Address: Road, Leicester, LE17RH; tel: +44(0)116 252 2338; email: rufat.babayev@le.ac.uk. He would like to express his sincere gratitude to Robin White, Adam Cygan and the anonymous reviewers for their comments. The usual disclaimer applies.

by means of national solidaristic communities in the Union. It is, in fact, manifested in the very interchangeability of such communities, whereby Union citizens enjoy the freedom to affiliate with the community of their residence. Nevertheless, the actual extent of such interchangeability has been at the forefront of various political and scholarly debates, given that full-fledged interchangeability runs the risk of undermining the delicate subsidisation process that lays the foundation of national solidaristic communities.

Preliminarily reserved for Union workers due to their status as *bone-fide* economic contributors, the idea of interchangeability of national solidaristic communities saw a change with the introduction of Union citizenship. This was regarded as a departure from the economic paradigm underpinning the threshold of membership in a national solidaristic community.¹ Nevertheless, recent developments suggest a growing re-consolidation of the factor of economic contribution as a criterion for determining the entitlement to welfare support in a host Member State. Pursuant to the Court's restrictive interpretation in a trilogy of recent rulings concerning Union citizens who were not actually engaged in employment,² the interchangeability of national solidaristic communities has been confined by the extent of an economic contribution in a host Member State. In particular, the inclusion within the circle of beneficiaries of the subsidisation process at national level seems to have become contingent on being 'earned' within the circle of contributors of this process. This also finds support in the compromise reached in February 2016 on the resettlement of the UK's EU membership. Despite now being legally obsolete, it not only established the 'emergency brake' concept, but also demonstrated the European Council's willingness and the Commission's endorsement to restrict Union citizens' welfare rights before they make a substantial economic contribution in a host Member State.

While the shift at Union level places an emphasis on the extent of economic contribution, the actual parameters of this criterion are being defined by Member States themselves, often resorting to the narrow and exclusionary interpretation of Union workers' and job-seekers' rights. This is evident, for instance, in the breadth of the welfare reforms introduced in the UK in the period leading up to the EU referendum vote. Given that they will most certainly remain in force until the UK eventually leaves the Union, and the likelihood of other Member States

¹ See, for example, AG Mazák's Opinion in Case C-158/07 *Förster* [2008] ECR I-8507, para. 54.

² Judgment of 11 November 2014, Case C-333/13 *Dano*, nyr; Judgment of 15 September 2015, Case C-67/14 *Alimanovic*, nyr; Judgment of 25 February 2016, Case C-299/14 *García-Nieto*, nyr.

embarking on similar reforms, they are explored here. The main question addressed is whether such a national initiative complies with Union law, according to which Union citizens have a fundamental right to seek and engage in work anywhere in the Union on the basis of equality and non-discrimination on the grounds of nationality. It is argued that, while some of the changes introduced by the UK government are in line with Union law, it is difficult to formulate this conclusion in general terms. There are aspects of the reforms that either contradict Union law or whose compliance with it requires further judicial clarification. More conceptually, the reforms can be seen as a national initiative intended to delimit the extent of Union workers' and job-seekers' rights by re-balancing them around the factor of actual economic contribution as a criterion for setting the threshold of membership in a national solidaristic community.

The analysis in this article starts in Section 2 and briefly outlines the contours of the national and Union models of social solidarity. Section 3 then examines the implications of the trilogy of the Court's recent rulings that reshape the paradigm of social solidarity formed at Union level. It is argued that these rulings re-consolidate the factor of economic contribution as a criterion determining the entitlement to welfare support in a host Member State. Section 4 explores the UK's welfare reforms, which are considered as an example of a Member State's unilateral practice of redefining the parameters of the factor of economic contribution.³ This section is divided into two parts. Part One concerns the status of a worker and the temporal limitations imposed on its retention. Part Two, in turn, focuses on the category of job-seekers by examining the amendments made to the eligibility criteria for Job-seeker's Allowance and other types of welfare benefits. This article concludes in Section 5 by arguing that the changing paradigm underpinning the sense of social solidarity at Union level, although a welcome change for Member States, raises uncertainty over the fate of Union citizenship and the rights associated with it and other Treaty provisions.

2. NATIONAL AND UNION MODELS OF SOCIAL SOLIDARITY AT THE CROSS-ROADS

The idea of social solidarity is a key principle laying the foundation of a welfare state system – a form of a community whose members collectively choose to meet certain social objectives

³ For other Member States, see, e.g., Blauberger and Schmidt (2014: 1).

that cannot be achieved within a private market setting.⁴ This, in general, includes the assurance for all community members of a ‘level of decent existence’⁵ in a range of eventualities involving but not limited to disability, unemployment, dismissal or retirement.⁶ The primary catalyst here is ‘the act of involuntary subsidisation’,⁷ whereby the wealth obtained by some community members is directed to meet the needs of others through the medium of public institutions.⁸ The effective realisation of such redistribution of wealth rests on two strands. First is ‘the existence of a common identity, forged through shared social and cultural experiences, and institutional and political bonds’.⁹ This factor draws the line between those who are considered as ‘outsiders’ and those who are considered as ‘insiders’ in the operation of a solidaristic community.¹⁰ Second, the effective redistribution of wealth requires the realistic management of community resources through balancing the revenues generated and those spent in social support.¹¹

A solidaristic community reflecting both aspects primarily exists at national level. The specific bond that engages someone in the process of subsidisation is expressed through a shared nationality. A state’s welfare system is therefore traditionally directed towards maintaining the well-being of its own nationals,¹² which is reflected in its tax and welfare policies. In contrast, a substantially different form of social solidarity has been formed at Union level. Unlike Member States, the Union lacks the ability to formulate its own tax and welfare policies and, hence lacks the necessary direct redistributive competence in the area of social security. As a result, the sense of social solidarity manifested at Union level is effectively realised by means of national welfare systems. In particular, it is expressed in the mechanism that aims to ensure the co-existence and coordinate the overlap of separate national solidaristic communities with interchangeable memberships. In a narrow sense, this is expressed in the system established under Regulation 883/2004.¹³ In a broader sense, however, even the Treaty provisions on the

⁴ Van Der Mei (2003: 3).

⁵ Schuyt (1998: 298).

⁶ Van Der Mei, *note 4 above*: 4.

⁷ Opinion of AG Fennelly in Case C-70/95 *Sodemare*, [1997] ECR I-03395, para. 29.

⁸ Lenaerts (2011: 398).

⁹ Dougan and Spaventa (2005: 185).

¹⁰ Lenaerts (2011).

¹¹ Dougan and Spaventa, *note 9 above*.

¹² Van Der Mei (2003: 5).

¹³ Regulation 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, L 166. See e.g. Judgment of 19 September 2013, Case C-140/12, *Brey*, nyr, para. 43; Case C-308/14 *Commission v UK*, nyr: Judgment of 14 June 2016, para. 67.

free movement of persons and Union citizenship could be construed to establish rights and principles that allow Union citizens to be affiliated with the solidaristic community of their residence and be integrated into the circle of participants of its subsidisation process.¹⁴ The actual extent of such an arrangement, however, has been the subject of contention,¹⁵ and has been portrayed as a catalyst for the outcome of the EU referendum that took place in the UK. Given the possible risk of disturbing the moral and financial underpinnings of the subsidisation process at national level,¹⁶ the key issue centres around delineating the actual extent of rights and principles established under Union law and setting the appropriate threshold of membership in a national solidaristic community.

3. TRANSFORMATION AT UNION LEVEL

The process of integration of Union citizens into the circle of participants in the subsidisation process at national level first started with the broad interpretation of Union workers rights.¹⁷ The Court has favoured the extensive definition of the right to equal treatment as regards ‘social advantages’ enshrined in Regulation 492/2011.¹⁸ This was effectively prompted by the position of Union workers: their lawful engagement in an economic activity and, more importantly, their role as *bona-fide* contributors.¹⁹ As the Court emphasised, through taxes paid in a host Member State, Union workers contribute to the financing of its social policies and should benefit from them on the same terms as national workers.²⁰

The introduction of Union citizenship led to the granting of certain welfare rights to those who were not engaged in an economic activity as such. This was primarily derived from their status of Union citizens, which was proclaimed by the Court to be ‘fundamental (...), enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality’.²¹ This has resulted in the broad interpretative framework adopted by the

¹⁴ Dougan and Spaventa, *note 9 above*.

¹⁵ Verschueren (2015: 365).

¹⁶ Dougan and Spaventa (2013: 191).

¹⁷ Spaventa (2017: 2).

¹⁸ See, for example, Case 207/78 *Even*, [1979] ECR 2019, para. 22; *Caves Krier Frères Sàrl*, para. 53.

¹⁹ Judgment of 13 December 2012, Case C-379/11, *Caves Krier Frères Sàrl*, nyr, para. 53. See also, Golynger O. (2005: 115).

²⁰ Judgment of 13 December 2012, Case C-542/09 *Commission v the Netherlands*, nyr, paras 63-66.

²¹ Case C-184/99 *Grzelczyk*, [2001] ECR I-6193, para. 31.

Court that has led, *inter alia*, to broadening the scope *ratione personae* of the Treaty,²² extending its scope to encompass specific policy areas,²³ and subjecting the conditions explicitly stipulated under Union secondary law to the proportionality assessment.²⁴ It was argued that this would strengthen the constitutional importance of Union citizenship and its transformation into an institution that ‘privilege[d] citizen status over economic activity’.²⁵ In particular, the Court’s approach was held to mark ‘a process of emancipation of [Union] rights from their economic paradigm’, whereby the right to equal treatment was no longer ‘bestowed upon citizens solely when they make use of the economic freedoms (...), but directly by virtue of their status as a citizen of the Union’.²⁶

Nevertheless, the trilogy of recent rulings reveals a perceptible shift in the Court’s approach. Starting with *Dano* followed by *Alimanovic* and *Garcia Nieto*, there has been a substantial re-consolidation of the economic paradigm underpinning the sense of social solidarity at Union level. In *Dano*, the issue concerned a special non-contributory benefit claim made by a Union citizen who did not work or seek employment. In *Garcia Nieto*, the case arose from a similar claim, although this time it was by a Union citizen who was in fact seeking employment. Similarly, in *Alimanovic*, an analogous claim was made for the same type of a benefit by a Union citizen, who unlike the previous claimants, had been temporarily employed for less than a year and was looking for a job. In all three rulings, the Court confirmed Member States’ discretion to deny the grant of welfare support while resorting to a restrictive interpretation that substantially departed from its previous stance.

The difference in the line of reasoning common to this trilogy of rulings lies in the primacy afforded to the black-letter provisions under Union secondary law. The first sign was evident in *Dano*, where the Court confined its analysis to Article 24 of Directive 2004/38, as it was held to constitute ‘a specific expression’ of the general principle of non-discrimination enshrined under Article 18 TFEU.²⁷ Having found the derogations under Article 24 (2) to be inapplicable, the Court proceeded with Article 24 (1), the applicability of which was held to be

²² See, for example, Case C-85/96 *Martinez Sala* [1998] ECR I-02691.

²³ See, for example, Case C-209/03 *Bidar* [2005] ECR I-02119; *Grzelczyk*

²⁴ Case C-413/99 *Baumbast*, [2002] ECR I-7091.

²⁵ Kostakopoulou (2005:233).

²⁶ Opinion of AG Mazák in *Förster*, para. 54.

²⁷ *Dano*, para. 61.

conditional on the satisfaction of the requirements pursuant to Article 7 of Directive 2004/38.²⁸ Thus, given the fact that the claimant lacked sufficient resources, Article 24, according to the Court, could not be invoked against the refusal by the national authorities to grant the welfare benefit at issue. This approach was reiterated in *Alimanovic*. The Court first established that the claimant could no longer enjoy the status of a worker under Article 7(2) of Directive 2004/38 due to having been employed for less than a year.²⁹ It then emphasised the claimant's rights as a job-seeker under Article 14 (4), though the reference to it in the wording of Article 24 (2) meant that a host Member State could refuse to grant social assistance to this category of Union citizens.³⁰ In a similar vein, the wording of Article 24 (2) of Directive 2004/38 was the focal point of the Court's reasoning in *Garcia Nieto*, where it emphasised a host Member State's discretion to deny social assistance to a Union citizen during the initial three-month condition-free residence provided under Article 6 of the Directive.³¹

The findings in these rulings represent a clear methodological shift, whereby the black-letter provisions of Union secondary law have been transformed to operate as a 'straightjacket' on the determination of Union citizens' rights.³² In particular, on the one hand, the relevant Treaty provisions, such as Articles 18, 20 and 45 TFEU are no longer at the forefront of the Court's reasoning, which does not sit well with its previous rulings. There has been an apparent retreat from the rhetoric based on the superiority of Union primary law over secondary law that used to be prevalent in the context of Union citizens' rights.³³ It is difficult to reconcile, for instance, the conclusion reached in *Alimanovic* with that in *Baumbast*, where the Court, in light of Article 20 TFEU, softened the self-sufficiency and health-cover requirements under Directive 2004/38.³⁴ In a similar vein, in *Saint Prix*,³⁵ with reference to Article 45 TFEU, the Court confirmed the possibility of retaining the status of a worker in case of pregnancy and childbirth, even though the Directive itself does not explicitly envisage it.³⁶ The 'hegemonic attribution of supremacy to [Union] secondary law' has therefore effectively transformed its function from

²⁸ *Ibid*, para. 73.

²⁹ *Alimanovic*, para. 55.

³⁰ *Ibid*, para. 57.

³¹ *Garcia Nieto*, para. 43.

³² Spaventa.(2017: 4).

³³ See for example, the Court's reasoning in *Martinez Sala*.

³⁴ *Baumbast*, para. 86.

³⁵ Judgment of June 2012, C-507/12 *Saint Prix*, nyr.

³⁶ *Ibid*, para. 38. See also the Court's reasoning in Judgment of 25 October 2012, C-367/11 *Prete*, nyr.

the mere setting the conditions for the exercise of the Treaty rights to defining their very existence.³⁷

On the other hand, there is no longer a requirement for an individual-centred assessment based on the proportionality principle. Unlike the earlier ruling in *Brey* where the principle of proportionality was still the focal point of the Court's reasoning,³⁸ the reference to it in *Dano* is rather brief. The Court only held that 'the financial situation of each person concerned should be examined specifically, without taking account of the social benefits claimed' to determine whether the conditions under Article 7 of Directive 2004/38 were met.³⁹ At first, one would have been hesitant to read too much into the change of the Court's approach in *Dano*. Given the circumstances of the case, it could in fact be construed to be limited to the situations in which a Union citizen's sole motive for moving to another Member State was to claim welfare support.⁴⁰

Nevertheless, not only has the Court reaffirmed this approach, it has even extended it beyond the category of economically inactive Union citizens.⁴¹ In *Alimanovic*, the Court limited the need for the proportionality assessment when giving effect to the temporal limitation imposed on the retention of the status of a worker by those who had been employed for less than a year. According to the Court, there is no need for the individual-centred assessment, as 'a period of six months after the cessation of employment during which the right to social assistance is retained, is consequently such as to guarantee a significant level of legal certainty and transparency in the context of the award of social assistance by way of basic provision, while complying with the principle of proportionality'.⁴² In *Garcia Nieto*, the Court extended this reasoning with regard to the limitation of job-seekers' right to equal treatment under Article 24 (2) of Directive 2004/38. It was held that 'if [the individual-centred] assessment [was] not necessary in the case of a citizen seeking employment who no longer ha[d] the status of 'worker', the same applie[d] *a fortiori* to persons who [were] job-seekers during the first three months of residence in a host Member State'.⁴³ A similar change in the approach is also

³⁷ Nic Shuibhne (2015: 891).

³⁸ *Brey*, paras. 70-72.

³⁹ *Dano*, para. 80.

⁴⁰ Verschueren (2015: 373).

⁴¹ See, however, the Court's approach in *Saint Prix*.

⁴² *Alimanovic*, paras. 59-61.

⁴³ *García-Nieto*, para. 48.

evident in AG Villalón's recent assessment of the compliance with Union law of the UK's right to reside test imposed on Union citizens' entitlement to Child Benefit and Child Tax Credit.⁴⁴

The exercise of Treaty rights has thus been made conditional on the strict satisfaction of the limitations and conditions specified under Union secondary law with no need for further assessment of individual circumstances.⁴⁵ In one respect, this leads to the synchronisation of Union primary and secondary law.⁴⁶ Setting limits on the rights and principles, in the Court own words, 'guarantees a significant level of legal certainty and transparency in the context of the award of social assistance'.⁴⁷ The lack of these factors could, in fact, be included among reasons prompting Member States to embark upon welfare reforms. As it is the case in the UK, one of the reasons is undoubtedly to ease the workload placed on national administrations in conducting a case-by-case assessment of individual circumstances by shifting to Union citizens much of the burden of proof for meeting the conditions for welfare support.⁴⁸

That said, it is difficult to dispute the fact that the change in the Court's approach has also altered the conceptual paradigm underpinning the welfare entitlements of Union citizens. The factor of economic contribution has turned into a 'dominant axis' around which the equal treatment to welfare support in a host Member State is construed.⁴⁹ In particular, the sense of social solidarity is being confined not just to those who can prove their market credentials,⁵⁰ but to those who are actually and actively engaged in employment. The mere prospect of being in such a position as a first-time or even a second-time job-seeker is not sufficient. As a result, the interchangeability of national solidaristic communities that manifests the sense of social solidarity at Union level appears to acquire a 'contributory' nature. It has been made conditional on the extent of the claimant's economic contribution in a host Member State. Union citizens thus enjoy the freedom to affiliate with the national solidaristic community of their residence. Such an affiliation, however, does not happen automatically when one moves and takes up a residence in a different Member State pursuant to Article 21 TFEU, but must be

⁴⁴ Opinion of AG Villalón in *Commission v UK*. More on this, see, O'Brien (2015).

⁴⁵ This was also followed by the apparent reversal of the objective of that Directive. Compare, for instance, the Court's reasoning in *Brey* (para. 53) and *Dano* (paras. 74-76).

⁴⁶ Thym (2015: 24).

⁴⁷ *Alimanovic*, para. 61.

⁴⁸ Blauberger, and Schmidt, *note 3 above*.

⁴⁹ Iliopoulou-Penot (2016: 1022).

⁵⁰ Spaventa (2017: 14).

‘earned’.⁵¹ In particular, inclusion within the circle of beneficiaries of the subsidisation process at national level seems now contingent on being within the circle of contributors to this process.

Despite the fact that it is now legally obsolete, the compromise reached in February 2016 on the resettlement of the UK’s EU membership further reaffirms the changing paradigm of social solidarity at Union level.⁵² Among other matters, it envisaged the introduction of the so-called ‘emergency brake mechanism’ that would have allowed Member States to restrict the access of Union citizens to non-contributory in-work benefits for a total period of up to four years from the commencement of employment.⁵³ The wording of such an arrangement clearly demonstrates the European Council’s willingness and the Commission’s endorsement to validate directly discriminatory treatment on grounds of nationality that would have defied the very rationale for granting extensive rights to Union workers.⁵⁴ More conceptually, however, the emphasis placed on the restriction of non-contributory in-work benefits could be construed as a consensus for reinforcing the factor of economic contribution as a threshold of membership in a national solidaristic community. In particular, it would have created a system whereby Union citizens would first be required to contribute to the economy of a host Member State before being entitled to welfare support. As stipulated, this restriction would have progressively phased out ‘from an initial complete exclusion to gradually increasing access to (...) benefits to take into account of the growing connection of [a] worker with the labour market of [a] host Member State’.⁵⁵ As such, it would have specifically targeted Union citizens on low incomes, as this category is most likely not to pay tax (or to pay less tax), but be eligible to receive welfare support pursuant to their status of a worker.⁵⁶ Irrespective of its fate, such an arrangement has nonetheless established the imposition of the ‘emergency brake’ concept on Union citizens’ welfare entitlements. It is likely that this will resurface in some form or other in the future, particularly in the context of the UK’s eventual withdrawal from the Union.

⁵¹ Davies (2004: 221).

⁵² European Council Meeting Conclusions 18 and 19 February 2016, EUCO 1/16, Brussels, 19 February 2016.

⁵³ *Ibid*, Section D/2 (b).

⁵⁴ This is the case despite the fact that the grounds along similar lines have been recognised by the Court as capable of justifying restrictions imposed on free movement. See, for example, Judgment of 28 January 2016, Case C-50/14 *CASTA and Others*, nyr, para. 61.

⁵⁵ Section D/2 (b), European Council Meeting Conclusions 18 and 19 February 2016.

⁵⁶ In-work welfare benefits of similar nature as, for instance, Income Support or Tax Credits are available for those on low income. See also, the Court’s reasoning in Case 139/85 *Kempf*, [1986] ECR 1741.

4. TRANSFORMATION AT NATIONAL LEVEL

The re-consolidation of the economic paradigm underpinning the sense of social solidarity at Union level is further fuelled by the adoption of stringent national practices as regards the status and corresponding rights of Union workers and job-seekers.⁵⁷ In particular, while the Court's methodological shift has placed an emphasis on the extent of an economic contribution as a precondition for Union citizens' welfare entitlements in a host Member State, the actual parameters of this criterion are being defined by Member States themselves, often resorting to very narrow and exclusionary interpretations of Union workers' and job-seekers' rights. This is evident, for instance, in the extent of the welfare reforms introduced in the UK in the period leading up to the EU referendum that primarily targeted those who were not actually engaged in employment.

4.1. Category of Union workers

One aspect of the UK welfare reforms concerns the determination of the status of a worker within the meaning of Union law and the time limits imposed on its retention.

4.1.1. *Status of a worker*

The UK government first introduced the so-called Minimum Earning Threshold (MET) test which is based on a two-tier approach, as a means to determine the status of a worker. The first tier looks at whether a person's earnings had been at least £150 per week during the last three months.⁵⁸ This amount is equivalent to working 24 hours a week at the National Minimum Wage level and was set at a point at which employees pay Class 1 National Insurance contributions.⁵⁹ Union citizens who satisfied this threshold were automatically regarded as workers for the purpose of Article 45 TFEU. Those whose earnings come below it were then subject to the second tier of the assessment, which involves further examination of the work that was undertaken.

⁵⁷ O'Brien (2016: 953).

⁵⁸ Press Release of the Department for Work and Pensions, 21 February 2014, available at: <https://www.gov.uk/government/news/minimum-earnings-threshold-for-eea-migrants-introduced>, (last accessed on 19 September 2016).

⁵⁹ Memo DMG 1/14, 'JSA(IB) - Right to Reside – Establishing Whether an EEA National Is/Was A "Worker" Or A "Self-Employed Person"', DMA Leeds: February 2014.

Taken on face value, the assessment under the MET test does not sit well with the principles established by the Court as regards the personal scope of Article 45 TFEU.⁶⁰ From the very beginning, the definition of who was regarded as a worker was given its own independent meaning.⁶¹ In particular, to ensure the effectiveness of Article 45 TFEU, the Court rejected the possibility of the term ‘worker’ being interpreted in accordance with national law. Viewed in this light, a potential risk posed by the use of the MET test may not seem altogether unfounded. The assessment under the first tier is premised upon a threshold that is estimated with reference to the national level of a minimum wage, which can lead to the unilateral delimitation of the personal scope of Article 45 TFEU. In fact, several Member States have proposed to use such a national standard as a criterion for determining the status of a worker. This, however, has been rejected by the Court to ensure the effectiveness of Article 45 TFEU, as otherwise the meaning of the term ‘worker’ would vary from Member State to Member State due to differences in the standards used.⁶²

Although, the test under the first tier alone is likely to contravene Article 45 TFEU, it does not seem problematic as such if it is combined with the assessment under the second tier. Those whose earnings are below the threshold are not simply denied the status of a worker and the corresponding rights. Instead, the second tier envisages further examination against a broad range of criteria.⁶³ As pointed out by the Department for Work and Pensions, this involves the assessment of each case, as a whole, taking all circumstances into account.⁶⁴ Among the factors to be considered are, for instance, the period of employment, the regularity of employment, the number of hours worked and the level of earnings.⁶⁵ The threshold under the first tier could, thus, be deemed to simplify the administrative burden of establishing the status of a worker without narrowing down the personal scope of Article 45 TFEU. It is true that a more restrictive approach under the second tier cannot altogether be discarded, particularly as regards part-time work.⁶⁶ However, from a practical point of view, the MET test does not appear to be any different from the former one.⁶⁷ As is apparent from the new policy guidelines for decision-

⁶⁰ See, for example, Case C-212/05 *Hartmann*, [2007] ECR I-6303, para. 17.

⁶¹ Case 75-63 *Hoekstra*, [1964] ECR 347, para. 1; See also, Case 53/81 *Levin*, [1982] ECR I-1035, para. 11; Case 66/85 *Lawrie Blum*, [1986] ECR 2121, para. 17.

⁶² *Levin*, para. 12.

⁶³ Memo DMG 1/14: para. 7.

⁶⁴ *Ibid.*

⁶⁵ Department for Work and Pensions, Housing Benefit Circular, HB A3/2014, para. 20.

⁶⁶ O’Brien (2015:119).

⁶⁷ See also, Evans (2015:284).

makers, each case has to be decided on its own merits,⁶⁸ considering the principles recognised in the Court's jurisprudence.⁶⁹ This, in turn, follows the approach adopted by the Court, according to which whether or not a person is a worker should only be decided in terms of an overall assessment of an employment relationship, as each relevant factor taken separately is not conclusive enough.⁷⁰

4.1.2. Retention of the status of a worker

The changes introduced by the UK government did not only concern the determination of the status of a worker, but also amended the conditions for its retention. Accordingly, those who have been duly recorded as involuntarily unemployed and registered as job-seekers after having been employed in the UK for at least a year can retain the status of a worker for a period of six months.⁷¹ This can further be extended by up to two months based on 'compelling evidence that [a Union citizen] is continuing to seek employment and has a genuine chance of being engaged'.⁷² The conditions for the retention of the status of a worker are different for those who have been employed in the UK for less than a year. Provided that there is a record of involuntary unemployment and registration as a job-seeker, this category of Union citizens is allowed to retain the status of a worker for a maximum period of six months. After the expiry of this period, they cease to have the right to reside in that capacity. As it appears from the guidance of the Department of Work and Pensions, they can still be granted the right to reside as a job-seeker, though this entails a substantial reduction in their welfare entitlements.⁷³

In contrast to the MET test, it is questionable whether the new terms introduced as regards the retention of the status of a worker are fully consistent with Union law. The problematic aspect of this legislative change lies in the approach adopted with respect to the category of Union citizens who have been employed in the UK for more than a year. Like those who have been employed for less than a year, their status is also confined to six months. It is true that they can extend it for two further months, but such an arrangement is not in line with the wording of Article 7 of Directive 2004/38. Under this provision, only the status of those who have been

⁶⁸ Memo DMG 1/14, *note 59 above*, para. 18.

⁶⁹ See Annex A to Housing Benefit Circular, *note 65 above*.

⁷⁰ Joined Cases C-22/08 and C-23/08 *Vatsouras*, [2009] ECR I-04585, para. 30.

⁷¹ Immigration (EEA) (Amendment) Regulations 2014, SI 2014/1451, 4 July 2014.

⁷² *Ibid*, Explanatory Memorandum to Immigration (EEA) (Amendment) Regulations 2014, para. 7.2; See also, Memo DMG 15/14, 'Habitual Residence and Right to Reside – JSA', para. 14.

⁷³ *Ibid*, para. 7. See also *Shabani* [2013] UKUT 315 (IAC).

employed for less than a year is subject to a temporal limitation. Article 7(3)c of Directive 2004/38 explicitly provides that this category of Union citizens is entitled to retain the status of a worker ‘for no less than six months’. As recently clarified by the Court in *Alimanovic*, they effectively lose that status at the expiry of that period.⁷⁴

Unlike this category, however, Article 7(3)b of Directive 2004/38 does not envisage any temporal constraint imposed on those who have been employed for more than a year.⁷⁵ The combination of Articles 7(3)c and 7(3)b could, in fact, be construed to establish a threshold for the retention of the status of a worker in the form of completion of a year of employment.⁷⁶ Accordingly, any genuine and effective employment below that threshold only entitles the person to retain the status of a worker for a period of six months. Reaching this threshold, however, means that a Union citizen can retain the status of a worker for a significantly longer period. This is what constitutes the very ‘gradual system’ for retaining the status of a worker referred to by the Court in *Alimanovic*, in which the level of protection afforded is meant to be progressive.⁷⁷ Union citizens employed for more than a year should, therefore, be clearly distinguished from those who have been in employment for less than a year. The length of the status of a worker granted to them is meant to reflect the fact that they are more likely to establish ‘a sufficient link of integration with the society of [a host Member State]’ by paying taxes and contributing to financing [its] social policy.⁷⁸

That said, it is not suggested that those who have been employed for more than a year can retain the status of a worker indefinitely. Although this issue has not been extensively covered in the Court’s jurisprudence, it is nevertheless possible to draw a few contours. It appears that the retention of the status of a worker by this category of Union citizens can be subject to two interrelated conditions. First, in accordance with the wording of Article 7(3)b, a Union citizen has to in duly record involuntary unemployment and register as a job-seeker. Second, pursuant to *Martinez Sala*, they must also remain in the labour market of a host Member State and

⁷⁴ *Alimanovic*, para. 55.

⁷⁵ See also the conclusion of Judge R.C.A. White in *Secretary of State for Work and Pensions v MM (IS)* [2015] UKUT 0128 (AAC), para. 53.

⁷⁶ Mantu (2014: 8).

⁷⁷ Barnard (2005:160).

⁷⁸ *Caves Krier Frères Sàrl*, para. 53.

continue to seek employment.⁷⁹ This is because, as clarified by the Court in *Collins*,⁸⁰ in order to be able to retain the status of a worker, there must be a link between previous employment and the search of another job.⁸¹

4.2. Category of Union job-seekers

As regards the category of Union citizens seeking employment, the recent reforms primarily focused on their entitlement to a range of welfare benefits in the UK.

4.2.1. Entitlement to Job-seeker's Allowance

Starting January 2014, the UK government has adopted a number of measures aimed at restricting access to Job-seeker's Allowance by Union citizen seeking employment in the UK. This includes the introduction of a new condition for the entitlement to this welfare benefit and the time limit set for its receipt.

4.2.1.1 Three-month residence requirement

The first step taken by the UK government involved the amendment of the so-called Habitual Residence test,⁸² according to which the eligibility for Job-seeker's Allowance is now conditional upon the completion of a fixed period of residence.⁸³ Whether it is a British national or a national of another Member State, the claimant is required to be habitually resident in the UK for a continuous period of three months. To a large extent, this requirement has been the target of criticism owing to its applicability to 'returning' British nationals.⁸⁴ From the perspective of nationals of other Member States alone, however, the new Habitual Resident test appears to be in line with the Court's jurisprudence. Despite broadening the extent of the right to equal treatment granted to the category of Union citizens seeking employment,⁸⁵ the Court also gave effect to the legitimate interests of Member States to protect their welfare systems from abuse. As a result, subject to the principle of proportionality,⁸⁶ the entitlement to an unemployment benefit was made conditional upon the existence of 'a genuine link (...)

⁷⁹ *Martinez Sala*, paras. 32 – 34.

⁸⁰ Case C-138/02 *Collins*, [2004] ECR I-2703

⁸¹ *Ibid*, para. 28.

⁸² For more on this, see, for example, Adler (1995); Kennedy (2011).

⁸³ The Jobseeker's Allowance (HR) Amendment Regulations 2013, No. 3196, para. 2.

⁸⁴ see O'Brien (2015: 113).

⁸⁵ *Collins*, para. 63.

⁸⁶ *Ibid*, para. 72.

between the person seeking work and the employment market of [a Member State]’.⁸⁷ It is therefore legitimate for a Member State to impose a residence requirement in order to establish that the person concerned has, for a reasonable period, genuinely sought work in a host Member State.⁸⁸

4.2.1.2 Time-limit on claims and its extension

The second step taken by the UK government involved the introduction of a time limit on the period within which Job-seeker’s Allowance can be claimed and conditions for its possible extension. Union citizens who enter the UK to seek employment are granted the right to reside for a total length of six months.⁸⁹ This period first consists of the initial three-month condition-free residence, which is conferred upon all Union citizens under Article 6 of Directive 2004/38. During that period, those who are engaged in employment search cannot bring a claim for Job-seeker’s Allowance, as they are required to be habitually resident in the UK for three months. Their eligibility to receive this benefit, in principle, therefore, only arises after the expiry of the initial three-month period of residence.⁹⁰ This is when they acquire the status of a job-seeker, which is limited to the period of three months. Such a temporal limitation, on its own, is in conformity with the Court’s jurisprudence. The period from three to six months combined with the initial three-month condition-free residence under Directive 2004/38 is likely to be ‘reasonable’ pursuant to the Court’s reasoning in *Antonissen* and *Commission v Belgium*.⁹¹

This combined six-month period does not cease automatically, but can be extended for a short period upon displaying ‘compelling evidence’ that a person is continuing to seek employment and has a genuine chance of being engaged’.⁹² Unlike the temporal limitation, such a requirement, however, is at odds with the Court’s jurisprudence, as it imposes a stricter condition. In *Antonissen*, the Court held that Union citizens seeking employment cannot be required to leave a host Member State at the expiry of the reasonable period if they provide ‘evidence’ of continuing to seek employment and having a genuine chance of being engaged. This finding, which is also enshrined in Article 14 (4) of Directive 2004/38, is in fact given

⁸⁷ Case C-224/98 *D’Hoop*, [2002] ECR I-06191, para. 38; Case C-258/04 *Ioannidis*, [2005] ECR I-08275, para. 30.

⁸⁸ *Collins*, para. 70.

⁸⁹ Explanatory Memorandum to Memo DMG 15/14, para. 7.

⁹⁰ *Ibid.*

⁹¹ *Antonissen*, para. 21; Case C-344/95 *Commission v Belgium*, [1997] I-1035, paras. 16-18.

⁹² The Immigration (EEA) (Amendment) (No. 2) Regulations 2013, No. 3032, para. 3.

effect within the new legislation adopted by the UK government.⁹³ The possibility of extending the status of a job-seeker is not ruled out. Nevertheless, unlike the wording in *Antonissen*, for such an extension to be granted, it is not sufficient to provide ‘evidence’ of continuing to seek employment and having a genuine chance of being engaged. Such evidence must actually be ‘compelling’. The problematic aspect here lies in the kind of evidence that would be considered as such. As clarified by the Department for Work and Pensions,⁹⁴ this includes either ‘a genuine job offer’ that will start in three months or ‘a change of location or recent completion of vocational training’ that have led to job interviews.⁹⁵ This could be construed to mean that the form of evidence within the meaning of *Antonissen* would not actually be sufficient for an extension to be granted. The references, for instance, to a genuine job offer or the outcome of job interviews that have already taken place seem to suggest that decision-makers would require not the submitted ‘evidence’ but the actual ‘chances of employment’ to be compelling.⁹⁶ This, in turn, goes beyond the *Antonissen* conditions.

4.2.2. Entitlement to other welfare benefits

The reforms brought by the UK government also concern other types of welfare benefits. As with Job-seeker’s Allowance, job-seekers’ right to claim Child Benefit or Child Tax Credit has been made conditional on the three-month habitual residence requirement.⁹⁷ According to the Government, this aims to protect the benefit system by requiring claimants to have a reasonable connection with the UK before becoming eligible.⁹⁸ With this legislative change, the eligibility condition for Child Benefit and Child Tax Credit was aligned with that prescribed for Job-seeker’s Allowance. More drastic measures, however, have been adopted with respect to the entitlement of Union citizens to Housing Benefit and Universal Credit.

Both are means-tested benefits and are provided to those whose income is below a specified limit. In particular, Housing Benefit aims to assist its recipients to meet the costs of rented accommodation.⁹⁹ Universal Credit is a new type of a welfare benefit introduced to replace

⁹³ See, for example, Explanatory Memorandum to the Immigration (EEA) (Amendment) (No. 3) Regulations 2014, No. 2761, para. 7.7.

⁹⁴ Memo DMG 15/14, *note 43 above*, paras. 14-15

⁹⁵ *Ibid.*

⁹⁶ Williams (2015: para. 15).

⁹⁷ The Child Benefit (General) and the Tax Credits (Residence) (Amendment) Regulations 2014, No. 1511, para. 3.

⁹⁸ *Ibid.*, Explanatory Memorandum to it, para. 7.3.

⁹⁹ ‘Housing Benefit’, available at; <https://www.gov.uk/housing-benefit/overview>.

several other existing ones and is designed to support people on low incomes or who are out of work.¹⁰⁰ Unlike Child Benefit and Child Tax Credit, the reforms did not just introduce a new temporal precondition, but altogether disqualified those seeking employment from claiming them.¹⁰¹ Prior to the reforms, although ordinarily excluded from Housing Benefit due to the absence of habitual residence,¹⁰² job-seekers from other Member States could still claim these benefits if they were in receipt of Job-seeker's Allowance.¹⁰³ This, however, has been amended by removing a link between the different benefits. Thus, the eligibility to receive Housing Benefit now no longer automatically arises when a person is receiving Job-seeker's Allowance. In contrast to Housing Benefit, the entitlement to Universal Credit was not, from the outset, extended to encompass job-seekers from other Member States.

4.2.2.1. Extent of job-seekers' right to equal treatment

Whether this aspect of the welfare reforms complies with Union law rests on the actual extent of the right to equal treatment provided to the category of job-seekers under Union law. In particular, the question that needs to be addressed here is whether they are in fact entitled to claim the welfare benefits at issue pursuant to either Union primary or secondary law. Initially, as mentioned earlier, job-seekers were only required to be treated equally as regards access to employment in a host Member State.¹⁰⁴ In *Collins*, however, the Court extended this to the welfare benefits that facilitated such access, though conditional upon residence in a host Member State. Even with this precondition, the finding in *Collins* stood at odds with Directive 2004/38 that shortly came into force. Although the Directive enshrines a specific enunciation of the principle of equal treatment under Article 24(1), it also explicitly excludes under Article 24(2) any obligation of a host Member State to confer 'social assistance' on Union citizens during the first three months of their stay or longer if they are seeking employment. There was, thus, a clear discrepancy between the Court's interpretation in *Collins* of several Treaty provisions taken in conjunction and the wording of Directive 2004/38. The Court reconciled this in *Vatsouras*, where it held that benefits of a financial nature intended to facilitate access to employment, independent of their status under national law, did not constitute 'social

¹⁰⁰ This includes Employment and Support Allowance, Income Support and Working Tax Credit.

¹⁰¹ The Housing Benefit (Habitual Residence) Amendment Regulations 2014, No. 539, para. 2; The Universal Credit (EEA Jobseekers) Amendment Regulations 2015, No. 546, para. 2.

¹⁰² Article 10 (3) Housing Benefit Regulations 2006, No. 213, 6 March 2006. Job-seekers from other Member States were not treated as habitually resident for the purpose of Housing Benefit.

¹⁰³ *Ibid*, Schedule 4, para. 12 and Schedule 5, para. 4.

¹⁰⁴ Case 316/85 *Lebon*, [1987] ECR 2811, para. 26.

assistance’ within the meaning of Article 24 (2) of Directive 2004/38.¹⁰⁵ As a result, not only did the Court confirm its finding in *Collins*, but also implicitly upheld the compliance of Article 24 (2) of Directive 2004/38 with Union primary law.

The extent to which Union citizens seeking employment can rely upon the right to equal treatment in a host Member State, thus, varies with the type of a welfare benefit claimed. In particular, while they are entitled under Article 45 TFEU to claim benefits that are intended to facilitate access to the employment market in a Member State, this does not encompass those that are classified as ‘social assistance’ pursuant to Article 24(2) of Directive 2004/38. The primary factor in the classification of a welfare benefit into either category lies in the objective it aims to achieve. What is important here, according to the Court, is what it is intended to achieve rather than ‘its formal structure’.¹⁰⁶ The entitlement to a welfare benefit, therefore, is not contingent on the way it is officially framed at national level. This resonates with the *effet utile* principle that requires Union law provisions to be given an autonomous and uniform interpretation throughout the Union.¹⁰⁷ Otherwise, for instance, Union citizens seeking employment could easily be barred by a Member State from claiming a welfare benefit by merely removing any reference in the national legislation to its function of facilitating access to employment.¹⁰⁸ That said, however, national authorities retain the freedom to ‘assess the constituent elements of [a welfare] benefit, in particular its purposes and the conditions subject to which it is granted’.¹⁰⁹ In addition, as the recent rulings demonstrate, the definition given to a welfare benefit by a national court is also taken into account.¹¹⁰

In this context, each category of welfare benefits has been attributed, to a certain extent, with its own characterisation. For instance, to distinguish a welfare benefit that facilitates access to employment in a Member State, the Court has highlighted the factor that its recipients ‘must be capable of earning a living’.¹¹¹ The concept of ‘social assistance’ within the meaning of Directive 2004/38, in turn, has been declared by the Court in *Brey* to have an autonomous

¹⁰⁵ *Vatsouras*, para. 45.

¹⁰⁶ *Vatsouras*, para. 42.

¹⁰⁷ Case C-204/09 *Flachglas Torgau* [2012] ECR, para. 37; Case C-260/11 *Edwards and Pallikaropoulos* [2013] ECR, para. 29.

¹⁰⁸ Opinion of AG Ruiz-Jarabo Colomer in *Vatsouras*, para. 57.

¹⁰⁹ *Vatsouras*, para. 41.p

¹¹⁰ See, for example, *Alimanovic*, para. 43.

¹¹¹ *Vatsouras*, para. 43.

meaning and not to be affected by a similar term used in other Union secondary legislative acts,¹¹² such as Regulation 883/2004, due to their distinct objectives.¹¹³ In this light, the Court defined it, and later confirmed,¹¹⁴ as encompassing ‘all assistance introduced by the public authorities, whether at national, regional or local level, that can be claimed by an individual who does not have resources sufficient to meet his own basic needs and the needs of [his/her] family’.¹¹⁵ Given the breadth of this definition, either Child Benefit, Housing Benefit or Universal Credit could indeed be construed to fall within the category of ‘social assistance’ for the purpose of Directive 2004/38.¹¹⁶ This means that the eligibility to claim them can be limited, which is how they are, in fact, characterised by the UK government.¹¹⁷ Such a conclusion, however, is not without reservations.

4.2.2.2. *Classification of welfare benefits*

Child Benefit, for instance, is a social security benefit,¹¹⁸ forming part of the larger category of family benefits,¹¹⁹ and, as such, falls within the scope of Regulation 883/2004. According to the system established under this Regulation, an economically inactive person is subject to the legislation of the Member State of his/her habitual residence. This is determined against a wide range of purely factual circumstances. Although this includes the length of residence in a Member State,¹²⁰ it is not possible to require a certain minimum period of residence.¹²¹ This factor raises several interrelated queries. On the one hand, it is not clear whether the three-month habitual residence requirement for the entitlement to Child Benefit complies with Regulation 883/2004, as it adds an extra condition to the habitual residence test established

¹¹² *Brey*, para. 60. See, for example, Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251; Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16.

¹¹³ *Brey*, paras. 57-58.

¹¹⁴ *Dano*, para. 63.

¹¹⁵ *Brey*, para. 61.

¹¹⁶ Thym (2015: 35).

¹¹⁷ See, for example, Report of the Social Security Advisory Committee on Universal Credit and Housing Benefit Cap, December 2012, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/185958/ssac-universal-credit-report.pdf, para. 2.13; See also Footnote 50 of Legal Annex, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/328811/FreeMovementLegalAnnex.pdf.

¹¹⁸ *Commission v UK*, para. 60.

¹¹⁹ Pieters (2006: 83).

¹²⁰ Practical guide on the applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland, available at: <http://ec.europa.eu/social/BlobServlet?docId=11366&langId=en> (last accessed), p. 43.

¹²¹ *Ibid*, footnote 55.

under it.¹²² On the other hand, one could also question the extent to which the relevant provisions of Directive 2004/38 should be given effect in this regard and whether the nature of a welfare benefit should play any role. Although AG Villalón has recently held that Directive 2004/38 remains fully effective within the framework of Regulation 883/2004, the Court has not explicitly ruled on this matter.¹²³ It did, however, hold that the coordination rule under the Regulation was not distorted by the the right to reside test applied in the UK.¹²⁴

In a similar vein, the unequivocal categorisation of Housing Benefit and particularly Universal Credit as ‘social assistance’ benefits pursuant to the *Collins/Vatsouras* distinction is also questionable, as their potential roles in facilitating access to employment cannot altogether be discarded. In the context of Housing Benefit, such a role seems to be expressed in its intrinsic relatedness to Job-seeker’s Allowance. In particular, Housing Benefit could be construed to constitute a necessary supplement for those seeking employment.¹²⁵ Given the rates of Job-seeker’s Allowance, it enables many to pay for rented accommodation while looking for work and, in general, maintain residence in order to secure a job.¹²⁶ More importantly, the existence of an inherent link between these two welfare benefits is further reinforced by the so-called ‘passporting’ arrangement. A recipient of Job-seeker’s Allowance is considered to automatically satisfy the income related requirements for claiming Housing Benefit.¹²⁷ Prior to the recent reforms, such an arrangement used to apply to job-seekers who were nationals of other Member States,¹²⁸ although this is no longer the case.

As regards Universal Credit, its possible facilitative role in terms of access to employment emanates from its essential features. It is true that the entitlement to this welfare benefit is dependent upon meeting certain basic financial conditions, which do not refer explicitly to the requirement to seek employment.¹²⁹ A potential recipient is only required, *inter alia*, to be aged between 18 years and 60 years and six months; to reside in the UK; not to be in education or

¹²² This is one of the Commission’s arguments in *Commission v UK*.

¹²³ Opinion of AG Villalón in *Commission v UK*.

¹²⁴ *Commission v UK*, para. 69

¹²⁵ O’Brien (2015: 117).

¹²⁶ *Ibid.*

¹²⁷ See, Schedule 4, para. 12 and Schedule 5, para. 4 of Housing Benefit Regulations 2006, No. 213, 6 March 2006; See also, *R v Penwith District Council ex parte Menear* [1991] 24 HLR 115, QBD.

¹²⁸ Impact Assessment: ‘The removal of Housing Benefit from EEA jobseekers’, 27 February 2014.

¹²⁹ Williams, M. (n.d.) Universal Credit and Jobseekers in the UK, available at:

http://www.airecentre.org/data/files/Martin_UC_EU_Jobseekers.pptx

any training course; and not to have capital greater than a prescribed amount.¹³⁰ At the same time, however, a different picture emerges if one looks at the aim of Universal Credit and how this is to be achieved. Universal Credit is intended to smooth the claimant's transition into work by reducing the welfare support they receive at a fixed rate as their earnings increase.¹³¹ Such a transition involves the commitment to engage with various employment-related activities.¹³² In particular, the recipients can be required not only to undertake certain actions in preparation for future work,¹³³ as well as actions that can actually secure employment. These include carrying out work searches, making job applications, creating and maintaining an online profile, registering with an employment agency and obtaining references.¹³⁴

Viewed from this angle, the unequivocal characterisation of Universal Credit as a 'social assistance' benefit within the meaning of the *Collins/Vatsouras* distinction seems rather questionable. This finds further support in the fact that Universal Credit is intended to replace several welfare benefits, which themselves are not classified as 'social assistance', but 'social security' or 'special non-contributory' benefits.¹³⁵ As a result, even if not as a whole, certain components of Universal Credit could indeed be construed to belong to the category of welfare benefits that facilitate access to employment.

These welfare benefits, therefore, appear to be somewhat mixed in nature and potentially capable of triggering both Article 45 TFEU and Article 24(2) of Directive 2004/38. The solution here, as first introduced by AG Wathelet in *Alimanovic*, lies in establishing their 'predominant' function, which could either be to ensure that a person's basic needs are met or to facilitate his/her transition into employment.¹³⁶ The Court confirmed this in *Alimanovic* in the context of the German basic provision for job-seekers, which, as framed by the national legislation, aimed to 'enable its beneficiaries to lead a life in keeping with human dignity'.¹³⁷

¹³⁰ Universal Credit FAQ, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/452143/uc-faq-aug2015.pdf: 1-2.

¹³¹ Explanatory Notes, Welfare Reform Act 2012, para. 11.

¹³² Welfare Reform Act 2012, Section 4(1) E and Section 13.

¹³³ *Ibid*, Section 16.

¹³⁴ *Ibid*, Section 17(3).

¹³⁵ Report of the SSAC, note 117 above, para. 2.11. See, however, *Alhashem* [2016] EWCA Civ 395, where Employment and Support Allowance, which has been replaced by Universal Credit, was categorised as a social assistance benefit.

¹³⁶ Opinion of AG Wathelet in *Alimanovic*, para 72.

¹³⁷ *Alimanovic*, para. 45.

This was held to be its predominant function, even though it also ‘intended to bring to an end or reduce the need for assistance, in particular by integration into the labour market’.¹³⁸ This finding has been inexplicitly confirmed in *Garcia-Nieto*, where the Court reinforced the discretion of a host Member State under Article 24(2) of Directive 2004/38.¹³⁹ In this light, the question of whether or not the disqualification of Union job-seekers from the entitlement to, for instance, Housing Benefit or Universal Credit complies with Union law hinges very much on establishing their predominant function.¹⁴⁰ This, in turn, requires further judicial clarification.

Viewed from the UK’s standpoint alone, it is apparent that the welfare reforms introduced by the UK government in the period leading up to the EU referendum vote have re-shaped the extent of Union workers’ and job-seekers’ rights. In particular, reflecting an amalgamation of factors, including an austerity-driven economic policy,¹⁴¹ the rise of euro-sceptism in the political scene,¹⁴² and a very conservative welfare philosophy,¹⁴³ they have re-balanced Union workers’ and job-seekers’ rights around the factor of economic contribution and targeted those who are not deemed to be actually contributing in the UK. That said, the likelihood of these welfare reforms being remedied through judicial review seems remote at present considering the developments taking place at Union level, as is evident, for instance, from the perceptible shift in the Court’s approach.¹⁴⁴

5. CONCLUSIONS

This article aimed to examine recent developments and their effect on re-shaping the paradigm of social solidarity formed at Union level. This form of social solidarity is effectively manifested in the interchangeability of national solidaristic communities, whereby Union citizens are free to affiliate with the solidaristic community of their residence. Although, at first, broadly defined in light of the nature and significance of Union citizenship, the prospect

¹³⁸ *Alimanovic*, para. 14.

¹³⁹ *García-Nieto*, para. 44.

¹⁴⁰ See the reasoning in *Alhashem*.

¹⁴¹ See, for example, Budget 2014: Policy Costings. 19 March: 49.

¹⁴² See, for example, Vail (2015: 109).

¹⁴³ See, for example, the emphasis on moving ‘from a low-wage, high-tax, high-welfare society to a higher-wage, lower-tax, lower-welfare economy’ in Chancellor George Osborne’s Summer Budget 2015 Speech, 8 July 2015.

¹⁴⁴ See, for example, the Court’s reasoning in *Commission v UK*.

of such interchangeability has recently been narrowed down in the trilogy of recent rulings. In particular, with the Court confining its reasoning to the black-letter provisions under Union secondary law and limiting, if not abandoning, the need for the proportionate assessment of individual circumstances, the interchangeability of national solidaristic communities is being confined to the extent of an economic contribution in a host Member State.

Along with such a methodological shift, Member States have themselves been re-shaping the actual parameters of the factor of economic contribution as a criterion setting the threshold of membership in a national solidaristic community. Prior to the EU referendum, the UK government introduced several reforms affecting the rights of Union workers and job-seekers. It is submitted, first, that some aspects of these reforms are not in line with Union law. The changes made, for instance, as regards retaining the status of a worker or job-seeker impose conditions that are stricter than those stipulated under Union law. Second, there are legislative amendments that need further judicial clarification. In particular, this includes the introduction of the minimum three-month habitual residence requirement for the eligibility to Child Benefit and the disqualification of Union citizens seeking employment from the entitlement to Housing Benefit and Universal Credit. In this way, the reforms could be seen as primarily targeting the category of those Union citizens who are not deemed to make an actual economic contribution in the UK.

Fixing the threshold of membership in a national solidaristic community around the factor of economic contribution in this manner, both at Union and national levels, has created much uncertainty about the fate of Union citizenship and Union citizens' rights derived from the Treaty, beyond those limited and conditioned by Union secondary law. It is highly doubtful whether the expansive interpretative framework introduced in seminal rulings such as *Martinez Sala*, *Grzelczyk* or *Baumbast* would endure if the Court had to rule on them again.¹⁴⁵ Considered in this light, the prospect of the once-proclaimed 'fundamental status' of Union citizenship seems not only to be left hanging in limbo, its very foundation appears unstable given its apparent vulnerability to the current political processes and pressures. There is an increasing tendency to echo Member States' concerns by placing an emphasis on the

¹⁴⁵ Peers (2014), 'In light of the Dano judgment, when can unemployed EU citizens be expelled?', available at: <http://eulawanalysis.blogspot.co.uk/2014/11/in-light-of-dano-judgment-when-can.html>

limitations of Union citizens' rights, rather than on their protection or extension.¹⁴⁶ Add to that, the political discourse that has emerged prior to and, more importantly, in the aftermath of the EU referendum the UK has clearly been instrumental. Not only Union citizenship and its associated rights, but the very fundamental nature of the free movement of person is currently at stake, considering how it is being portrayed as merely the price to be paid to gain access to the internal market.¹⁴⁷

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¹⁴⁶ See e.g. the Court's apparent reversal of the objective of Directive 2004/38 in *Brey* (para. 53) and *Dano* (para. 74-76). See more Thym (2015: 25).

¹⁴⁷ McCauliff (2016: 46).

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