CEPS COMMENTARY
Thinking ahead for Europe

The Dano case – Or time for the UK to digest realities about the balance of competences between the EU and national levels

Michael Emerson

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On November 11th, the Court of Justice of the European Union (CJEU) handed down a judgment in the case of Ms Dano,[1] who had brought proceedings against the Leipzig Jobcenter for refusing to grant her certain social welfare benefits. Ms Dano had moved from her native Romania with her son in 2010 to live with her sister. Ms Dano does not work and is not a jobseeker. Her complaint was that in refusing her certain social benefits the German agency was discriminating against an EU national from another member state.

In the language of present UK controversy over immigration, this would be characterised as a specimen case of 'benefit tourism'. In rejecting Ms Dano's case, the Court pointed out that in such cases the welfare claimant can only justify equal treatment with nationals of the member state in question if she complied with the conditions for residence. The relevant directive of the EU states that for periods of residence of more than three months but less than five years, the claimant must have sufficient resources of his/her own, which was not the case here.

The Court's official press release goes on to say more precisely that the Directive on the free movement of EU citizens and related regulations do not preclude domestic legislation that excludes nationals of other member states from entitlement to certain non-contributory cash benefits. EU law does not regulate the conditions to be laid down in such legislation. Underlining the point, the Court says: "As that competence lies with national legislatures, they also have competence to define the extent of the social cover provided by that type of benefit." And so in this particular case, Ms Dano could not claim the right to residence and therefore could not invoke the principle of non-discrimination laid down in EU law.

In response to this case Prime Minister David Cameron described the ruling as "simple common sense". And so say all of us as well.

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[1] Elisabeta Dano, Florin Dano v Jobcenter Leipzig (http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-11/cp140146en.pdf).

Michael Emerson is Senior Associate Research Fellow at CEPS. His forthcoming book, to be co-published next spring by CEPS and Rowman Littlefield International, and entitled *Britain's Future in Europe – Reform, Renegotiation, Repatriation or Secession'*, examines the entire landscape of EU policies from the standpoint of the British debate over its possible in-or-out referendum.

However the implications for the British debate over Europe are far deeper than this simple remark, for two reason.

The first is that it sheds a lot of light on how the UK might manage its concern over 'benefit tourism' by means fully within its own competences, and without breaching existing EU law. Many other member states are using conditions of residence to control perceived problems of 'benefit tourism', while at the same time considering that challenges to the basic rules of free movement of persons and of employment are a red line that cannot be crossed. The Prime Minister has promised to produce before Christmas new proposals to control immigration from other EU member states. He has an open road to do this by adjusting where necessary the conditions for residence in ways that would not challenge basic EU law. By contrast, such methods as applying quotas to limit such immigration would be contrary to basic EU law, and would politically challenge the red lines laid down by the rest of the EU.

The second message from this ruling is about the role of the CJEU in influencing the balance of competences between the EU and its member states. The UK government is actually well advanced in publication of evidence that touches on this issue through its vast research project entitled the 'Balance of Competences Review'. The submissions to this project contain various complaints about the European Court of Justice exploiting its role by engineering through its judgments 'competence creep' in favour of the EU level of jurisdiction. Whether this is the case or not can be debated. But the Dano case is clear. Here the EU Court of Justice is taking a position on the details of the frontier territory between EU and national competences, and coming down firmly in defence of the latter. While in the British political debate there are demands of repatriation of competences, here the case is one of the EU Court endorsing and clarifying national competences, rather than extending them.

All this may indeed be 'simple common sense'. And the British pride themselves in this element of their national tradition. It would be a welcome development if the spokesmen of the British government more readily fashioned their discourse along these lines. The abundant message that the government's balance of competences reviews is throwing up time and again is that the EU's competences are 'about right', but these findings are passed over in silence. This is not to exclude the case for more effectiveness in the execution of these competences, or serious reform in various cases, or for adjustments in the balance of sharing of competences between the EU and member states, since indeed most of the competences in question are 'shared'. But any of these steps is categorically different from the proposition of 'repatriation' of competences, which at the level that they are defined in the Lisbon Treaty is a non-starter.