



HIGHLIGHT

EQUAL TREATMENT IN THE FIELD OF SOCIAL SECURITY: CAN ECONOMICALLY INACTIVE CITIZENS BE REQUIRED TO BE LAWFULLY RESIDENT IN THE HOST MEMBER STATE TO ACCESS CERTAIN SOCIAL SECURITY BENEFITS?

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This infringement action was brought by the Commission against the UK for requiring non-UK Union citizens who are economically inactive to *lawfully* reside in the UK to access certain social security benefits (child benefits and child tax credits). This requirement is based on Art. 7, para. 1, lett. b), of Directive 2004/38 (the Directive),¹ which establishes that economically inactive Union citizens have the right to *reside* in another Member State (MS) provided they have sickness insurance and sufficient resources “not to become a burden to the social assistance” of the host MS.² These benefits, however, fall within the scope of Regulation No 883/2004 (the Regulation),³ which only requires being *habitually* resident in the host MS to be entitled to them.⁴ Hence, the Commission maintains that the UK is adding a condition that does not stem from the wording of the Regulation, which simply refers to the “the place where a person *habitually* resides”.⁵

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¹ Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

² On this rule and how it has been applied by UK courts see M. COUSINS, *Civis europeus sum? Social assistance and the Right to Reside in EU law*, SelectedWorks 2014, www.works.bepress.com.

³ Regulation (EC) No 883/2004 of the European Parliament and of the Council on the coordination of social security systems.

⁴ Art. 1, lett. j), and Art. 11, para. 3, lett. e), of the Regulation.

⁵ Art. 1, lett. j), of the Regulation (emphasis added).

The Commission also argues that this requirement is *directly* discriminatory on grounds of nationality, and thus, a breach of Art. 4 of the Regulation.

By reference to *Brey*,⁶ the UK contends that economically inactive citizens should not become a burden for finances of the host MS “unless they have a minimum degree of connection with that state”.⁷ The UK also argues that, although the contested practice may amount to *indirect* discrimination, it can be justified because it pursues the legitimate objective of protecting public finances.

The Advocate General (AG) established first that the benefits at stake are *social security* benefits,⁸ but he then applied the rulings in *Brey*, *Dano*⁹ and *Alimanovic*¹⁰ to the present case, although those judgments concerned *social assistance* for the purposes of the Directive. The AG argued that the test of lawful residence is also relevant to social security benefits because the Regulation and the Directive are “closely linked”, and the provisions of the Regulation “cannot be interpreted in such a way as to neutralise the conditions and limitations” of freedom of movement and residence.¹¹ However, the opinion of the AG disregarded that these instruments have different objectives: the Directive seeks to *facilitate free movement and residence* between MS and governs the conditions to exercise that right, whereas the Regulation seeks to “coordinate the application of MS social security schemes”.¹² The AG also ignored that the personal scope of these two instruments is different:¹³ while the Regulation applies broadly to those “who are or have been subject to the legislation of one or more [MS]”,¹⁴ the Directive concerns only Union citizens who move to or reside in another MS and their family members.¹⁵

Subsequently, Cruz Villalón contended that contested practice amounts to *indirect* discrimination because it affects more non-UK Union citizens, and that this type of nationality discrimination “is inherent in the system” because nationality is relevant to the exercise of the right to free movement. However, the finding that the “lawful residence” test amounts to *indirect* discrimination could be questioned because this test applies *only* to non-UK Union citizens, which in other instances has been deemed to amount to

⁶ Court of Justice, judgment of 19 September 2013, case C-140/12, *Pensionsversicherungsanstalt v. Brey*, para. 44.

⁷ Opinion of Advocate General Cruz Villalón delivered on 6 October 2015, case C-308/14, *European Commission v. United Kingdom of Great Britain and Northern Ireland*, para. 25.

⁸ *Ivi*, para. 46.

⁹ Court of Justice, judgment of 11 November 2014, case C-333/13, *Dano v. Jobcenter Leipzig*.

¹⁰ Court of Justice, judgment of 15 September 2015, case C-67/14, *Jobcenter Berlin Neukölln v. Alimanovic*.

¹¹ Opinion of Advocate General Cruz Villalón, cit., para. 73.

¹² Recital 15 of the Regulation.

¹³ See C. O'BRIEN, *An Insubstantial Pageant Fading: A Vision of EU Citizenship under the AG's Opinion in C-308/14 Commission v UK*, in *EU Law Analysis*, 7 October 2015, www.eulawanalysis.blogspot.co.uk.

¹⁴ Art. 2, para. 1, of the Regulation.

¹⁵ Art. 3, para. 1, of the Directive.

direct discrimination.¹⁶ The AG then argued that the lawful residence test could be justified to protect MS public finances,¹⁷ disregarding earlier cases where the Court expressed reservations about using “purely economic aims” to justify restrictions of fundamental freedoms¹⁸ and without conducting an in-depth proportionality analysis.

These conclusions seem in line with the Court’s rulings in *Brey*, *Dano* and *Alimanovic*,¹⁹ but it is questionable whether that approach should be extended from the Directive to the Regulation without taking into account more carefully the differences between the two acts.

¹⁶ See Opinion of Advocate General Kokott delivered on 12 March 2015, case C-83/14, *CHEZ Razpredelenie Bulgaria AD*, para. 82.

¹⁷ Opinion of Advocate General Cruz Villalón, cit., para. 84.

¹⁸ See Court of Justice, judgment of 28 April 1998, case C-158/96, *Kohll v. Union des caisses de maladie*, para. 41; Opinion of Advocate General Sharpston delivered on 25 June 2009, case C-73/08, *Bressol v. Gouvernement de la Communauté française*, paras 90-94.

¹⁹ D. THYM, *The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens*, in *Common Market Law Review*, 2015, p. 17 *et seq.*, p. 24.

