**The ECJ sacrifices EU citizenship in vain: *Commission v UK***

Case C-308/14 *Commission v UK* **Judgment of the Court (First Chamber) of 14 June 2016** EU:C:2016:436

**1 Introduction**

The ECJ has played politics and lost. This judgment, touching on questions of national welfare sovereignty and the UK’s claimed prerogative to discriminate on the grounds of nationality, was released nine days before the UK referendum on EU membership.[[1]](#footnote-1) Under these circumstances, the Court is a political actor. It is impossible to know the intersection of legal and political in the minds of judges, but those minds do not operate in a vacuum. If we were to disregard the desire to maintain the Union, then we would be hard-pressed to explain the Court’s choices to avoid engaging with key legal provisions, to embroider conditions into others, and to sacrifice the last vestiges of EU citizenship upon the altar of the UK’s nativist tendencies.

Over decades, the ECJ had painstakingly[[2]](#footnote-2) constructed a controversial,[[3]](#footnote-3) complex and subtle body of case law to give meaning to the ‘fundamental status’[[4]](#footnote-4) of EU citizenship,[[5]](#footnote-5) in what Advocate General Szpunar recently described as a ‘vast jurisprudential endeavour’.[[6]](#footnote-6) In the last few years, however, the Court has executed a swift dismantling project.[[7]](#footnote-7) In *Brey*,[[8]](#footnote-8) the scope of benefits that could be withheld from non-nationals was widened; in *Dano[[9]](#footnote-9)* the Court found that proportionality-based case-by-case assessments were not necessary if a claimant might be deemed to have moved ‘solely’ for the purpose of claiming benefits. The proportionality principle was also revoked in the context of jobseekers in *Alimanovic*[[10]](#footnote-10) and *Garcia Nieto.*[[11]](#footnote-11)And in *Commission v UK* the Court has kicked over the traces of EU citizenship.

The UK right to reside test applied to Child Benefit and Child Tax Credit[[12]](#footnote-12) excludes EU nationals from eligibility unless they meet the criteria in Article 7 of Directive 2004/38.[[13]](#footnote-13) This triggers big questions about non-discrimination, the interaction and hierarchy of laws and principles, the use of EU citizenship and legitimacy of automatic exclusions, and the rights and status of EU citizen children. It is disappointing that none of these questions received much of an airing. Given the recent trajectory of the Court’s reasoning, and the timing of the judgment, the approval of the right to reside test is not surprising. But the brief, contorted means by which the Advocate General and the Court get there, the sweeping acceptance of automatic exclusions of those falling foul of the test, and the deference shown to the public finances trump card, are startling and, to anyone familiar with the Court’s often studious, robust and visionary reasoning,[[14]](#footnote-14) uncharacteristically careless. It has done itself and EU citizens a disservice, to little avail.[[15]](#footnote-15) More than the Commission, it is the losing party in this case.

This piece addresses four key issues arising from the case: (i) the elevation of the *Brey* formulation permitting right to reside tests above all other relevant legal provisions; (ii) the mangling and dodging of the discrimination question; (iii) the problematic findings on ‘systematic verification’ and the reversed burden of proof; and (iv) the condoning of a test that results in automatic exclusions from social security, marking a departure from the rest of *Brey,* killing proportionality, extinguishing citizenship-based claims to equal treatment, and disregarding the rights and welfare of children.

**2 The facts**

The Commission had received ‘numerous’ complaints[[16]](#footnote-16) about the UK right to reside test for eligibility for several welfare benefits. Unlike the benefits at issue in *Brey*, *Dano, Alimanovic* or *Garcia Nieto*, these benefits are not special non-contributory benefits, which are partly social assistance. They are family benefits, so pure social security benefits,[[17]](#footnote-17) falling within Regulation 883/2004.[[18]](#footnote-18) UK nationals automatically have a right to reside. EU nationals must demonstrate that they meet the criteria for a right to reside under Article 7 of Directive 2004/38, by showing that they are ‘qualified persons’ under Regulation 6 of the Immigration (European Economic Area) Regulations 2006.[[19]](#footnote-19) As self sufficiency is never accepted in the UK as a route to gain benefits (since any benefit application is deemed to dissolve any claim to self-sufficiency),[[20]](#footnote-20) and as jobseeker entitlements are dwindling,[[21]](#footnote-21) and the window during which a jobseeker right to reside is accepted is narrowing,[[22]](#footnote-22) the right to reside test typically means that a claimant must either be in work or be the family member of someone who is in work, or else have permanent residence (for which, again, *work* history is the primary factor).[[23]](#footnote-23)

The Commission initiated infringement proceedings against the UK and, being dissatisfied with the UK’s responses, brought the action before the Court. In light of the judgment in *Brey*, the Commission decided to exclude the special non-contributory benefits that had been part of its pre-litigation investigation, and focus instead on the rules for Child Benefit and Child Tax Credit. The Commission had two heads of claim. Firstly, that the test added a condition to Regulation 883/2004, altering the habitual residence test (which should have a Union meaning), and, in effect disapplying the system within that Regulation for determining competence, resulting in persons for whom no Member State was competent for family benefits. It argued that Article 11(3)(e) of Regulation 883/2004, which provides that ‘any other person to whom subparagraphs (a) to (d) do not apply shall be subject to the legislation of the Member State of residence’ determines whose legislation was applicable, and was distorted by the additional ‘right to reside’ condition, which effectively left people for whom the UK was the competent state, without coverage for family benefits, akin to a situation in which no Member State is competent. Secondly, since the test only created conditions for EU nationals, not UK nationals, the Commission argued that it was directly discriminatory, contrary to Article 4 of Regulation 883/2004, headed “Equality of treatment”, and which states:

“*Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof*.”

**3 Advocate General Cruz Villalón’s Opinion**

In an Opinion delivered on the 6th of October 2015,**[[24]](#footnote-24)** the Advocate General, having summarised the heads of claim and the arguments of the parties began his discussion of the first head – the creation of an extra condition for Regulation 883/2004, by asserting that the Commission’s argument had ‘in fact’ been “weakening over the course of this dispute”.[[25]](#footnote-25) This was, according to the Advocate General, because the UK had maintained that the right to reside test was independent of, not part of, the habitual residence test. Accepting that the benefits should be classified as social security, the Advocate General found that regardless of “ambiguous” wording[[26]](#footnote-26) in UK legislation that resulted in “unnecessary intertwining”[[27]](#footnote-27) of the right to reside and habitual residence, the right to reside test was independent of Regulation 883/2004, and did not affect applicability of the conflict of laws principles in Article 11 (specifically 11(3)(e)), so that the “crux” of the case had to be the discrimination question, and the first head has to be dismissed.

The bulk of the Advocate General’s analysis was devoted to the question of discrimination, and the Commission’s argument that the test created an extra condition solely for non-nationals, violating the non-discrimination principle in Article 4 of Regulation 883/2004. The AG said the “argument requires a slightly more complex response, in contrast to how it was presented by the Commission”.[[28]](#footnote-28) He went on to find that the provisions in Directive 2004/38 must be read into (and be “fully effective” within) the framework of Regulation 883/2004.[[29]](#footnote-29) To back this up, he quoted paragraph 44 of *Brey* in which the Court had held that “there is nothing to prevent, in principle, the granting of social benefits to Union citizens who are not economically active being made conditional upon those citizens meeting the necessary requirements for obtaining a legal right of residence in the host Member State”.[[30]](#footnote-30) The Advocate General added that the Court did not indicate that this finding did not also apply to social security.[[31]](#footnote-31) He found that a “difference in treatment as regards the right of residence is inherent in the system and, to a certain extent, inevitable”,[[32]](#footnote-32) and found that Regulation 883/2004 could only confer entitlements upon those deemed under Directive 2004/38 to be exercising lawful residence. So the question of discrimination under Article 4 was avoided by finding that it was not engaged; “any difference in treatment between UK nationals and nationals of other Member States occurs at a stage before that of the practical application of Article 4 of Regulation No 883/2004, and does not therefore affect its applicability in principle.”[[33]](#footnote-33)

Moving on to ask whether the process of checking claimants’ rights to reside was discriminatory, the Advocate General found that it did create an indirectly discriminatory difference in treatment. He dealt with the question of justification briefly, stating that “without any need to pursue the argument further, I consider that the necessity of protecting the host Member State’s public finances… is in principle sufficient justification for a Member State to check the lawfulness of residence at that point”.[[34]](#footnote-34)

Next, the Advocate General confirmed that the process of verification of a right to reside must abide by certain rules – it must be interpreted in conformity with the “fundamental right” of free movement, be conducted “as unintrusively as possible”,[[35]](#footnote-35) and specifically must comply with Article 14(2) of Directive 2004/38 which states that such verification “shall not be carried out systematically”. He found that UK checks were not systematic, and that although all claimants had to provide information at the point of claim, it was “only in cases of doubt… that the UK authorities will carry out the necessary checks” for a right to reside under Directive 2004/38.[[36]](#footnote-36)

However, the UK was not to consider itself free to impose tests that resulted in automatic exclusions. The Advocate General finished with an invocation of EU citizenship as precluding a legislative approach that was “tantamount to presuming… [that a claimant was] unlawfully present” so that citizens should not have to prove that this is not the case. In fact, as “a matter of principle, the opposite presumption should, in fact, be made”.[[37]](#footnote-37) He found that the UK was compliant here as well – it could not be inferred that the UK presumed that benefit claimants were unlawfully present, which would have been contrary to Article 20(2) TFEU and Article 21 TFEU.[[38]](#footnote-38) He concluded by arguing that those failing the right to reside test were entitled to rely on the proportionality principle in *Brey*, so have case-by-case assessments of their circumstances, to assess whether they might have a right to reside as self-sufficient persons, or whether they posed unreasonable (“excessive”) burdens. He concluded that it not been shown that the UK did not provide this.[[39]](#footnote-39)

**4 The judgment**

In summarising the arguments of the parties, the Court noted a problem of divergent translation in the much-relied upon paragraph 44 of *Brey*, which in the English version appeared to approve right to reside tests for “social security benefits”, but in the original German version, refers to “social benefits”. The Commission argued that it therefore was not establishing a principle for social *security* benefits, which were not at issue in *Brey*, while the UK argued that ‘social benefits’ was a broader term that did capture social security benefits.

The Court noted the UK’s position that it would be “difficult to conceive” a system allowing benefit restrictions for some benefits, but not for those at issue, which were “funded from taxation, also have the potential to impose an unreasonable burden on the public finances of the host Member State,” and displayed “in any event some characteristics of social assistance”.

The Court also noted a further point of dispute; the Commission alleged that the right to reside test does not allow for a proportionality assessment as required by the *Brey* judgment, since it “is an automatic mechanism that systematically and ineluctably bars claimants” giving no regard to individual circumstances. The UK replied that this was a new complaint, which should be declared inadmissible in accordance with Article 127 of the Rules of Procedure.[[40]](#footnote-40)

The findings of the Court began with a confirmation that the benefits at issue were family benefits “granted automatically to families that meet certain objective criteria relating in particular to their size, income and capital resources, without any individual and discretionary assessment of personal needs, and which are intended to meet family expenses”[[41]](#footnote-41) and so must be characterised as social security benefits covered by Regulation 883/2004, drawing upon *Hoever and Zachow*.[[42]](#footnote-42)

Addressing the Commission’s main ground – that the right to reside test adds an extra condition for the application of Article 11(3)(e) that is not otherwise provided for in Regulation 883/2004, the Court emphasised that Article 11(3)(e) is a “conflict rule” and is “not intended to lay down the conditions creating the right to social security benefits”,[[43]](#footnote-43) and pointed to the Regulation’s role in coordination, rather than harmonisation.[[44]](#footnote-44) It then quoted the *Brey* paragraph 44 formulation, that there was “nothing to prevent” the application of a right to reside test to economically inactive EU migrants claiming social benefits,[[45]](#footnote-45) in order to find that the right to reside test did not distort the conflict rule, but was an “integral part” of the eligibility conditions for the benefit. Someone failing the right to reside test was not left in a situation in which no State was competent; they were in the same situation as anyone subject to UK law but who did not satisfy any of the other substantive conditions for the benefits at issue, so was not in fact entitled to any such benefit in any Member State.[[46]](#footnote-46)

Next, the Court accepted that the right to reside test was indirectly discriminatory, without responding to the allegation of direct discrimination. It did not examine whether the test was justified, however, instead shifting to ask whether the process of checking for lawful residence was justified – in particular, whether the checks were proportionate. The Court reported the submissions of the UK that claimants must provide “data” which are then checked, and that “only in specific cases” were claimants “required to prove that they in fact enjoy a right to reside lawfully in United Kingdom territory”,[[47]](#footnote-47) and found that verification was not systematic but carried out “only in the event of doubt.”[[48]](#footnote-48) The Court concluded that the Commission had “not provided evidence or arguments showing that such checking does not satisfy the conditions of proportionality, that it is not appropriate for securing the attainment of the objective of protecting public finances or that it goes beyond what is necessary to attain that objective”,[[49]](#footnote-49) and so that there was no discrimination contrary to Article 4.

**5 Comments**

Both the Opinion and the judgment contort the available legislation to try to make it fit the desired outcome, but the judgment is the more cavalier of the two in ignoring the key question of discrimination at the heart of the case, declining to examine the legal provisions at issue, and abandoning any attempt at methodical legal construction.

This analysis addresses four key issues. First, the Advocate General and the Court both seem to distil a fundamental principle of exclusion from paragraph 44 of *Brey*, such as to displace any other applicable primary or secondary law. Second, both the Opinion and the judgment mangle the question of discrimination. The Advocate General argues that the protection from discrimination in Article 4 of Regulation 883/2004 only applies to those who have already met the (discriminatory) requirements of Directive 2004/38 – so suggesting that an *ex ante* discriminatory gateway to coverage by the Regulation can avoid the equal treatment provision from being invoked. The Court in contrast, having established that the right to reside test was indirectly discriminatory (having ignored the Commission’s complaint of direct discrimination) *did not examine* whether the existence of, and rules within, the test were justified. It skipped instead to justifying the “checks” for a right to reside, treating this as the same issue, which it is not. It did not attempt to consider Article 4 of Regulation 883/2004, other than to conclude that it was not infringed. Third, in examining those checks, both the Advocate General’s finding that the UK does not presume unlawful residence, and the Court’s cognate finding that the UK’s verification processes are not systematic, are unconvincing. Here, the Court reverses the burden of proof so that once a prima facie case of indirect discrimination has been shown, it is up to the Commission to produce evidence that it has not been justified. This is practically and legally problematic. Fourth, in failing to examine whether the right to reside test was justified, the Court (in contrast to the Advocate General) has condoned the automatic dismissal of proportionality-based claims, but done so without explanation. This extinguishes citizenship-based claims for equal treatment, and yet it does so without reference to citizenship, the relevant provisions in primary law, or any consideration of the rights and special situation of *children,* thecitizens whose rights are at issue.

5.1 *Distilling a fundamental principle of exclusion from paragraph 44 of Brey to govern the personal scope of Regulation 883/2004*

The formulation upon which *Commission v UK* rests is that of *Brey*, paragraph 44, which stated that there was nothing to prevent the use of right to reside tests in granting social benefits. But this was not a standalone, catch-all principle in *Brey* – the lawfulness of the right to reside was inextricably linked to the nature of the benefits. Those benefits had to be “examined in the context”[[50]](#footnote-50) of the purpose of the right to reside test; the right to reside test was a lawful means to avoid undue burdens on the “social assistance system”.

Classification mattered, and was central to the applicability of paragraph 44. But in *Commission v UK* the principle is extended to cover benefits recognised to be pure social security. Here, it might have been helpful had the Court been explicit about whether it accepted the UK’s contention that “social benefits” is a wide enough term to mean that the *Brey* principle applies to social security too. The Advocate General argued that it was extended by omission – that there was “nothing in those judgments to indicate that such findings apply exclusively to the social assistance benefits… and not to other social benefits”.[[51]](#footnote-51) It is odd to suggest that the Court should spell out the material matters on which it is *not* ruling, and to read into its choice not to do so an extension of a principle from one piece of legislation to another. And when that reading conflicts with a host of legal provisions – Articles 2, 4 and 11(3)(e) of Regulation 883/2004 for starters, then reliance upon not only on a single paragraph in a judgment, but on something the Court did not say in that paragraph, suddenly seems a very shaky basis for the findings that follow.

The Court appears to accept the extension without stating that it is doing so, or without giving any reason for reading such an extension into *Brey*. It reports, but does not analyse, the UK’s submission that the benefits in question “display in any event some characteristics of social assistance”[[52]](#footnote-52) and that “it is difficult to conceive that Member States are not required to pay special non-contributory cash benefits… but …[are] required to pay them benefits such as the social benefits at issue.”[[53]](#footnote-53) These statements, reported without comment, bolster the approach that amalgamates all “social benefits” and breaks down the distinction between legislation adopted to deal with social assistance and legislation adopted to deal with social security.

The *Brey* paragraph 44 formulation is elevated to a higher principle of exclusion, which displaces the wording of Regulation 883/2004. The Advocate General’s claim[[54]](#footnote-54) that the Commission’s case had been “weakening over the course of the dispute” because the UK had presented the right to reside test as a separate test to habitual residence, so not incorporating an extra condition into Regulation 883/2004, is unconvincing. Firstly, the UK does bind the tests together, and secondly, whether they amount to one or two tests is irrelevant, if the effect of introducing an extra condition is the same. The right to reside test is part and parcel of the habitual residence test, since the regulations provide that a claimant cannot be habitually resident unless she has the right to reside in the Common Travel Area.[[55]](#footnote-55) The regulations applied to Child Benefit and Child Tax Credit do not use the term “habitually resident”, but claimants must be treated as being in the UK. And to be treated as being in the UK, you have to have a right to reside.[[56]](#footnote-56) In any event, one test or two, the effect is the same, and the Advocate General implicitly accepts that the right to reside test *does* create a condition governing access to Regulation 883/2004, when he suggests that it determines who is entitled to protection from discrimination under Article 4.[[57]](#footnote-57)

The Commission argued that the right to reside test applied to social security benefits effectively obviated Article 11(3)(e), according to which persons to whom other provisions of that article do not apply “shall be subject to the legislation of the Member State of residence”. The Court responded that as the regulation is a coordinating, not harmonising, instrument, it does not lay down conditions creating a right to social security benefits; the right to reside test should be treated as any other substantive eligibility condition, which is the prerogative of Member States. Thus 11(3)(e) is “not distorted”[[58]](#footnote-58) because it does not create eligibility. The right to reside test “forms an integral part of the conditions for grant of the social benefits at issue”,[[59]](#footnote-59) and anyone failing it is in the same position as any “claimant who does not satisfy for any other reason one of the conditions that must be met in order to be eligible for a family benefit”.[[60]](#footnote-60)

But this reasoning is peculiar; calling a condition “integral” does not mean it cannot conflict with the Regulation; a Member State might say the same thing about an actual residence condition, for instance, which would contravene the principle of exportation of Regulation 883/2004. Or it might even say it about nationality. There are some sorts of conditions that are permissible, and there are some that are not. Describing the Regulation as not laying down conditions is misleading – it *does* give guidance on what conditions might be unlawful - stating that place of residence cannot be a deciding factor in many cases;[[61]](#footnote-61) stating that conditions as to insurance must be capable of being discharged by insurance in other Member States,[[62]](#footnote-62) and so on; and providing a principle of equal treatment for persons subject to the Regulation in Article 4.

While Article 11(3)(e) is about allocation of competence, it can only really mean anything in light of the personal scope of Regulation 883/2004, which is deliberately broader than that of Article 7 in Directive 2004/38. The ECJ had already made clear in *Dodl and Oberhollenzer*[[63]](#footnote-63) that the Regulation’s predecessor, Regulation 1408/71, was not confined to people in employment. Regulation 883/2004, far from narrowing the scope of Regulation 1408/71, was enacted to “replace and extend” that instrument.[[64]](#footnote-64) Recital (42) of Regulation 883/2004 refers explicitly to “the extension of this Regulation to all European Union citizens” and “the new category of non-active persons, to whom this Regulation has been extended”. Article 2 spells out the broad personal scope:

“*This Regulation shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors”*.

Economic activity is relevant for determining competence – and it is open to a Member State to dispute competence where a Union citizen has or should have entitlement in another State due to recent economic links. But once competence has been established, the competent State is bound to treat that person equally with its own nationals in respect of *social security* claims. Member States are not given free rein to set discriminatory criteria in their eligibility conditions; those conditions must take account of the non-discrimination provision in Article 4. And where the UK is competent, it is liable for payment of family benefits to those EU nationals “satisfying the conditions required” of UK nationals.[[65]](#footnote-65) The implementing Regulation 987/2009[[66]](#footnote-66) explicitly links competence with liability for payment of benefits, defining the competent state as “the one whose legislation applies or which is liable for the payment of certain benefits.” [[67]](#footnote-67)

The Court’s approval of the application of a right to reside test transplants the limitations of Articles 7 and 24(2) of Directive 2004/38 into Regulation 883/2004. The Advocate General acknowledged that this effectively merged the two instruments and argued that the law should not exist in “separate compartments”.[[68]](#footnote-68) But where separate instruments have different material and personal scopes, a generic call for holistic jurisprudence cannot justify embroidering an extra condition into one of them, especially where it has the effect of rendering provisions within it obsolete. The Court’s finding that Article 11(3)(e) can continue to operate undistorted, because it is about competence, not eligibility, is too simplistic. Claimants cannot apply for family benefits from non-competent States. If Member States are entitled to refuse social security to those EU nationals for whom Article 11(3)(e) has deemed those States competent, even when those claimants meet the conditions imposed upon own-State nationals, then there is very little point for Article 11(3)(e) to exist at all, other than to tell us whose rules of exclusion apply.

The right to reside condition is not analogous to other eligibility conditions. As a result of this judgment, an EU national parent making a child benefit claim is readily assimilated to a UK national *without a child* making a child benefit claim, and is readily distinguished from UK national parents making a child benefit claim, whose *only* difference is nationality. This is why discrimination formed a significant part of the Commission’s submission, and the right to reside test merited rigorous scrutiny – which, as the next section shows, the Court was unwilling to provide.

5.2 *Mangling and dodging the question of discrimination*

It is not just Article 11(3)(e) that ceases to have any effect if the right to reside is treated as a ‘gateway’ for accessing Regulation 883/2004; the equal treatment provision, Article 4, is out of reach according to both the Opinion and the judgment.

The Advocate General dealt with the prohibition of discrimination in Article 4 by finding that failing the right to reside test prevented Article 4 from being engaged, because it “occurs at a stage before that of the practical application of Article 4”.[[69]](#footnote-69) So claimants might only gain protection from discrimination if they have already passed a discriminatory test. The actual effects of Article 4, if it is engaged, are not discussed, but the Advocate General instead invokes a generic idea of discrimination as a natural and inevitable feature of the system of free movement; stating “this difference in treatment… is inherent in the system and, to a certain extent, inevitable”,[[70]](#footnote-70) and “the difference in treatment between UK nationals and nationals of other Member States stems from the very nature of the system”.[[71]](#footnote-71) As a matter of practicality, this may reflect how national welfare systems work – but it conflicts directly with legislation and case law. That conflict needs to be discussed; legal principles and instruments should not be simply eclipsed by “natural” discriminatory instincts. The problem posed by extending a discriminatory right to reside test to social security is swept aside with the imprecise phrase that the Court has “traditionally associated entitlement to social benefits” with a right to reside.[[72]](#footnote-72)

The Court’s approach to the question of discrimination was evasive. It outlined that there was a basic case to answer – but did not address the Commission’s allegation of *direct* discrimination. Instead it treated the right to reside test as the same thing as a residence condition, which would be indirectly discriminatory:

“[the] legislation gives rise to unequal treatment between United Kingdom nationals and nationals of the other Member States as such *a residence condition* is more easily satisfied by United Kingdom nationals, who more often than not are *habitually resident* in the United Kingdom, than by nationals of other Member States, *whose residence*, by contrast, is generally in a Member State other than the United Kingdom.”[[73]](#footnote-73)

It then added that “such indirect discrimination” must be objectively justified. This is careless reasoning. The right to reside test (as the UK was at pains to point out)[[74]](#footnote-74) is not a test for actual or usual residence – which could be characterised as indirect discrimination. It is a condition of meeting the criteria in Article 7 of Directive 2004/38 – typically a condition to be, or be the family member of, a worker. And this specific condition is only imposed upon EU nationals. UK nationals do not “more easily satisfy” the test; they do not “more often than not” satisfy the test – they *always* and *automatically* satisfy the test and so are excused from meeting the condition.

Only EU nationals must provide evidence of a right to reside. Only EU nationals can be excluded from entitlement due to economic inactivity. The application of an extra condition to non-nationals was recognised as being directly discriminatory in *Grzelczyk*. The subject of that case was access to a benefit, the minimex, for which there were certain eligibility criteria. However, an extra condition was imposed upon non-nationals who had to “satisfy the additional requirement of having actually resided in Belgium for at least five years immediately preceding the date on which the minimex was granted”.[[75]](#footnote-75) As the claimant satisfied the conditions that had to be met by Belgian nationals, the Court found that “the fact that Mr Grzelczyk  is not of Belgian nationality is the only bar to its being granted to him… the case is one of discrimination solely on the ground of nationality.”[[76]](#footnote-76)

More discussion was needed in *Commission v UK* to examine the directly discriminatory nature of a right to reside test. The Court should either explain why imposing an extra condition only on non-nationals is not directly discriminatory, or acknowledge that direct discrimination is at play and highlight any perceived shortcomings in EU law, if it feels that differential treatment should be permitted. Instead, it skips the question entirely and assumes that the matter is one of indirect discrimination.

At the very least, if skipping direct discrimination was a result of accepting the UK’s claim that the point was inadmissible, it should have said so. But the inadmissibility claim was tenuous; there is no rule of procedure to suggest that the Court can only confine itself to the specific wording in questions raised in a pre-litigation reasoned opinion. The Court’s rules of procedure preclude the raising of new pleas in law “during the course of proceedings”,[[77]](#footnote-77) but pleas that have been entered into the application before the Court are not new pleas.[[78]](#footnote-78) And direct discrimination was raised in the application before the Court. Moreover, if faced with a preliminary reference in which one party made an argument about indirect discrimination, the Court were to identify direct discrimination, it would be entitled to do so, as a re-interpretation of the question put, and using the same legal provisions. It would seem odd for it not to have that lee-way in an infringement case. As it happens, that leeway is not required, as the matter was explicitly put before them. But even the issue of admissibility was avoided by ignoring the question entirely.

Having asserted that the issue is one of indirect discrimination, the Court turns to justification. And here it performs a clumsy substitution. It is clear, said the Court, that the need to protect public finances justifies “the possibility of checking whether residence is lawful.” Without missing a beat, the subject has suddenly switched from the right to reside condition itself, to the checks that follow from it.

With judicial sleight of hand, the right to reside condition itself is whisked off the table. It is assumed lawful, and the only thing that needs justification is checks for compliance with the condition. As Cousins argues, the right to reside test, and its consequent checks, are different things.[[79]](#footnote-79) But a discriminatory condition has been coupled with a justification for *checks* for compliance – not justification for the discriminatory condition itself.

A brief thought experiment might highlight the absurdity of this. Let us say that all EU national men automatically had a right to reside, but EU national women had to comply with the conditions set in Article 7 of Directive 2004/38. First, it would make no sense to describe this as ‘indirectly’ discriminating on the ground of sex. It may be argued that nationality should permit differences of treatment, but that does not alter the *direct* nature of the discrimination at issue. Next, let us imagine that this has nevertheless been characterised as indirect discrimination, and that the offending state was not asked to justify the rule excluding women, but was just asked to justify the procedures by which the authorities *checked* whether claimants were women. Under this approach, the Court might find that requiring a birth certificate from everyone was excessive, but asking them to fill in a form declaring their sex was not.

It is the condition, not the checks, that is the main problem, and it is the condition that must be justified once it has been shown to be discriminatory. The checks are a separate, though important issue – and even here, both the Advocate General and the Court avoid analysing the duties created by Article 14(2) of Directive 2004/38, preferring to report the UK’s submissions, and reverse the burden of proof, so that it the Commission must not only show discrimination, but also prove that it is not justified.

5.3 *Systematic verification and indirect discrimination: evading definition and reversing the burden of proof*

The Advocate General made clear that European citizenship precludes a presumption of unlawful residence.[[80]](#footnote-80) He also pointed to the Article 14(2) Directive 2004/38 requirement that checks on lawful residence should not be systematic. He went on to find that it cannot be inferred that the UK makes a presumption of unlawful residence which “would be contrary to Article 20(2) TFEU and Article 21 TFEU.”[[81]](#footnote-81)

The Court in contrast made no mention of citizenship, or presumptions as to lawfulness of residence, but did mention Article 14(2), and found in the space of two paragraphs, in which it appeared to rely on the UK’s submissions, that Article 14(2) was not infringed. It was “apparent from the observations made by the United Kingdom” that claimants are required to provide a “set of data”, which are subsequently checked, and “[i]t is only in specific cases that claimants are required to prove that they in fact enjoy a right to reside lawfully”.[[82]](#footnote-82) The Court said it was evident that “the checking of compliance with the conditions laid down by Directive 2004/38 for existence of a right of residence is not carried out systematically”.[[83]](#footnote-83)

More explanation was sorely needed, to look at the components of the justification, and also to identify a distinction between permitted checks and prohibited systematic verification. The checks were framed as indirect discrimination, so the Member State must show that it is pursuing a legitimate aim, that the means are proportionate and appropriate, and do not go beyond what is necessary. The UK was not required to do any of these. The question of legitimate aim was waved through as a declaration of “the need to protect the finances of the host Member State.” But, while politically potent, the mere mention of public finances on its own should not close down all argument. Some actual (not abstract) threat to public finances ought to be shown, in light of the evidence that fears of EU national benefit tourists are misplaced.[[84]](#footnote-84)

As for the proportionality and necessity of the test, and possible conflict with Article 14(2) through “systematic” verification, the entire claims system in the UK rests on the presumption that EU nationals must prove that they are not unlawfully resident. There is no starting presumption of lawful residence, or starting position of citizenship-based eligibility that is then limited and in some cases checked. The right to reside test takes the conditions of secondary law and makes them *a priori* conditions of the very existence of the right to move and reside. The conditions come first and must be demonstrably met in each and every claim. As the EU Rights Project has found, this can lead to considerable delay even for claimants who *do* have a right to reside, and to wrong, first-instance refusals, because of poorly conducted verification by decision makers who do not understand EU law, request unnecessary extra documentation, lose claimants’ documents, and make wrong assumptions about eligibility.[[85]](#footnote-85)

Even on the Court’s thin summary of the facts, as Cousins argues, “it is clear that there *is* systematic verification of the right to reside in *every* case—it is only the *degree* of verification which varies.”[[86]](#footnote-86) And there is an abundance of other evidence to point to systematic checking. The decision maker guidance on establishing whether a claimant really is or was a worker (using the UK’s flawed and high threshold) requires proof that earnings have been at or above the Minimum Earnings Threshold for a continuous period of at least three months.[[87]](#footnote-87) Those with variable earnings are expected to provide considerable evidence if they wish to prove their right to reside.[[88]](#footnote-88) On top of the routine checks, HMRC[[89]](#footnote-89) issue more intensive “compliance” checks, which should “never” be started unless there is a ground to suspect that the award is wrong, or as part of a random enquiry programme.[[90]](#footnote-90) But the UK government announced in 2014 that restrictions to benefits for EU nationals would be “augmented by additional HMRC compliance checks to improve detection of when EEA migrants cease to be entitled to these benefits. *The checks will apply to all EEA migrant claims*”.[[91]](#footnote-91) The Budget made clear that these checks would be applied to “new claims and existing awards”.[[92]](#footnote-92) In responding to a Freedom of Information request, the government confirmed that it had been carrying out “increased compliance checks”, issuing letters “targeted at EU/EEA Nationals”[[93]](#footnote-93) requesting further information and/or evidence to check that claimants met entitlement conditions for Child benefit and Child Tax Credit. In *all* cases of cross-border benefit claims, claimants face routine requirements for “documentary evidence” of entitlement, and a “wide range of checks and an annual review”.[[94]](#footnote-94)

The Court did not need to seek out this evidence – it could simply have looked at the evidence put before it. The failure to analyse the nature of the “data” required of claimants, to discuss the extra evidence claimants are routinely asked to supply, to address how “doubt” is established, and to discuss the frequency of follow-up checks, strips Article 14(2) of any meaning. The repeated use of the word “only” (“it is *only* in specific cases that claimants are required to prove” their right to reside;[[95]](#footnote-95) “it is *only* in the event of doubt” that verification is carried out,)[[96]](#footnote-96) without statistics, tells us nothing about frequency, or numbers, so cannot tell us about proportionality.

Typically, where a potential infringement has been made out, it is up to the infringer to demonstrate that their actions are justified. In *Commission v Belgium* the Court stated that “the reasons which may be invoked by a Member State by way of justification must be accompanied by appropriate evidence or by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State, and precise evidence enabling its arguments to be substantiated,”[[97]](#footnote-97) a requirement drawing upon a wealth of cases,[[98]](#footnote-98) and repeated in *Commission v Luxembourg.*[[99]](#footnote-99) Barnard charted a “remarkable shift” from “considerable deference” to Member States’ justifications in the 1980s, through to a more substantial review of their claims by 2004.[[100]](#footnote-100) This review has been quite demanding – in *Commission v Austria*,[[101]](#footnote-101) Austria claimed that restricting access to university courses to those fulfilling the criteria to register for equivalent courses in their home states was necessary to preserve the financial equilibrium of the Austrian higher education system, submitting that the number of students registering for medical courses could be five times greater than the number of places. The Court was dismissive, because “no estimates relating to other courses have been submitted.”[[102]](#footnote-102) The Court has elsewhere criticised the use of “generalizations” when attempting to justify discrimination.[[103]](#footnote-103) Reynolds has noted how this evidentiary burden placed upon Member States has posed problems when faced with perceived conflicts between free movement and fundamental rights,[[104]](#footnote-104) exacerbating the extent to which the latter are on the ‘back foot’. Nic Shuibhne and Maci warn of the danger of creating an insuperable hurdle making it difficult to distinguish between “rightly protecting things and illicit protectionism”.[[105]](#footnote-105)

But here we have a rather complete reversal in which no evidence is demanded of the UK; instead the Commission must adduce the evidence to prove a negative – the absence of justification. The UK could have provided the statistics on frequency of follow-up checks. Instead, the Court decided that it was the Commission’s responsibility to show that the checks were disproportionate, were not appropriate, or went beyond what was necessary. This is a problematic reversal of the burden of proof, and requires the Commission to provide information that is in possession of the UK. Having considered the justification of the checks, the next section analyses the issue of justification that the Court missed out – that of the right to reside condition, in particular the question of proportionality.

5.4 *The question the Court did not ask – is the right to reside test justified?*

We will begin from the Court’s premise that the right to reside test is indirectly discriminatory. Although flawed, it is an increasingly accepted legal fiction. From this, it follows that the test must be justified by a legitimate aim, and be appropriate, necessary and proportionate. If we accept the idea of public finances posing a legitimate aim in principle (though it still must be shown to be a legitimate aim in fact), the big question looming is proportionality.

The Commission argued that the right to reside condition is disproportionate, because it “is an automatic mechanism that systematically and ineluctably bars claimants who do not satisfy it from being paid benefits, regardless of their personal situation and of the extent to which they have paid tax and social security contributions in the United Kingdom”.[[106]](#footnote-106) Because the Court only examined whether the *checks* were justified, it did not consider whether the condition was proportionate, and so gave no response to the Commission’s complaint.

Those who fail the right to reside test are excluded automatically from Child Benefit and Child tax Credit. Here, it is worth noting that while paragraph 44 of *Brey* assumes a higher-law status in the judgment, paragraph 45 is notable by its absence. This added that while right to reside tests were in principle permissible, it was important that such requirements were “themselves consistent with EU law”. The Court in *Brey* found that in order to be consistent with EU law such tests should not result in the automatic barring of economically inactive persons from entitlement to benefits without assessment of their individual circumstances. Drawing upon Recital (16) of Directive 2004/38, the Court had found that the authorities dealing with a benefit application should take into account “the amount and the regularity of the income [a claimant] receives; the fact that those factors have led those authorities to issue him with a certificate of residence; and the period during which the benefit applied for is likely to be granted to him”.[[107]](#footnote-107) It may also be relevant, the Court added, to “determine the proportion of the beneficiaries of that benefit” in a similar situation to the claimant.

This non-automatic exclusion approach touches upon the essence of Union citizenship, and the idea that citizenship provides a last-resort safety net, and an entitlement to have one’s claim and personal circumstances assessed, so that those who fall through the gaps in Directive 2004/38 are able to call, to some degree, upon their primary law rights to move and reside, and to equal treatment. The Court recently reminded us in *St Prix*[[108]](#footnote-108) that these rights do stem from primary law, and that Directive 2004/38 provisions are not exhaustive. But the right to reside test treats them as though they were exhaustive, and constitutive of the primary law rights, and does not permit any claim that relies upon EU citizenship.

It is not just proportionality that is a victim in automatic benefit exclusions – it is EU citizenship itself. The “real link” case law showed that, thanks to the fundamental status of EU citizenship, and the Article 18 TFEU-based right to equal treatment, nearly-blanket rules had to have *some* proportionality-based exceptions. The Court had already departed from the *Brey* proportionality requirement, and so rolled back EU citizenship, in what Thym describes as a “noteworthy shift of emphasis”,[[109]](#footnote-109) and Giubboni calls a “spectacular retreat from… transnational solidarity”,[[110]](#footnote-110) evident in *Dano, Alimanovic* and *Garcia Nieto*. Each of those cases dealt with particular categories of claimant (those deemed to be benefit tourists, or certain categories of jobseeker), and benefits characterised as social assistance. In *Alimanovic*, the Court suggested that the provisions on worker status retention in Directive 2004/38 themselves provided a sufficiently “gradual system” itself taking into account “various factors characterising the individual situation”[[111]](#footnote-111) such that no more proportionality would be required for those falling through the gaps. To permit an individual assessment for such people would threaten the “significant level of legal certainty” offered to claimants who had been told “without any ambiguity” what their entitlements are.[[112]](#footnote-112)

This made it impossible to derive any right from primary law, ignored the position previously taken that Article 7(3) of Directive 2004/38 is not an exhaustive list, exaggerated the sliding scale nature of the retention rules, and failed to explain the shift in priority between the two competing tensions of fairness and administrative simplicity. But it was at least confined by the phrase that no individual assessment was necessary “in circumstances such as those at issue in the main proceedings”,[[113]](#footnote-113) which may refer to the claimant’s status as a long-term jobseeker, and the claim for a benefit for the long-term unemployed. This was, as Iliopoulou puts it, a “pragmatic and understandable” compromise,[[114]](#footnote-114) but it was not an elegant one - the paradox remained unaddressed as to which circumstances “such as those at issue” *must* be taken into account, in order to find that *no other* circumstances need be taken into account.

But in *Commission v UK* the automatic exclusion from benefits appears to extend to anyone who fails a right to reside test – regardless of their residence/work history or degree of integration, even in the context of social security. The basis for this is unclear; paragraph 44 of *Brey*, which is used as the source for finding that right to reside tests are lawful, included citations of *Martinez Sala, Grzelczyk, Trojani, Bidar*[[115]](#footnote-115) and *Förster,*[[116]](#footnote-116) all of which precluded the use of blanket rules, and all of which required some assessment of circumstances of the case, and developed the “real link” approach to assessing citizenship-based claims to equal treatment.[[117]](#footnote-117) The reliance upon the paragraph 44 formulation, and more specifically, the reliance upon something the Court did not say within it, in order to override primary and secondary law, becomes even less persuasive, when we consider that the Court is using it to depart from *Brey* itself, and to depart from all of the authorities upon which that formulation relies.

The Court appeared to consider the automatic exclusion created by the right to reside test inherently lawful, stating that the test was a “substantive condition which economically inactive persons must meet in order to be eligible for the social benefits at issue”.[[118]](#footnote-118) It is not clear whether the Court accepted the UK’s allegation that the Commission’s objection to automatic exclusions was a new, inadmissible complaint, because it did not respond to it. But the issue of automatic exclusion is not a plea in itself; it is part of the justification investigation that the Court is empowered, and indeed obliged, to undertake, once a prima facie case of discrimination has been established. Otherwise the Commission would always have to anticipate all possible justifications - and adduce sufficient evidence to challenge their proportionality - as part of an application. The burden of proof would be not only reversed but also placed upon the Commission before proceedings even begin. Here, it is worth remembering the Court’s statement that “there is no rule of procedure which requires the Member State concerned to put forward, during the pre-litigation procedure, all the arguments in its defence,”[[119]](#footnote-119) since that would be contrary to the “*general principle of respect for the rights of the defence*”. Logically, there can therefore be no requirement for the Commission to anticipate, and refute, arguments that a Member State has not yet been obliged to raise, (ie to defend against the defence) at the outset of proceedings. A Member State’s attempt to silence the investigation of the Court, by claiming that responses to justification claims are ‘new complaints’ is an obstruction to access to justice, and would give the go-ahead to weak, unsubstantiated justification claims. However, the two inadmissibility claims made by the UK (automatic exclusions, and direct discrimination) were given covert, and so unchallengeable, effect, by ignoring the relevant points made by the Commission.

In permitting automatic exclusions from benefit eligibility, the Court permits Member States to treat all migrants who are deemed to be economically inactive as equally worthless and irrelevant. It extinguishes whatever embers of citizenship might have been left flickering by the confinement of *Alimanovic* to jobseekers. But the label of “economic inactivity” masks a wide variety of migrant lives and experiences[[120]](#footnote-120) – including many people who actually in work; the UK’s minimum earnings threshold – equivalent to 22 hours per week on the minimum wage[[121]](#footnote-121) - has no sliding scale for lone parents or persons with reduced work capacity due to disability or caring obligations. Other Member States employ hours and earnings thresholds too,[[122]](#footnote-122) which work to exclude people on variable hours, who cannot demonstrate continuous work above the threshold. Other EU nationals may be in and out of work, so again fall foul of continuity requirements; others may have been in work for several years, but not been recognised as permanent residents - again, inability to evidence continuously high enough earnings over a full five year period can exclude many people who have been resident for far longer than that.[[123]](#footnote-123) They may have a high degree of integration into society, have a strong family employment history, and have compelling circumstances that led to a loss of worker status. But they will all be treated as though they did not.

The citizens who get completely lost in this citizenship sacrifice, are those whose welfare is at the heart of this case – children. Regulation 883/2004 protects family benefit eligibility in a wide set of circumstances, possibly in recognition of the vulnerability of children, and the need to avoid punishing them for the choices or misfortunes of their parents. Recital (34) of the Regulation notes the need cover the “very broad scope” of family benefits which afford “protection in situations which could be described as classic as well as in others which are specific in nature”.

Children are typically “economically inactive”, and have no control over their parasitic status as family members – they cannot determine their parents’ migratory choices or employment statuses. The children may have been born in the host State and have no significant links with their State of nationality. They are the archetype of citizenship-by-praxis; as Advocate General Wathelet said of the children in *NA*, they may be said to have “*constructed* their citizenship” in the State of residence.[[124]](#footnote-124) But the Court in *NA*[[125]](#footnote-125) declined to consider the rights attaching to the children’s citizenship, prioritising their parasitic status under Article Regulation 1612/68, regardless of domestic violence.[[126]](#footnote-126)

*Commission v UK* also erases children’s rights from view. They are left without protection from the competent State because of their parents’ EU nationality, even though they cannot get protection from a non-competent State. It is deeply problematic to frame these benefits as awards to the ‘economically inactive’ parents; the Court in *Ibrahim*[[127]](#footnote-127)and *Teixeira*[[128]](#footnote-128) recognised that whether or not the carer is the recipient, benefits awarded to a family support the *children’s* enjoyment of their rights to reside. To find otherwise would deprive children of any welfare entitlement since they are unlikely to be the technical recipient of benefit payments.[[129]](#footnote-129) That reasoning applies *a fortiori* in the case of Child Benefit and Child Tax Credit, which are specifically designed to address costs of protecting child welfare. The UN Committee on the Rights of the Child has recently investigated the impacts of general reductions to child tax credits upon children in the UK, and stated that it was “seriously concerned” about the cuts that were imposed “regardless of the needs of the households” concerned and jeopardising child welfare.[[130]](#footnote-130) The Court is here condoning not just a cut, but wholesale exclusion from child tax credits, regardless of the needs of the households concerned, increasing the risk of child poverty for EU national children, and the risk that Member States will violate the UN Convention on the Rights of the Child.[[131]](#footnote-131) While the EU is not a party to the UNCRC, the Commission has announced that “standards and principles of the UNCRC must continue to guide EU policies and actions that have an impact on the rights of the child”,[[132]](#footnote-132) which arguably includes actions of the ECJ.

The Treaty of Lisbon introduced the “protection of the rights of the child” as a Union objective in Article 3 TEU. The Charter of Fundamental Rights of the European Union also states that “[c]hildren shall have the right to such protection and care as is necessary for their well-being”,[[133]](#footnote-133) and adds that “[i]n all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.”[[134]](#footnote-134) A European Parliament report argues that the rights of the child “now constitute an integral part of fundamental rights which the EU and Member States are bound to respect by virtue of European and international law.”[[135]](#footnote-135) It is difficult to see why the ECJ, when dealing with matters fully within the scope of EU law, and impacting directly upon, and potentially unlawfully damaging, child welfare, should be excused the obligation of even *mentioning* the children’s best interests, never mind making them a primary consideration.

**6 Conclusion**

The ruling is not much of a surprise, since it continues a now well-established project of EU citizenship-deconstruction. But the existing legal framework does not fit the finding – and where it could not be bent, it has been ignored. The liberties taken with legislation, silence on key questions, disregard of contested provisions, and reversal of the burden of proof, all paint a picture of a new teleological principle – the need to accommodate the UK’s desires to discriminate, in order to avoid offending national welfare sensitivities, and placate the population sufficiently to tempt it to vote to stay in the Union. The sacrifice was in vain. Those campaigning to leave were unlikely to be impressed, and responded with ire that the ECJ had the jurisdiction to rule on “our social security” system at all, [[136]](#footnote-136) and the UK voted to leave the European Union anyway. So we have blazed a trail of destruction in our wake – leaving the other countries to survey the wreckage of what was once EU citizenship.

Paragraph 44 in *Brey* has been made to do a lot of legwork. The Court has seized upon one sentence, or more specifically, has seized upon an omission in that sentence, pitted it against the authorities on which it is based, departed from the judgment itself, and clung to it to override any conflicting legal principle in primary or secondary law. The Court avoids exposing too starkly the weakness of this approach by avoiding discussing the conflicting legal provisions, or explaining how they are being weighed up and displaced. Regulation 883/2004 gets a battering; its material and personal scope are effectively curbed, with extra conditions stitched in, lifted from Directive 2004/38. Not only has that Directive been recently transformed from an instrument facilitating free movement to an instrument preventing benefit tourism,[[137]](#footnote-137) it has now been transformed into a higher constitutional principle of exclusion, transplanted into other secondary laws, even where those laws have at least equal status and explicitly different scopes and objectives. Article 11(3)(e) of Regulation 883/2004 is made redundant as “competence” is redefined as a prerogative to discriminate. The description of the right to reside as like any other substantive condition for eligibility for a benefit is misleading; it is not like any other condition that a UK national must meet. It conflicts directly with Article 4 of Regulation 883/2004. But this provision gets no attention in the judgment between noting that the Commission raise it, and than stating that it is not infringed. But we need to know what it means, if it does not mean what it says.

The Court has passed up on the chance to explain why it considers the right to reside test to be indirect discrimination, rather than discrimination on the ‘sole’ ground of nationality, as was the extra condition in *Grzelczyk*. The ‘indirect discrimination’ line may be a necessary legal fiction, but some legal reasoning to explain the distinction would be helpful. Or else the Court might have – more ambitiously – faced up to the problem that the EU framework is unrealistic, since it theoretically prohibits direct discrimination, while we all know it is tolerated, in the form of right to reside tests. On recognising that the right to reside test is (indirectly) discriminatory, the Court neglected to examine whether that condition is justified, instead looking at whether the checks, to see whether claimants pass the test, are justified. This is a perplexing judicial non-sequitur, with the effect of assuming that the test itself, and the discrimination that it embodies, is lawful. In stating that it is up to the Commission to adduce the evidence to show that the checks are disproportionate and that verification is systematic, the burden of proof is reversed. The UK was excused from demonstrating a legitimate aim with means that are appropriate, necessary and proportionate, beyond brandishing a public finances trump card, while we are assured without explanation that systematic checking is not the same thing as systematic verification.

The Court has condoned the automatic exclusions that result from the right to reside test, so destroying any possibility of a claim based on proportionality, or asserting a *Brey*-based right to a case-by-case assessment of personal circumstances. The Court chooses to not tell us why it cleaves so closely to one fragment of *Brey*, while dispensing with the rest of it. This destroys any residual hopes that citizens might have equal treatment rights stemming from EU citizenship and Article 18 TFEU. EU citizenship is extinguished, but furtively, since “citizenship” is not mentioned once in the whole judgment, and nor is Article 18 TFEU. The failure to engage with primary law, while dismissing and eviscerating it, is striking.

The ruling has a particularly pronounced effect upon the rights of children - those citizens whose welfare is at the heart of the instant case, and yet whose status and best interests do not get a single mention. This suggests that the Court does not take the TEU and Charter commitments on children’s rights seriously. The UN has drawn the lines to connect the benefits at issue with child welfare, to show that reductions in those benefits place the UK on the brink of breaching its international children’s rights obligations. But the Court has issued a judgment that endorses wholesale automatic exclusions from those benefits, placing EU national children at considerable risk of destitution.

We should not expect the Court to operate as though in a bubble, hermetically sealed off from the biggest challenge faced by the EU in decades; the melodrama of the UK referendum could hardly be ignored in a case dealing with something so sensitive as UK welfare law. But we are entitled to expect it to try – or at the very least, appear to try – to interpret and apply legal provisions with a semblance of legal method. In divining from a fragment of *Brey* a fundamental principle of exclusion, it has curbed, rewritten, and even rendered obsolete, provisions of Regulation 883/2004. In failing to examine the directly discriminatory nature of the test, skipping over Article 4 of Regulation 883/2004, ignoring *Grzelczyk* and condoning automatic exclusions, contrary to *Brey* and contrary to the authorities relied upon in *Brey*, it has released Member States from an obligation to apply limitations to social security in a proportionate way and given them a licence to discriminate on the ground of nationality. In neglecting Article 18 TFEU, and apparently forgetting about the existence of EU citizenship, it has extinguished the last few embers of EU citizenship, and denied EU national children any personal claim to have their welfare considered or best interests protected.

Now that the UK referendum is over, we might hold out hope that the Court will feel less politically hamstrung, so reclaim its integrity. But the tide of xenoscepticism has not been confined to the UK,[[138]](#footnote-138) and the very basis of free movement – and indeed of the Union - is widely questioned,[[139]](#footnote-139) so there may be little cause for optimism regarding future case law. Here, the Court could have employed detailed reasoning, and given some role to proportionality and Article 18 TFEU, to reach a more nuanced, carefully confined decision, that meted out some degree of ‘victory’ to the UK without tearing down the walls for everyone else. However, a truly ethically robust analysis would have had to flag up the conflict between what the law says about social security, and what the noisier Member States presently want it to say, admitting that such conflict could only be overcome through sophistry, and questioning whether it is desirable to distort the law in order to accommodate discriminatory urges in the name of political expediency. In either case, close analysis would have been necessary. Making complex, contentious decisions about the relative weight of competing legal principles demands attention to detail. Unfortunately, this judgment is frugal on detail and sparing on analysis; the consequence is a sweeping ruling that will have ramifications throughout the EU, denuding citizenship of equal treatment rights, imperilling the welfare of children, and corroding the Court’s own credibility and authority.

1. Judgment 14th June 2016; the UK referendum on EU membership was held on the 23rd of June 2016. [↑](#footnote-ref-1)
2. Case C-85/96, *María Martínez Sala v Freistaat Bayern*,EU:C:1998:217*;* Case C-456/02, *Michel Trojani v Centre public d'aide sociale de Bruxelles,* EU:C:2004:488*;* Case C-413/99, *Baumbast and R v Secretary of State for the Home Department*,EU:C:2002:493*;* Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l’emploi (ONEm)*, EU:C:2011:124*;* on developments in EU citizenship, see Nic Shuibhne, “The Resilience of EU Market Citizenship”, 47 CML Rev, (2010), 1597; Kochenov, “The Essence of European Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon?”, 62 *International & comparative law quarterly,* (2013), 97. [↑](#footnote-ref-2)
3. Hailbronner, “Union citizenship and access to social benefits”, 42 CML Rev. (2005), 1245; Tomuschat, annotation of *Martínez Sala*, 37 CML Rev. (2000), 449; Somek, “Solidarity decomposed: Being and time in European citizenship”, 32 EL Rev. (2007), 787. [↑](#footnote-ref-3)
4. Case C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, EU:C:2001:458. [↑](#footnote-ref-4)
5. Though the construction has not always been coherent, and has created a ‘patchwork’ of statuses – O’Brien, “I trade, therefore I am: Legal personhood in the European Union”, 50 CML Rev. (2013), 1643. [↑](#footnote-ref-5)
6. Case C‑165/14, *Alfredo Rendón Marín v Administración del Estado*, Opinion of AG Szpunar delivered on the 4th Feburary 2016, EU:C:2016:75, at para 110. [↑](#footnote-ref-6)
7. Nic Shuibhne, “Limits rising, duties ascending: The changing legal shape of Union citizenship”, 52 CML Rev, (2015), 889; Giubboni “Free Movement of Persons and European Solidarity Revisited” 7(3) Perspectives on Federalism (2015) E1; Thym, “The elusive limits of solidarity: Residence rights of and social benefits for economically inactive Union citizens”, 52 CML Rev. (2015), 17–50. [↑](#footnote-ref-7)
8. Case C-140/12, ***Pensionsversicherungsanstalt v Peter Brey*,** EU:C:2013:565. [↑](#footnote-ref-8)
9. Case C-333/13, *Elisabeta Dano and Florin Dano v Jobcenter Leipzig*,EU:C:2014:2358. [↑](#footnote-ref-9)
10. Case C-67/14, *Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others*, EU:C:2015:597. [↑](#footnote-ref-10)
11. Case C-299/14,*Vestische Arbeit Jobcenter Kreis Recklinghausen v Jovanna García-Nieto and Others*, EU:C:2016:114. [↑](#footnote-ref-11)
12. Section 23 of the Child Benefit (General) Regulations 2006 (as amended by the Child Benefit (General) and the Tax Credits (Residence) (Amendment) Regulations 2014), and Section 3 of the Tax

    Credits (Residence) Regulations 2003 (as amended by the Child Benefit (General) and the Tax

    Credits (Residence) (Amendment) Regulations 2014). [↑](#footnote-ref-12)
13. 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, O.J. 2004, L 158/77. [↑](#footnote-ref-13)
14. Such that it gave substance to the previously ‘toothless’ citizenship provisions – Jacqueson, ‘Union Citizenship and the Court of Justice: Something new Under the Sun? Towards Social Citizenship’, 27, EL Rev, (2002), 260, at 263. [↑](#footnote-ref-14)
15. Since the UK has in any case voted to leave the EU. BBC News ‘EU referendum: the results in maps and charts” 24 June 2016 at <http://www.bbc.co.uk/news/uk-politics-36616028> accessed 29 July 2016. [↑](#footnote-ref-15)
16. Judgment, 21. [↑](#footnote-ref-16)
17. Judgment, 61. [↑](#footnote-ref-17)
18. Regulation (EC) 883/2004 of 29 April 2004 on the coordination of social security systems, O.J. 2004, L 166/1. [↑](#footnote-ref-18)
19. Immigration (European Economic Area) Regulations 2006 SI 1003. [↑](#footnote-ref-19)
20. *UK Upper Tribunal, VP v. Secretary for Work and Pensions (JSA)*, [2014] UKUT 32 (AAC). [↑](#footnote-ref-20)
21. For example, EU national jobseekers were excluded from Housing Benefit by the Housing Benefit (Habitual Residence) Amendment Regulations 2014. For more detail on UK welfare changes impacting on EU jobseekers see O’Brien, “The pillory, the precipice and the slippery slope: The profound effects of the UK’s legal reform programme targeting EU migrants”, 37 *Journal of Social Welfare and Family Law* (2015), at 111–136. [↑](#footnote-ref-21)
22. Jobseekers were prevented from establishing habitual residence in their first three months of residence by the (Jobseeker’s Allowance: Habitual Residence) Amendment Regulations 2013 SI No. 3196; the total period an EU national can claim a right of residence for if they come to the UK as a jobseeker is six months; they will only be entitled to claim JSA for the second half (91 days in total) of that period: The Immigration (European Economic Area) (Amendment) (No. 3) Regulations 2014. [↑](#footnote-ref-22)
23. And they must be working ‘enough’ and for a long enough period to be classified as a worker: O’Brien ‘Civis capitalist sum: Class as the new guiding principle of EU free movement rights”, CML Rev, forthcoming (2016). [↑](#footnote-ref-23)
24. Opinion of Cruz Villalón delivered on 6 October 2015 EU:C:2015:666 [↑](#footnote-ref-24)
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26. Opinion of AG Cruz Villalón, 54. [↑](#footnote-ref-26)
27. Ibid., para 53. [↑](#footnote-ref-27)
28. Ibid., para 57. [↑](#footnote-ref-28)
29. Ibid., para 72. [↑](#footnote-ref-29)
30. Ibid., para 74. [↑](#footnote-ref-30)
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39. Ibid., paras 97-98. [↑](#footnote-ref-39)
40. “Consolidated version of the Rules of Procedure of the Court of Justice of 25 September 2012” at < http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp\_en.pdf> accessed 29 July 2016 [↑](#footnote-ref-40)
41. Judgment, para 60. [↑](#footnote-ref-41)
42. C‑245/94 and C‑312/94, EU:C:1996:379, para 27. [↑](#footnote-ref-42)
43. Judgment, para 65. [↑](#footnote-ref-43)
44. Ibid,. para 67. [↑](#footnote-ref-44)
45. Ibid., para 68. [↑](#footnote-ref-45)
46. Ibid., para 71. [↑](#footnote-ref-46)
47. Ibid., para 83. [↑](#footnote-ref-47)
48. Ibid., para 84. [↑](#footnote-ref-48)
49. Ibid., para 85. [↑](#footnote-ref-49)
50. *Brey*, Cit*. supra* n8, para 30. [↑](#footnote-ref-50)
51. Opinion of AG Cruz Villalón, para 74. [↑](#footnote-ref-51)
52. Judgment, para 51. [↑](#footnote-ref-52)
53. Ibid., para 50. [↑](#footnote-ref-53)
54. ### Also analysed in O’Brien “An insubstantial pageant fading: a vision of EU citizenship under the AG’s Opinion in C-308/14 Commission v UK” EU Law Analysis, 7 October 2016, at <http://eulawanalysis.blogspot.co.uk/2015/10/an-insubstantial-pageant-fading-vision.html> accessed 29 July 2016.

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56. Child Benefit Regulations 2006, Reg 23(4)(a); Tax Credits (Residence) Regulations 2003, Reg. 3(5); HMRC *Internal Manual: Child Benefit Technical Manual* CBTM 10010 “Residence and immigration: residence – introduction”, at <https://www.gov.uk/hmrc-internal-manuals/child-benefit-technical-manual/cbtm10010> accessed 29 July 2016. [↑](#footnote-ref-56)
57. Opinion of AG Cruz Villalón, para 77. [↑](#footnote-ref-57)
58. Judgment para 69. [↑](#footnote-ref-58)
59. Ibid. [↑](#footnote-ref-59)
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62. Article 6, Regulation 883/2004. [↑](#footnote-ref-62)
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67. Ibid., Recital (10). [↑](#footnote-ref-67)
68. Opinion of AG Cruz Villalón at para 73. [↑](#footnote-ref-68)
69. Ibid., para 77. [↑](#footnote-ref-69)
70. Ibid., para 75. [↑](#footnote-ref-70)
71. Ibid., para 76. [↑](#footnote-ref-71)
72. Ibid., para 74. [↑](#footnote-ref-72)
73. Judgment, para 78, emphases added. [↑](#footnote-ref-73)
74. “the United Kingdom has maintained that the lawful residence test which it applies in circumstances such as those at issue in this case is independent of the test of habitual residence.” Opinion of AG Cruz Villalón, para 41. [↑](#footnote-ref-74)
75. *Grzelczyk*, supra, note 4, para 28. [↑](#footnote-ref-75)
76. Ibid., para 29. [↑](#footnote-ref-76)
77. Court of Justice of the European Union, Op Cit *supra* note 40. [↑](#footnote-ref-77)
78. It is clear from the judgment, para 40, that the complaint was entered into the application. [↑](#footnote-ref-78)
79. ## Cousins, “ ‘The baseless fabric of this vision’: EU citizenship, the right to reside and EU law”, 23(2), Journal of Social Security Law, (2016), 89-105, at 103.

    [↑](#footnote-ref-79)
80. Opinion of AG Cruz Villalón, para 94. [↑](#footnote-ref-80)
81. Ibid. [↑](#footnote-ref-81)
82. Judgment, para 83. [↑](#footnote-ref-82)
83. Ibid, para 84. [↑](#footnote-ref-83)
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