Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 6 October 2015 [1]

Case C-308/14

**European Commissionv
United Kingdom of Great Britain and Northern Ireland**

(Action for failure to fulfil obligations brought by the Commission against the United Kingdom of Great Britain and Northern Ireland)

(Failure of a Member State to fulfil obligations — Coordination of social security systems — Regulation (EC) No 883/2004 — Article 4 — Equal treatment with regard to access to social security benefits — Family allowances — Right of residence — Directive 2004/38/EC — National legislation denying child benefit and child tax credit to persons not having a right of residence in the Member State in question)

1. The Commission claims that the United Kingdom has failed to fulfil its obligations under Regulation No 883/2004 on the coordination of social security systems, [2] by imposing a 'right of residence test' on persons claiming certain social benefits, on the grounds that that test is both inconsistent with the meaning of the abovementioned regulation and discriminatory.

2. The Court is thus faced once again, as it was in the recent cases of *Brey*, [3] *Dano* [4] and *Alimanovic*, [5] with the question of the relationship between Regulation No 883/2004 and Directive 2004/38. [6] Like its predecessors, this case, too, raises the question whether it is legitimate to take into account the lawfulness of residence in the abovementioned context of investigating claims for social benefits, albeit with significant differences. So, whereas the previous requests for a preliminary ruling were concerned with the interpretation of Directive 2004/38 and touched to some extent on Regulation No 883/2004, the issue here is compliance with that regulation and, in particular, whether the application of the directive has any relevance at all in the circumstances of the present case.

3. The — ultimately predominant — allegation of discriminatory treatment directed against the United Kingdom will, in essence, call for a basic distinction to be drawn between two questions: on the one hand, the question of principle as to whether or not the application of the aforementioned regulation should place 'in abeyance' the provisions of Directive 2004/38 that set out the framework for determining the lawfulness of a Union citizen's residence in a Member State other than his own; on the other hand, the intrinsically different question of the circumstances and conditions in which any checking of the situation of lawful residence is compatible with the prohibition of discrimination laid down in Article 4 of Regulation No 883/2004.

1 — Original language: Spanish.

2 — Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 (OJ 2004 L 166, p. 1).

3 — C-140/12, EU:C:2013:565.

4 — C-333/13, EU:C:2014:2358.

5 — C-67/14, EU:C:2015:597. See also the Opinion of Advocate General Wathelet in *García Nieto and Others*, C-299/14, EU:C:2015:366.

6 — Directive 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77).

I – **Legal context**

A – *EU law*

1. Regulation No 883/2004

4. According to Article 1(j) and (z) of Regulation No 883/2004:

‘For the purposes of this Regulation:

…

(j) “residence” means the place where a person habitually resides;

…

(z) “family benefit” means all benefits in kind or in cash intended to meet family expenses, excluding advances of maintenance payments and special childbirth and adoption allowance mentioned in Annex I.’

5. According to Article 3(1)(j) of that regulation:

‘1. This Regulation shall apply to all legislation concerning the following branches of social security:

…

(j) family benefits.’

6. Article 4 of that regulation, entitled ‘Equality of treatment’, provides that:

‘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.’

7. Article 11(1) and (3)(e) of that regulation provides as follows:

‘1. Persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. Such legislation shall be determined in accordance with this Title.

…

3. Subject to Articles 12 to 16:

…

(e) any other person to whom subparagraphs (a) to (d) do not apply shall be subject to the legislation of the Member State of residence, without prejudice to other provisions of this Regulation guaranteeing him benefits under the legislation of one or more other Member States.’

8. Article 67 of that same Regulation provides as follows:

‘A person shall be entitled to family benefits in accordance with the legislation of the competent Member State, including for his family members residing in another Member State, as if they were residing in the former Member State …’

2. Directive 2004/38

9. Article 7 of Directive 2004/38 is worded as follows:

‘1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State,

(c)

— are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

— have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

…

3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

(a) he/she is temporarily unable to work as the result of an illness or accident;

(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first 12 months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than 6 months;

(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.’

10. According to Article 14 of that directive,

‘1. Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.

2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.

In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.

3. An expulsion measure shall not be the automatic consequence of a Union citizen’s or his or her family member’s recourse to the social assistance system of the host Member State.

…’

11. According to Article 15(1), ‘the procedures provided for by Articles 30 and 31 shall apply by analogy to all decisions restricting free movement of Union citizens and their family members on grounds other than public policy, public security or public health’.

12. Article 24 of that directive, entitled ‘Equal treatment’, provides that:

‘1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.

2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.’

B – *National law*

13. The relevant UK legislation will be presented during the course of this Opinion.

II – **Pre-litigation procedure**

14. During 2008, the Commission received numerous complaints from citizens of other Member States resident in the United Kingdom that the competent UK authorities had refused to grant them certain social benefits on the grounds that they did not have a right of residence in that State.

15. The Commission sent a request for clarification to the United Kingdom, which, by two letters dated 1 October 2008 and 20 January 2009, stated in reply that, under UK legislation, while the right to reside in the United Kingdom is conferred on all UK nationals, nationals of other Member States are not, in certain circumstances, considered to have a right of residence. According to the UK

Government, that restriction is based on the concept of the right of residence as defined in Directive 2004/38 and on the limitations which that directive attaches to that right, in particular the requirement that an economically inactive person must have sufficient resources not to become a burden on the social assistance system of the host Member State.

16. On 4 July 2010, the Commission sent the United Kingdom a letter of formal notice identifying the provisions of its legislation under which, if they were to be eligible for certain benefits, claimants had to have a right of residence in that State in order to be considered habitually resident in the United Kingdom.

17. On 30 July 2010, the UK Government answered the letter of formal notice, arguing that its national system was not discriminatory and that the condition of a right of residence was justified as a proportionate measure for ensuring that benefits were paid to persons sufficiently integrated in the United Kingdom.

18. On 29 September 2011, the Commission issued a reasoned opinion, to which the United Kingdom replied by letter of 29 November 2011.

19. Dissatisfied with that reply, the Commission brought the present action for failure to fulfil obligations. In the light of the ruling given by the Court in the judgment in *Brey*,[7] delivered in September 2013, the Commission decided to confine its action to the family allowances referred to above, that is to say, child benefit and child tax credit, to the exclusion of the 'special non-contributory cash benefits' that had also been the subject of the reasoned opinion and which, in accordance with the judgment in *Brey*, could be classified as 'social assistance' for the purposes of Article 7(1)(b) of Directive 2004/38.

III – **Procedure before the Court**

A – *The Commission's action*

1. Principal head of claim

20. The principal head of claim raised by the Commission against the United Kingdom is that, by requiring a person claiming child benefit or child tax credit to have a right of residence in the United Kingdom as a condition of being treated as habitually resident[8] there, the United Kingdom has added a condition that does not appear in Regulation No 883/2004 and deprives persons who do not meet it of the cover under the social security legislation of one of the Member States which that regulation is intended to ensure.

21. According to the Commission, the definition of 'residence' in Article 1(j) of Regulation No 883/2004 states that, for the purposes of that regulation, 'residence' means 'the place where a person habitually resides'.[9] In the Commission's view, that place is determined by reference to purely factual considerations, specifically, to where that person has his centre of interests, and its interpretation cannot be influenced by the provisions of Article 7 of Directive 2004/38. It goes on to say that Article 11(3)(e) of Regulation No 883/2004 establishes a system of conflict of laws rules for

7 — C-140/12, EU:C:2013:565.

8 — In reality, as the United Kingdom points out, the habitual residence test (to which the other social benefits referred to in the reasoned opinion are indeed subject but do not form part of the subject-matter of the action for failure to fulfil obligations), is not applicable to the benefits at issue in this case, where the requirement is that the claimant 'must be in the United Kingdom'. One of the conditions that a claimant must meet in order to be regarded as being 'in the United Kingdom', besides being physically present and ordinarily resident there, is to have a right of residence there.

9 — As opposed to 'stay', which, according to Article 1(k) of Regulation No 883/2004, means 'temporary residence'.

determining the Member State to whose legislation the persons governed by Regulation No 883/2004 are subject. However, the Commission further contends, the condition of a 'right of residence' test established by the United Kingdom 'disapplies' the rules of that regulation which determine the applicable legislation, with the result that no Member State will be obliged to pay certain family allowances to the persons concerned, despite the fact that the latter live in a Member State and have dependent children.

2. Alternative head of claim

22. In the alternative, the Commission claims that, by imposing a condition for entitlement to certain social security benefits which UK nationals automatically meet, the United Kingdom has created a situation involving direct discrimination against nationals of other Member States, thus infringing Article 4 of Regulation No 883/2004.

23. The Commission submits that, in the course of the pre-litigation procedure, the United Kingdom moved from the view that the 'right of residence' criterion was one more component of the habitual residence test,[10] to the view that it is an independent condition which, though discriminatory, is justified. The Commission, relying on Advocate General Sharpston's Opinion in *Bressol and Others*,[11] considers that the right of residence condition constitutes direct discrimination on grounds of nationality. That condition applies only to foreign nationals, because UK nationals resident in the United Kingdom automatically fulfil it, which, in the Commission's view, infringes the principle of equal treatment under Article 4 of Regulation No 883/2004. The Commission states that, this being direct discrimination, no justification whatsoever is possible.

24. The Commission submits that, even if that condition were to be considered to be indirect discrimination, as the United Kingdom contends, the latter has not put forward any argument that permits the inference that the unequal treatment in question is appropriate and proportionate to the aim of ensuring that there is a genuine link between the person claiming the benefit and the host Member State.

25. The United Kingdom, on the other hand, maintains that economically inactive persons ought not to become a burden on the welfare system of the host Member State, unless they have a minimum degree of connection with that State. The Commission accepts that a Member State may wish to ensure that there is a genuine link between the person claiming the benefit and the competent Member State. In the case of social security benefits, however, it is Regulation No 883/2004 itself which establishes the means of testing whether such a genuine link exists (in this particular case, by applying the habitual residence criterion), and the Member States may make no changes to its provisions and add no supplementary conditions. The Commission argues that the United Kingdom has not even attempted to show how the right of residence criterion is apt for determining whether a person has a link with the United Kingdom sufficient for him to be granted social security benefits under that regulation.

10 — In reality, the test to determine whether the claimant is in the United Kingdom. See footnote 8.

11 — C-73/08, EU:C:2009:396. The Advocate General's reasoning was not endorsed in the judgment in *Bressol and Others* (C-73/08, EU:C:2020:181), where the Court held that the difference in treatment in question constituted indirect discrimination (paragraph 47).

B – *Defence*

26. In its defence, the United Kingdom disputes the Commission's principal head of claim by relying, in essence, on the judgment in *Brey*,[12] in which the Court, rejecting on that occasion the same arguments that the Commission is also putting forward in the present case, held that 'there is nothing to prevent, in principle, the granting of social security benefits to Union citizens who are not economically active being made conditional upon those citizens meeting the requirements for obtaining a legal right of residence in the host Member State' (paragraph 44). It also held that the purpose of Article 70(4) of Regulation No 883/2004, which, like Article 11, establishes a 'conflict of laws rule' the aim of which is to prevent the concurrent application of several national legislative systems and to ensure that persons covered by the Regulation are not left without social security cover because there is no legislation applicable to them, is not to lay down the basic conditions governing entitlement to the benefits at issue in that case (special non-contributory cash benefits); rather, 'it is for the legislation of each Member State to lay down those conditions' (paragraph 41). The United Kingdom considers that the same reasoning applies to the conflict of laws rule in Article 11 of Regulation No 883/2004, which performs the same function as Article 70(4) (the latter provision being specific to special non-contributory cash benefits) when it comes to determining the national legislation to which the claimant is subject.

27. As regards the alternative head of claim put forward by the Commission, the United Kingdom maintains that the allegation of direct discrimination appears for the first time in the application and was not made in the reasoned opinion addressed to it by the Commission during the pre-litigation procedure. It takes the view that the Court has already held in various judgments that it is lawful to require economically inactive EU nationals to demonstrate that they have a right of residence as a condition of qualifying for social security benefits, and, moreover, that Directive 2004/38 expressly recognises this as a legitimate means of ensuring that such citizens do not become an unreasonable burden on the social security system of the host Member State. The principle of equal treatment under Article 4 of Regulation No 883/2004 must be interpreted in the light of that principle.

28. The United Kingdom submits that the right of residence condition is only one of the three cumulative conditions that a claimant must satisfy in order to demonstrate that he is in the United Kingdom. Whether or not the two others (presence and ordinary residence) are satisfied does not depend on the claimant's nationality, so that a UK national does not automatically satisfy the condition of 'being in the United Kingdom' that entitles him to the benefits at issue. The United Kingdom none the less recognises[13] that those conditions are more easily satisfied by its nationals than by the nationals of other Member States and that the measure at issue is indirectly discriminatory.[14] In its contention, however, the measure is objectively justified (as paragraph 44 of the judgment in *Brey*,[15] concerning a similar case, confirms), in particular by the objective of protecting public finances, given that the two benefits in question are not funded from beneficiaries' contributions but from taxation. Moreover, there is nothing to indicate that it is disproportionate from the point of view of attaining the objective pursued, in accordance with the judgment in *Brey*.[16]

12 — C-140/12, EU:C:2013:565. In that judgment, the Court concluded that 'the Austrian compensatory supplement to the old-age pension' with which that case was concerned was to be considered both a 'special non-contributory cash benefit' for the purposes of Regulation No 883/2004 and a 'social assistance benefit' for the purposes of Directive 2004/38. For that reason, it held to be consistent in principle with EU law the fact that, in the case of Union citizens, entitlement to that compensatory supplement was conditional upon their demonstrating that they had a 'legal right to reside in Austria', so as to ensure that paying that benefit to economically inactive Union citizens did not impose an unreasonable burden on Austria's finances. That said, it is in any event necessary to examine the particular circumstances of the case in question in order to determine whether the grant of the benefit at issue to a person in Mr Brey's situation might represent an unreasonable burden on the national social assistance system.

13 — Paragraph 35 of the defence.

14 — Paragraph 36 of the defence.

15 — C-140/12, EU:C:2013:565.

16 — C-140/12, EU:C:2013:565, paragraphs 71 to 78.

C – *Reply*

29. As regards the principal head of claim, the Commission states in its reply that the judgment in *Brey*[17] was concerned only with the application of Directive 2004/38 to special non-contributory cash benefits, which have features characteristic of both social security and social assistance, whereas the present action relates to two family benefits within the meaning of Article 3(1)(j) of Regulation No 883/2004, that is to say pure social security benefits, to which Directive 2004/38 does not apply. In that connection, the Commission refers to an issue with the translation of the judgment in *Brey*, inasmuch as paragraph 44 of the English-language version refers to 'social security benefits', while the German-language version (the authoritative version, since the case was Austrian) refers to 'Sozialleistungen' (social benefits).[18]

30. The Commission draws attention to the fact that the UK legislation, instead of encouraging the free movement of Union citizens, which is the underlying purpose of the EU legislation on the coordination of social security systems, discourages it by introducing a barrier to that freedom in the form of discrimination on grounds of nationality, with the result that a person may not be entitled to the family benefits at issue either in his Member State of origin, in which he is no longer habitually resident, or in the host Member State if he has no right of residence there.

31. With respect to the alternative head of claim, in its reply, the Commission complains that the United Kingdom interprets the conflict of laws rule in Article 11 of Regulation No 883/2004 to the effect that it permits a Member State to introduce a discriminatory condition for entitlement to a social security benefit. The reference to the fact that Member States may impose legitimate restrictions in order to prevent a Union citizen becoming an unreasonable burden on the social assistance system of the host Member State applies only to social assistance, not to social security benefits. Precisely because the mechanism for the coordination of social security systems attributes responsibility for paying family benefits to the Member State where the person with dependent children is habitually resident, the objective put forward by the United Kingdom of protecting public finances is not a legitimate purpose. At all events, the criterion introduced by the United Kingdom is not a proportionate means of attaining that objective (for example, a person who has paid taxes in the United Kingdom for many years but who is unemployed for a period of time may have lost his right of residence in that Member State and, consequently, his entitlement to the benefit in question) and does not ensure that the circumstances of each individual case are assessed, as required by the judgment in *Brey*.[19]

D – *Rejoinder*

32. In its rejoinder, the United Kingdom emphasises that its national legislation may be applicable in accordance with the conflict of laws rules in Regulation No 883/2004 and that a person habitually resident in that State may none the less not be entitled to the specific social benefits in question.

33. The United Kingdom considers that the term 'social benefits' is broader than 'social security benefits' and that, even if the judgment in *Brey*[20] does use the first term instead of the second in the German- and French-language versions, this only serves to broaden the scope of the principle laid down in paragraph 44 so as also to include social security benefits. Nowhere does the judgment in *Brey* state that the Court's findings in that judgment are confined exclusively to special non-contributory cash benefits. The same is true of the judgment in *Dano*.[21]

17 — C-140/12, EU:C:2013:565.

18 — In French, 'prestations sociales', which is the same as 'social benefits'.

19 — C-140/12, EU:C:2013:565, paragraphs 63 to 80.

20 — C-140/12, EU:C:2013:565, paragraph 44.

21 — C-333/13, EU:C:2014:2358.

34. Furthermore, the United Kingdom submits that it does not understand why, if Member States are not required to pay special non-contributory cash benefits which provide a basic, minimum level of income to Union citizens with no right of residence, they should be required to pay them benefits such as those at issue in the present case, which are additional to that basic, minimum level and which, since they are funded from taxation, have the potential to impose an unreasonable burden on public finances within the meaning of the judgment in *Brey*.[22] The United Kingdom adds that, at all events, the two benefits at issue in the present case have some characteristics of social assistance, even though this is not a condition that must of necessity be satisfied in order for the principle established by the judgment in *Brey* (which refers, generally, to 'social benefits') to apply also to the benefits forming the subject of the present action for failure to fulfil obligations. In the United Kingdom's view, the Court confirmed in its judgment in *Dano*[23] that only economically inactive Union citizens whose residence satisfies the conditions in Article 7(1)(b) of Directive 2004/38 may claim equal treatment with nationals so far as entitlement to social benefits is concerned.

35. As regards the Commission's submission that the UK legislation does not ensure that the individual circumstances of each case are assessed, as required by the judgment in *Brey*,[24] the United Kingdom maintains that, because the latter argument appears for the first time in the Commission's reply and was not mentioned during the pre-litigation procedure, it is inadmissible in accordance with Article 127 of the Rules of Procedure of the Court of Justice.

36. In any case, the United Kingdom explains[25] how the two benefits at issue are awarded in practice. The department responsible for administering those two benefits, Her Majesty's Revenue and Customs, takes account of, inter alia, the information provided by the Department for Work and Pensions to check whether a person has claimed social assistance. This enables it to ascertain whether that person has a right of residence in the United Kingdom and is therefore entitled to the two benefits at issue. In cases in which there is doubt as to whether the claimant has a right of residence, an individual assessment of the claimant's personal circumstances is carried out. This includes an examination of his contribution history, whether he is actively seeking employment and whether he has a genuine chance of being engaged.

37. A hearing was held on 4 June 2015. At that hearing, the two parties essentially reiterated the arguments set out above and answered the questions put by the Court.

IV – Assessment

A – *Introduction*

38. As already mentioned, by this action the Commission is seeking a declaration by the Court that, by requiring claimants to pass the checking — or testing — of lawful residence in that Member State as a condition for the grant of child benefit and child tax credit, the United Kingdom has failed to fulfil its obligations under Article 4 of Regulation No 883/2004.

39. The Commission has set out its action in the form of a principal head of claim and an alternative head of claim. By its principal head of claim, the Commission argues that the United Kingdom decided to introduce a lawful residence test as part of the habitual residence test provided for in Article 11(3)(e) of Regulation No 883/2004, thereby creating an additional requirement which does

22 — C-140/12, EU:C:2013:565.

23 — C-333/13, EU:C:2014:2358, paragraph 73.

24 — C-140/12, EU:C:2013:565, paragraphs 63 to 80.

25 — Paragraph 21 of the rejoinder.

not appear in that provision. However, in the alternative, the Commission argues that that Member State is introducing a requirement that is applicable solely to non-nationals (since UK nationals as a matter of principle have the right of residence in that Member State), which thus constitutes discrimination prohibited by Article 4 of that regulation.

40. Consequently, as the case is presented by the Commission, it would in principle seem that the two arguments should be analysed in the order of priority indicated: first, the unlawfulness of incorporating a lawful residence test into what, under Article 11(3)(e) of Regulation No 883/2004, is a test of habitual residence and, secondly, the discrimination resulting from imposing on non-UK Union citizens a test of lawful residence not applied to UK nationals. For reasons that I shall explain below, I shall not answer those arguments in quite that way.

41. In fact, the Commission's argument has been, as it were, weakening over the course of this dispute. It should be remembered that, from the time it answered the reasoned opinion sent it by the Commission, the United Kingdom has repeatedly denied that it was seeking, by means of the legislation at issue, to justify a test of lawfulness as part of the test of habitual residence. In fact, since that time, 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. [26] Thus, the crux of the dispute has gradually shifted towards the second head of claim, namely, that of discrimination prohibited by Article 4 of Regulation No 883/2004.

42. Consequently, I shall deal only briefly with the argument submitted by the Commission in its principal head of claim, after which I shall focus on the argument initially submitted in the alternative head of claim. However, the circumstances of the case call first of all for some clarification of the nature of the social benefits with which this case is concerned.

B – *The social benefits to which the action relates*

43. This action for failure to fulfil obligations is concerned with child benefit and child tax credit, both being cash benefits funded from general taxation and not from the beneficiaries' contributions, and the purpose of which is to assist with covering family expenses. The United Kingdom did not include either of them in Annex X of Regulation No 883/2004, nor has it been disputed during these proceedings that they are not special non-contributory cash benefits for the purposes of Article 70 thereof.

44. Under Section 141 of the Social Security Contributions and Benefits Act 1992, 'a person who is responsible for one or more children in any week shall be entitled, subject to the provisions of this Part of this Act, to a benefit (to be known as "child benefit") for that week in respect of the child or each of the children for whom he is responsible'. [27] Child benefit is a family benefit essentially intended to meet some of the cost of caring for those children for persons who have one or more dependent children. It is in principle a universal benefit, although higher-income claimants have to repay a sum up to the maximum received as child benefit when they settle their tax obligations. [28]

26 — See, in particular, page 3 of the United Kingdom's reply to the reasoned opinion.

27 — Regarding child benefit, see, for Great Britain, Section 146 of the Social Security Contributions and Benefits Act 1992 and 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, for Northern Ireland, Section 142 of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 and Section 27 of the aforementioned Child Benefit (General) Regulations (as amended).

28 — See details on https://gov.uk/child-benefit, the UK Government website which explains how this benefit works. According to the information on that website, child benefit is currently GBP 20.72 per week for the first child and GBP 13.70 per week for each subsequent child. See also https://www.citizensadvice.org.uk/benefits/children-and-young-people/benefits-for-families-and-children/#h-child-benefit, which gives practical details of how to claim and obtain this benefit.

45. For its part, child tax credit, which is governed by Sections 8 and 9 of the Tax Credits Act 2002,[29] is also a cash benefit which is granted to persons with dependent children, the amount paid varying depending on family income, the number of dependent children and other circumstances, such as whether a member of the family is disabled.[30] Child tax credit replaced a series of supplementary benefits that were granted to those claiming various maintenance allowances (which were income-linked) for dependent children, with the general aim of reducing child poverty.[31]

46. Regarding the nature of these benefits, I agree with the Commission that they are social security benefits for the purposes of Regulation No 883/2004. Specifically, they are family benefits within the meaning of Article 3(1)(j), in conjunction with Article 1(z) of that regulation, inasmuch as, according to the characteristics set out in the case-law of the Court, they are benefits automatically granted to persons fulfilling certain objective criteria, without any individual or discretionary assessment of personal needs, and are intended to meet family expenses.[32]

47. Furthermore, I also agree with the Commission that the fact that the grant of the disputed benefits is not subject to any contribution requirement does not affect their classification as a social security benefit. The method by which a benefit is financed is immaterial for the purpose of its classification as a social security benefit, as is clear from the fact that under Article 3(2) of Regulation No 883/2004, non-contributory benefits are not excluded from the scope of that regulation.[33]

C – *Whether the test of lawful residence as a supplementary requirement incorporated into the examination of habitual residence is compatible with the Regulation*

48. The Commission's principal head of claim is based on the fact that the United Kingdom has incorporated a test of lawful residence into the examination of habitual residence provided for in Article 11(3)(e) of Regulation No 883/2004, thereby creating a supplementary requirement which does not appear in that provision. According to subparagraph (e) of that article, 'any other person to whom subparagraphs (a) to (d) [of Article 11(3)] do not apply shall be subject to the legislation of the Member State of residence'. Some further clarification is required in order to respond to that claim.

49. It should be remembered that the purpose of Regulation No 883/2004 is to coordinate Member States' social security systems in order to guarantee that the right to free movement of persons may be exercised effectively. To that end, Regulation No 883/2004 lays down a series of common principles which the social security legislation of all the Member States must observe and which, together with the system of conflict of laws rules it contains, ensure that persons exercising their right to free movement and residence within the Union will not be adversely treated by the various national

29 — Regarding the residence requirement for child tax credit, see Section 3 of the Tax Credits (Residence) Regulations 2003 (as amended by the Child Benefit (General) and the Tax Credits (Residence) (Amendment) Regulations 2014).

30 — Despite its name, child tax credit is a regular payment made by the competent authorities into the beneficiary's bank account and which apparently requires the beneficiary to be a taxpayer. The website https://www.gov.uk/child-tax-credit/what-youll-get does not give a specific sum, because the amount received will depend on the particular personal and family circumstances. More details on how this tax credit works can be found on https://www.citizensadvice.org.uk/benefits/children-and-young-people/benefits-for-families-and-children/#-child-benefit.

31 — Paragraph 6 of the United Kingdom's defence.

32 — Judgment in *Hoever and Zachow* (C-245/94 and C-312/94, EU:C:1996:379), paragraph 27. See also the judgment in *Hughes* (C-78/91, EU:C:1992:331), paragraph 22. It is true that the amount of child tax credit depends on family income and the number of children, and ceases to be paid when that income exceeds a given level, but the Court has already held in the judgment in *Hughes* (C-78/91, EU:C:1992:331), paragraph 17, that it does not follow that the grant of the benefit is dependent on an individual assessment of the claimant's personal needs, which is a characteristic feature of social assistance, since the criteria applied are objective, legally defined criteria, which, if met, confer entitlement to the benefit, the competent authority having no power to take account of other personal circumstances.

33 — See the judgment in *Hughes* (C-78/91, EU:C:1992:331), paragraph 21.

systems because they have exercised that right.[34] One of those common principles is the principle of equal treatment under Article 4 of Regulation No 883/2004 which, for the specific area of social security, embodies the prohibition of discrimination on grounds of nationality which is applicable to all EU law under Article 18 TFEU.[35]

50. The purpose of Article 11(3)(e) of Regulation No 883/2004 as a conflict of laws rule,[36] is to determine the national legislation applicable to the grant of the social security benefits listed in Article 3(1) thereof (including family benefits) in the case of persons to whom the provisions of subparagraph (a) to (d) of Article 11(3) are not applicable, that is to say, essentially persons who are economically inactive. The purpose of the rule contained in Article 11(3)(e) of Regulation No 883/2004 is both to prevent the concurrent application of a number of national legislative systems to a given situation and the complications which might ensue, and also to ensure that persons covered by that regulation are not left without social security cover for want of any legislation applicable to them.[37]

51. Under Article 11(3), persons to whom subparagraph (e) applies will be subject to the legislation of the Member State of residence, without prejudice to other provisions of Regulation No 883/2004 which guarantee that they will receive benefits under the legislation of one or more of the other Member States which, as defined in Article 1(j) of that regulation, is 'the place where a person habitually resides'.[38]

52. Consequently, when determining where a person falling within the scope of Regulation No 883/2004 has his 'habitual' residence for the purposes of Article 11(3)(e), regard must be had to purely factual circumstances. In fact, the case-law of the Court[39] has developed a non-exhaustive list of elements (all of a factual nature) which must be taken into account in order to determine a person's habitual place of residence, a list that is currently embodied in Article 11(1) of Regulation No 987/2009,[40] in order to establish which Member State's legislation will apply to a given situation within the framework of Regulation No 883/2004. Both parties appear in the end to agree that the concept of 'habitual residence' is a factual element.

34 — See, in that regard, Lenaerts, K., and van Nuffel, P., *European Union Law*, 3rd edition, London: Sweet and Maxwell, 2011, p. 269, and Eichenhofer, E., *Sozialrecht der Europäischen Union*, 3rd edition, Berlin: Erich Schmidt, pp. 49 and 50 and p. 68 et seq.

35 — Regarding the content of the principle of equal treatment and the prohibition of discrimination on grounds of nationality in the specific area of EU law on social security, see Husmann, M., 'Diskriminierungsverbot und Gleichbehandlungsgebot des Art. 3 VO 1408/71 und der Artt. 4 and 5 VO 883/2004', *Zeitschrift für europäisches Sozial- und Arbeitsrecht*, No 3, 2010, p. 97 et seq., and Bokeloh, A., 'Die Gleichbehandlung der Staatsangehörigen in der Europäischen Sozialrechtskoordinierung', *Zeitschrift für europäisches Sozial- und Arbeitsrecht*, No 10, 2013, p. 398 et seq., and also Eichenhofer, E., op. cit., p. 82 et seq. and the bibliography and case-law cited therein.

36 — A feature of the system of conflict rules contained in Regulation No 883/2004 is that it has the effect of divesting the legislature of each Member State of the power to determine the ambit and the conditions for the application of its national legislation, so far as the persons who are subject thereto and the territory within which the provisions of national law take effect are concerned (judgment in *Ten Holder*, 302/84, EU:C:1986:242, paragraph 21).

37 — See, by analogy, the judgment in *Brey* (C-140/12, EU:C:2013:565), paragraph 38 et seq.

38 — The Court has already held that the term 'residence' for those purposes means 'habitual residence', that is, the place in which the persons concerned habitually reside and in which the habitual centre of their interests is to be found, and thus constitutes an autonomous concept particular to EU law (judgments in *B.*, C-394/13, EU:C:2014:2199, paragraph 26, and *Swaddling*, C-90/97, EU:C:1999:96, paragraphs 28 and 29).

39 — See, in particular, the judgments in *Swaddling* (C-90/97, EU:C:1999:96), paragraph 29, and *Wencel* (C-589/10, EU:C:2013:303), paragraph 45 et seq.

40 — Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ 2009 L 284, p. 1).

53. That having been said, there is every indication that the problem arises from the terms used in the UK legislation which, in stating that persons who are not lawfully resident in the United Kingdom in accordance with EU law 'are not in' the territory of the United Kingdom,[41] creates a sort of legal fiction. In doing so, the national legislation is unnecessarily intertwining two concepts, those of 'lawful residence' and of 'habitual residence' which, as the Commission correctly states, are not to be confused. Furthermore, a strictly literal reading of that legislation could even lead us to accept the Commission's argument to the effect that the United Kingdom has incorporated into the habitual residence test an additional element, that of lawful residence, which is entirely distinct from it and which to a certain extent 'distorts' it, and to argue that, for that reason alone, the United Kingdom has failed to comply with Regulation No 883/2004.

54. However, that line of reasoning would be excessively simplistic and, to my mind, in the final analysis, wrong. It is evident that, regardless of the wording or terminology, which admittedly is ambiguous, what the national legislature is doing in this case is not 'distorting' the test of habitual residence by examining the lawfulness of residence as a means of assessing whether a person is habitually resident in its territory.[42] In fact, as stated above, from the time of its reply to the Commission's reasoned opinion, the United Kingdom has distanced itself from a defence of the test of lawful residence which links it to the test of habitual residence under Article 11(3)(e) of Regulation No 883/2004. What the United Kingdom claims to be doing, independently of Article 11(3)(e) of Regulation No 883/2004 and indeed of the Regulation as a whole, is examining the lawfulness of residence under EU law (and in particular Directive 2004/38) in connection with the grant of specific social benefits.

55. This line of argument put forward by the United Kingdom has been taken into account by the Commission itself in its alternative head of claim to the effect that, if a test of lawful residence is not incorporated into the examination of habitual residence but the lawfulness of residence is assessed separately, this would inevitably result in discrimination prohibited by Article 4 of the aforementioned Regulation. It could be said that the Commission has been aware from the outset that the crux of the problem lies in Article 4 of Regulation No 883/2004. In fact, although it focussed all its arguments in its principal head of claim on the test of (habitual) residence as the criterion for establishing connection used in the conflict of laws rule in Article 11(3)(e) of that regulation, in reality it was claiming only that the United Kingdom had failed to comply with Article 4 of that regulation.

56. In the light of all of the foregoing, the Commission's principal head of claim must be dismissed, in so far as the test of lawful residence introduced by the UK legislation does not in itself affect the provisions of Article 11(3)(e) of Regulation No 883/2004.

41 — Both in the case of child benefit and that of child tax credit, in order to be entitled to those benefits, the relevant national legislation requires the claimant 'to be in the United Kingdom' (literally 'is in Great Britain' or in Northern Ireland). It subsequently states that that requirement is fulfilled only if the claimant (a) is physically in the United Kingdom, (b) has his habitual residence in the United Kingdom and (c) *has a right of residence in the United Kingdom*. Thus, those benefits will not be granted if the claimant does not have a right of residence in the United Kingdom because, in that case, under Section 23(4) of the Child Benefit (Residence) Regulations 2006 and Section 3(5) of the Tax Credits (Residence) Regulations 2003, in conjunction with Section 146 of the Social Security Contributions and Benefits Act 1992, that person is considered 'not to be in' the United Kingdom.

42 — The United Kingdom expressly recognises this in paragraph 32 of its defence and paragraph 7 of its rejoinder.

D – *Act of discrimination contrary to Article 4 of Regulation No 883/2004 which the United Kingdom may have committed by carrying out checks on the lawfulness of a claimant's residence when processing claims for specific social benefits*

1. Preliminary considerations

57. In the Commission's view, even if it should be accepted that the test of lawful residence could be independent of the habitual residence test under Article 11(3)(e) of Regulation No 883/2004, the United Kingdom has at all events infringed that regulation. In the Commission's opinion, examining the lawfulness of residence when processing claims for social security benefits is discriminatory and contrary to Article 4 of Regulation No 883/2004, in that it establishes a requirement applicable solely to non-nationals, for UK nationals have a right of residence in that Member State as a matter of principle. Article 4 in fact requires equal treatment in respect of the benefits and obligations provided for in national social security legislation. This argument requires a slightly more complex response, in contrast to how it was presented by the Commission.

58. In the first place, it is necessary to consider the question of principle of whether a Member State is obliged to grant social benefits, such as those at issue in this case, that it grants to its own nationals and to Union citizens who reside lawfully in that Member State, to a Union citizen whose residence within its territory is not lawful (that is to say, he does not fulfil the requirements laid down, in particular, in Directive 2004/38). How this question is answered will determine whether it is in itself discriminatory within the meaning of Article 4 of Regulation No 883/2004 for a Member State to agree to grant specific social benefits only to persons who reside legally within its territory.

59. In the second place, if the abovementioned problem may be considered to have been resolved, it will be necessary to address the more specific matter, also a matter of principle, of whether a Member State from which a person claims a specific social benefit, such as those at issue in this case, may legitimately check whether the claimant is lawfully resident at the same time as it checks whether he is habitually resident.

60. Lastly, should the second difficulty also be resolved, it would still be necessary to address the question whether that right of the Member State is, as it were, absolute, or whether, on the contrary, it is lawful only in certain circumstances. As will be seen, this aspect of the problem emerged only at the last moment and very briefly, specifically in the Commission's reply, which is why the United Kingdom considers that argument inadmissible because out of time. If necessary, the potential inadmissibility of that argument will have to be considered, regardless of any reasons of expediency that might lead me to propose a reply.

2. Relevance of the case-law in the judgments in *Brey* and *Dano*

61. However, before proceeding in the order indicated, it is first of all necessary to refer to the possible relevance to this case of the case-law in the judgments in *Brey*[43] and *Dano*,[44] to which the parties have referred repeatedly throughout these proceedings.[45]

43 — C-140/12, EU:C:2013:565.

44 — C-333/13, EU:C:2014:2358.

45 — See also the recent judgment in *Alimanovic* (C-67/14, EU:C:2015:597), to which the parties have not made reference because it was delivered after the hearing in the present case.

62. To start with, there can be no doubt that the case-law in the judgments in *Brey*[46] and *Dano*[47] is relevant to this case, in so far as those judgments address the question whether it is legitimate for a Member State to take account of the lawfulness of residence in its procedures for the grant of social benefits to Union citizens resident within its territory.

63. However, whilst in *Brey* and *Dano*, in the context of a reference for a preliminary ruling in both cases, the Court had been asked to give a ruling on the correct interpretation of Article 7 of Directive 2004/38, the relevance of which was not disputed, in the present case the matter at issue, which has been raised in an action for failure to fulfil obligations, is whether it is relevant to apply that directive, in particular Article 7 thereof, when applying Regulation No 883/2004.[48]

64. Secondly, unlike in the case at issue here, those judgments, like the judgment in *Alimanovic*,[49] were concerned with special non-contributory cash benefits governed by Article 70 of Regulation No 883/2004 and considered to be social assistance benefits for the purposes of Directive 2004/38.[50] In that regard, whilst Directive 2004/38 takes account of the need to have recourse to social assistance benefits in the context of the lawfulness of residence,[51] it is silent regarding social security benefits such as those at issue in this case.

65. That said, I shall be making the relevant references to this case-law in the course of my arguments.

3. A Member State's obligation to grant social benefits, in connection with the lawfulness of residence, and its consequences as regards the claim of discriminatory treatment

66. The first question that must be addressed, as a matter of principle, is whether a Member State is obliged to grant a Union citizen resident within its territory the social benefits which it grants to its own nationals only when that person's residence fulfils the requirements laid down, in particular, in Directive 2004/38. As I have stated, the conclusion reached on this matter will have consequences as regards the question whether it is discriminatory, within the meaning of Article 4 of Regulation No 883/2004, for a Member State to refuse to grant social benefits, such as those at issue in this case, to persons not lawfully resident within its territory.

67. In order to answer this question, in line with the observations made by the Court in *Dano*,[52] it is necessary to start from the premise that Article 20(1) TFEU confers on any person holding the nationality of a Member State the status of citizen of the Union. As the Court has held on many occasions, Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy within the scope *ratione materiae* of the FEU Treaty the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.[53]

46 — C-140/12, EU:C:2013:565.

47 — C-333/13, EU:C:2014:2358.

48 — It should be borne in mind that, in the case of economically inactive citizens, it is Directive 2004/38, in particular Article 7(1)(b) thereof, which sets out the circumstances which the host Member State must verify in order to determine whether a person claiming the social benefits at issue in this case (which fall within the material scope of Regulation No 883/2004) is legally resident within its territory.

49 — C-67/14, EU:C:2015:597, paragraph 43.

50 — See, in particular, the judgment in *Brey* (C-140/12, EU:C:2013:565), paragraph 58 et seq.

51 — Thus, as Advocate General Wathelet stated in point 96 of his Opinion in *Dano* (C-333/13, EU:C:2014:341), inevitably introducing 'potential unequal treatment in the granting of social assistance benefits between nationals of the host Member State and other Union citizens'.

52 — C-333/13, EU:C:2014:2358, paragraph 57.

53 — Judgments in *Grzelczyk* (C-184/99, EU:C:2001:458), paragraph 31; *D'Hoop* (C-224/98, EU:C:2002:432), paragraph 28; and *N.* (C-46/12, EU:C:2013:97), paragraph 27.

68. Every Union citizen may therefore rely on the prohibition of discrimination on grounds of nationality laid down in Article 18 TFEU in all situations falling within the scope of EU law. These situations include those relating to the exercise *ratione materiae* of the right to move and reside within the territory of the Member States conferred by point (a) of the first subparagraph of Article 20(2) TFEU and Article 21 TFEU. [54]

69. However, in this connection, according to the Court's findings in *Dano*, [55] it is to be noted that Article 18(1) TFEU prohibits any discrimination on grounds of nationality '[w]ithin the scope of application of the Treaties and without prejudice to any special provisions contained therein'. The second subparagraph of Article 20(2) TFEU expressly states that the rights conferred on Union citizens by that article are to be exercised 'in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder'. Furthermore, under Article 21(1) TFEU too the right of Union citizens to move and reside freely within the territory of the Member States is subject to the 'limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'. [56] That reference to the limited nature of that freedom is also referred to in the Explanation on Article 45 of the Charter of Fundamental Rights of the European Union, which affirms the right to free movement and residence, when it states that '[t]he right guaranteed by paragraph 1 is the right guaranteed by Article 20(2)(a) [TFEU] … In accordance with Article 52(2) of the Charter, those rights are to be applied under the conditions and within the limits defined by the Treaties'. [57]

70. In that regard, it must be recalled that the purpose of Regulation No 883/2004 is very closely connected with the fundamental right to free movement enjoyed by Union citizens, since it was adopted to facilitate and guarantee the effective exercise of that right through the coordination of Member States' national social security systems. [58] In fact, as noted earlier, the purpose of Regulation No 883/2004 is to coordinate Member States' national social security systems with the aim, as may be seen from its preamble, of 'guaranteeing that the right to free movement of persons can be exercised effectively' (recital 45) and thus 'contributing towards improving the standard of living and conditions of employment' of persons moving within the Union (recital 1). Consequently, the rights granted by Regulation No 883/2004 are intended to guarantee freedom of movement and residence for Union citizens, subject to the legal conditions on which that freedom is granted. [59]

54 — Judgments in *Dano* (C-333/13, EU:C:2014:2358), paragraph 59; and *N.* (C-46/12, EU:C:2013:97), paragraph 28, inter alia.

55 — C-333/13, EU:C:2014:2358, paragraph 60.

56 — See, inter alia, the judgments in *Baumbast and R* (C-413/99, EU:C:2002:493), paragraph 84 et seq.; *Trojani* (C-456/02, EU:C:2004:488), paragraph 31 et seq.; and *Brey* (C-140/12, EU:C:2013:565), paragraphs 46 and 47.

57 — Explanations relating to the Charter of Fundamental Rights, OJ 2007 C 303, p. 17.

58 — See, in that regard, the judgment in *Wencel* (C-598/10, EU:C:2013:303): those principles, which underlie the provisions for the coordination of national social security legislation, are closely connected with freedom of movement for persons, the most important principle of which is that the activities of the European Union are to include, in particular, the abolition, as between Member States, of obstacles to freedom of movement for persons (paragraph 39).

59 — Regulation No 883/2004 does not harmonise Member States' social security legislation, so that it is still for the Member States to decide what benefits they will grant to whom and subject to what conditions and how their social security systems are to be funded. That Regulation is in principle without prejudice to the substantive conditions that each Member State may establish for the purpose of granting the social security benefits coordinated by the Regulation, provided that they observe the common principles laid down therein (see, to that effect, the judgment in *Brey*, C-140/12, EU:C:2013:565, paragraph 41 and the case-law cited).

71. Some of the conditions and limitations which Articles 20 TFEU and 21 TFEU impose on the right to free movement and residence within the European Union, as a freedom that is not absolute [60] but rather 'regulated', are laid down in Directive 2004/38. [61] That directive, whose compatibility with the Treaties the Court did not call into question in its judgments in *Brey*, [62] *Dano* [63] or *Alimanovic*, [64] and which has not been disputed during these proceedings, according to recital 4 thereof, was adopted with a view to remedying this sector-by-sector, piecemeal approach to the right of free movement and residence and facilitating the exercise of this right.

72. It is therefore necessary to start from the premise that the provisions of Directive 2004/38 governing Union citizens' freedom of movement and residence also remain fully effective within the framework of a regulation such as that at issue, intended to give practical effect to the right of free movement and residence within the Union, and that they cannot be considered ineffective within that context. In that regard, I cannot agree with the Commission's assertion [65] that 'the concept of residence in Regulation No 883/2004 … is not subject to any legal preconditions'. [66]

73. It does not appear to me excessive to recall, in that regard, that the EU legal order could hardly consist of a multiplicity of entirely separate compartments. This is particularly true in the case of two rules of EU law as closely linked as those at issue in this case. [67] If, as I have just indicated, EU law subjects the exercise of freedom of movement and residence to certain limitations and conditions, embodied in particular in Directive 2004/38, it seems clear that the provisions of Regulation No 883/2004 cannot be interpreted in such a way as to neutralise the conditions and limitations accompanying the grant and proclamation of that freedom. [68] In a word, an interpretation has to be sought that will, to the greatest possible extent, promote Union citizenship and Union citizens' freedom of movement and residence, while at the same time having regard to the objectives pursued by both those two legal acts and the provisions thereof.

74. Furthermore, to my mind, the above position is confirmed by the case-law of the Court, which has traditionally associated entitlement to social benefits on an equal basis with nationals of the host Member State with the requirement that the claimant must be 'legally' resident in the territory of that State. [69] Moreover, the Court recently confirmed this in its judgement in *Brey*, in which it held that 'there is nothing to prevent, in principle, the granting of social security benefits to Union citizens who are not economically active being made conditional upon those citizens meeting the necessary

60 — As the Commission itself recognised at the hearing.

61 — See also the Opinion of Advocate General Wathelet delivered in *Dano* (C-333/13, EU:C:2014:341), point 90.

62 — C-140/12, EU:C:2013:565, paragraphs 46 and 47.

63 — C-333/13, EU:C:2014:2358, paragraph 60 et seq.

64 — C-67/14, EU:C:2015:597.

65 — See paragraph 33 of its application.

66 — Paragraph 32 of the application.

67 — The Court has on many occasions addressed the relationship between the free movement of Union citizens who are economically inactive or seeking employment and their entitlement to various kinds of social benefits. See, in particular, inter alia, the judgments in *Martínez Sala*, C-85/96, EU:C:1998:217; *Grzelczyk*, C-184/99, EU:C:2001:458; *D'Hoop*, C-224/98, EU:C:2002:432; *Collins*, C-138/02, EU:C:2004:172; *Trojani*, C-456/02, EU:C:2004:488; *Bidar*, C-209/03, EU:C:2005:169; *Vatsouras and Koupatantze*, C-22/08 and C-23/08, EU:C:2009:344; and the judgments in *Brey*, C-140/12, EU:C:2013:565; *Dano*, C-333/13, EU:C:2014:2358; and *Alimanovic*, C-67/14, EU:C:2015:597.

68 — In that regard, I cannot agree with the Commission's assertion in paragraph 18 of its reply that, with regard to social security benefits such as those at issue in this case, the test of lawful residence introduces a barrier to movement that would not occur if solely a test of habitual residence were applied.

69 — See, in particular, the judgment in *Martínez Sala* (C-85/96, EU:C:1998:217), paragraph 63 ['a citizen of the European Union, *lawfully resident in the territory of the host Member State* can rely on Article 6 of the Treaty in all situations which fall within the scope *ratione materiae* of Community law' (emphasis added)], a finding that is repeated verbatim in the judgments in *Grzelczyk*, C-184/99, EU:C:2001:458, paragraph 32, and *Bidar*, C-209/03, EU:C:2005:169, paragraph 32, paragraph 46 of which states that 'Article 3 of Directive 93/96 does not preclude a national of a Member State who, by virtue of Article 18 EC and Directive 90/364, *is lawfully resident* in the territory of another Member State where he intends to start or pursue higher education from relying during that residence on the fundamental principle of equal treatment enshrined in the first paragraph of Article 12 EC' (emphasis added). See also the judgment in *Trojani* (C-456/02, EU:C:2004:488), in which, before going on to examine the effects of the principle of equal treatment in Mr Trojani's case, points out that he 'is lawfully resident in Belgium' (paragraph 37).

requirements for obtaining a legal right of residence in the host Member State',[70] and in its judgment in *Dano*, in which it held that 'so far as concerns access to social benefits … a Union citizen can claim equal treatment with nationals of the host Member State only if his residence in the territory of the host Member State complies with the conditions of Directive 2004/38'.[71] In my view, there is nothing in those judgments to indicate that such findings apply exclusively to the social assistance benefits or the special non-contributory cash benefits with which those cases were concerned and not to other social benefits.[72]

75. That being said, it cannot be denied that the premise that the residence of a person claiming a social benefit such as those at issue in this case should not be unlawful could also be viewed as a difference in treatment between UK nationals and nationals of other Member States. However, one way of looking at it is that this difference in treatment as regards the right of residence is inherent in the system and, to a certain extent, inevitable:[73] by definition, a national of a Member State cannot be denied a right of residence in that State.

76. In other words, the difference in treatment between UK nationals and nationals of other Member States stems from the very nature of the system, inasmuch as, as EU law currently stands, being a national of a particular Member State is not irrelevant when it comes to exercising freedom of movement and residence.

77. In short, in the light of all the foregoing considerations, I consider that Regulation No 883/2004 requires a Member State to grant social benefits such as those at issue in the case only to a Union citizen who is exercising his right to free movement and residence in its territory lawfully, that is to say, in particular, in compliance with the requirements of Directive 2004/38. In that regard, 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.

4. Ascertaining whether the claimant's residence is lawful when processing claims for specific social benefits

78. The previous question of principle having been resolved, it is now necessary to address a second aspect which, to my mind, is more directly relevant to the Commission's arguments: whether, on the basis of the foregoing, a Member State may, without infringing the prohibition of discrimination in Article 4 of Regulation No 883/2004, take steps to ascertain whether a Union citizen, who is a national of another Member State, is lawfully resident, precisely at the time when it is processing a claim for a social benefit such as those at issue in this case.

79. Expressed in those terms, the question would then essentially focus on whether the Member State is introducing an inequality in the 'obligations' under Article 4 of Regulation No 883/2004, owing to the fact, which cannot easily be denied, that it is non-UK citizens rather than UK nationals who will be more likely to suffer the inconvenience of undergoing and, as the case may be, passing the checks carried out by the UK authorities on their legal right of residence when processing claims for a

70 — C-140/12, EU:C:2013:565, paragraph 44, which has been the subject of intensive discussion between the parties during these proceedings.

71 — C-333/13, EU:C:2014:2358, paragraph 69.

72 — Irrespective of the fact that, since the judgment in *Alimanovic* (C-67/14, EU:C:2015:597) quotes paragraph 69 of the judgment in *Dano* (C-333/13, EU:C:2014:2358), the language it uses is more precise in that it refers to 'access to social assistance, such as that at issue in the main proceedings' (paragraph 49).

73 — See, in that regard, the judgment in *Dano* (C-333/13, EU:C:2014:2358): 'any unequal treatment between Union citizens who have made use of their freedom of movement and residence and nationals of the host Member State with regard to the grant of social benefits is an inevitable consequence of Directive 2004/38' (paragraph 77), which cites the Opinion of Advocate General Wathelet delivered in that case (C-333/13, EU:C:2014:341), points 93 and 96.

benefit such as child benefit or child tax credit. It is apparent from the explanations given by the United Kingdom during the hearing that the extent of the checks carried out will in any case depend on the claimant's particular circumstances, with economically inactive Union citizens being, as might be foreseen, more likely to suffer that inconvenience.

80. In that regard, it might be expected that that additional complexity in processing the aforementioned claims could in practice be avoided, in so far as Directive 2004/38 provides for mechanisms (specifically in Article 8 thereof)[74] enabling a Union citizen who is not a national of the host Member State to prove that he is lawfully resident by means of a certificate which the competent authorities will issue once they have checked that he satisfies, in particular, the requirements of Article 7 of that directive. When a claimant has that certificate, any inconvenience that he might suffer during the processing of a claim for a social benefit will be minimal or even non-existent: if so requested, the claimant will simply have to produce the document attesting that the Member State considers his residence in its territory to be lawful.

81. The United Kingdom explained, however, at the hearing that, although Union citizens have the option of requesting the UK authorities to issue a document attesting to their right of residence in that Member State (which obviously would make it easier to prove that fact), it is not obligatory to have such a document. In fact, in the majority of cases, claimants do not usually have a certificate attesting to the lawfulness of their residence in the United Kingdom.

82. However, the possibility that a Member State could make the issue of such certificates compulsory does not preclude the viability of a system such as that in the United Kingdom which, failing in most cases any prior recognition as described above, applies a legal residence test when processing social benefit claims.

83. Consequently, it must be acknowledged that this is a case of difference in treatment which would have to be described as indirect discrimination in so far as it is non-UK Union citizens (especially those who are economically inactive) who will be most affected by the inconvenience and problems that that process entails.

84. In that connection, the question arising is whether that indirect discrimination is justifiable, which the Commission says it is not. In that regard and without any need to pursue the argument further, I consider that the necessity of protecting the host Member State's public finances,[75] an argument relied on by the United Kingdom,[76] is in principle sufficient justification for a Member State to check the lawfulness of residence at that point. In short, this verification process is the means whereby the host Member State is able to ensure that it is not granting social benefits, such as those at issue in this case, to persons to whom, for the reasons set out in the previous section, it is not obliged to grant them.

85. In conclusion, I consider that, expressing it in terms of principle, the host Member State is entitled, where appropriate, to ensure that a Union citizen is not unlawfully present in its territory, that is to say, essentially, whether he satisfies the requirements of Directive 2004/38, at the time when it is processing claims for social benefits, such as those at issue in this case, without the difference in treatment between UK nationals and other Union citizens which that entails giving rise to any discrimination prohibited by Article 4 of Regulation No 883/2004, inasmuch as it is justified in the terms set out above.

74 — Regarding permanent residence, see also Article 19 of Directive 2004/38.

75 — A purpose which the Court has deemed lawful since the judgment in *Grzelczyk* (C-184/99, EU:C:2001:458), paragraph 44. It should be borne in mind that the aim of protecting public finances is not strictly economic, but rather that the Court associates it with the indirect objective of protecting the overall level of assistance that the State in question is able to offer (judgments in *Bidar*, C-209/03, EU:C:2005:169, paragraph 56, *Brey*, C-140/12, EU:C:2013:565, paragraph 61 and *Dano*, C-333/13, EU:C:2014:2358, paragraph 63).

76 — Paragraph 37 of the defence.

5. The requirements involved in the verification of the lawfulness of residence in the host Member State

86. I consider that the arguments set out above are sufficient to refute the Commission's arguments centred on the unlawfulness, expressed in terms of principle, of the lawful residence test provided for in the UK legislation. However, it should be borne in mind that this conclusion does not imply the acceptance of any means whatsoever that may be used to verify the lawfulness of residence. On the contrary, I consider that, in order to be compatible with EU law, that verification process must satisfy a series of requirements, procedurally and even substantively, as I shall set out below.

87. In fact, it must not be forgotten that the verification process in question, in so far as it may affect the freedom of movement and residence conferred by Union citizenship, must be interpreted in conformity with that fundamental right and be conducted as unintrusively as possible.

88. However, I would once again observe that the purpose of the Commission's action was not to challenge how the United Kingdom carries out that verification. It is true that the Commission has claimed that, when verifying compliance with the requirements of Article 7 of Directive 2004/38, the United Kingdom does not ensure that the particular circumstances of every case are assessed, as required by the judgment in *Brey*.[77] However, that argument appears for the first time in the Commission's reply and was not mentioned either during the pre-litigation procedure or in the application itself. The Commission stated during the hearing that that aspect was not a new ground, but simply an additional element that should be taken into account when assessing whether the test of lawful residence, as a discriminatory measure, is proportionate to the objective pursued. However, I agree with the United Kingdom that this is a new ground raised at a stage in the proceedings at which it was not admissible under Article 127 of the Rules of Procedure.

89. The focus of the Commission's action is that, when examining claims for social benefits, such as those at issue in this case, a Member State is not permitted to require that persons claiming such benefits should not be unlawfully present in its territory and to verify that this is the case, and it is not concerned with the means whereby the UK authorities, both procedurally and substantively, assess whether or not a Union citizen fulfils the requirements of Directive 2004/38.

90. Notwithstanding the foregoing, if the Court should consider that the merits of that argument must be examined and given that the United Kingdom gave some elements of a reply to that argument in its rejoinder and during the hearing, I shall discuss some aspects of it below, although not exhaustively.

91. From the procedural point of view, the difference in treatment afforded to nationals of the Member State in question resulting from the national authorities' right to carry out the verification referred to above would be compatible with Union citizenship and the principle of equal treatment only in so far as that verification was carried out in strict observance of the principle of proportionality, that is to say, that the checks should be appropriate to the objective pursued, as unintrusive as possible and carried out to the extent strictly necessary in order to achieve the abovementioned objective.

92. Furthermore, verification by the national authorities, in connection with the grant of the social benefits in question, that the claimant is not unlawfully present in their territory must be assessed as a situation involving checks on the lawfulness of the residence of Union citizens under Directive 2004/38, as referred to in the second paragraph of Article 14(2) of that directive, and should therefore comply with the requirements set out therein.[78]

77 — C-140/12, EU:C:2013:565, especially paragraph 69.

78 — It should be recalled that, under Article 14(2) of Directive 2004/38, 'Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein. In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically'.

93. It is apparent from the statements made by the United Kingdom during the hearing that checks on whether claimants satisfy the conditions laid down in Directive 2004/38 to be granted the right of residence are not carried out in every single case, something which, in my view, is prohibited by Article 14(2) of that directive:[79] although all persons claiming the social benefits at issue[80] must provide, in the appropriate form, information which may be used to determine whether they have a right of residence in that Member State, it is only in cases of doubt, as the United Kingdom stated in paragraph 21 of its rejoinder and which it confirmed during the hearing, that the UK authorities will carry out the necessary checks to ascertain whether or not the claimant fulfils the requirements of Directive 2004/38 (in particular Article 7 thereof), that is to say, whether he has a right of residence under that directive.

94. Nor, in my opinion, can it be inferred from the statements made by the United Kingdom that that Member State presumes that a person claiming the benefits at issue in this case is unlawfully present in its territory, which would be contrary to Article 20(2) TFEU and Article 21 TFEU, which confer on Union citizens the right to move and reside freely in the territory of the Member States. In fact, European citizenship and, in particular, the affirmation of the principle that a Union citizen is entitled to establish his place of residence in any Member State on the conditions laid down by EU law, precludes national legislation from adopting any approach that might be tantamount to presuming that, after the first three months of residence and before he has acquired a permanent right of residence, such citizen is unlawfully present in that territory, so that it would systematically be for the person in question to prove that this is not the case. As a matter of principle, the opposite presumption should, in fact, be made.

95. Furthermore, because legitimate checks on whether a claimant is lawfully present in the United Kingdom fall within the scope of the second paragraph of Article 14(2) of Directive 2004/38, any finding by the national authorities that that Union citizen does not have a right of residence under that directive because he does not fulfil the requirements set out therein, regardless of whether this would carry an expulsion measure and despite the fact that it is merely declaratory,[81] is 'a decision [restricting] free movement of Union citizens' within the meaning of Article 15(1) of that directive,[82] which, as laid down in that provision, has the effect of activating the guarantees provided for in Articles 30 and 31 thereof.

96. In my view, this means that, in such circumstances, the competent authorities may not confine themselves simply to refusing to grant the benefit claimed, but must, in addition, under Article 30 of Directive 2004/38, specifically when they find that there is no right of residence under Directive 2004/38, inform the persons concerned 'precisely and in full' and 'in such a way that they are able to comprehend its content and the implications for them' of the reasons on which that finding is based, also specifying the court or administrative authority with which the person concerned may lodge an appeal and the time-limit for that appeal. At the same time, the procedural safeguards under Article 31 of Directive 2004/38 are activated, enabling the person concerned to seek an administrative or judicial review of the lawfulness of the authorities' assessment.

79 — According to the statements made by the United Kingdom, these checks are carried out as follows: the claimant has to complete the claim form with information which may be used to determine whether he has a right of residence in the United Kingdom; once they receive the form, the authorities responsible for deciding whether to grant the benefits then carry out the relevant checks; in specific cases, the authorities require claimants to produce evidence to show whether they actually have the right of residence as shown by the information provided in the form.

80 — It should be borne in mind that this procedure applies not only to Union citizens, but also to third-country nationals, who may be entitled to the family benefits in question if they have a right of residence in the United Kingdom and fulfil the requirements of being present in and having their habitual residence in that State.

81 — Loss of the right of residence in the host Member State under Directive 2004/38 is an automatic consequence of failure to fulfil the requirements set out therein.

82 — Article 15(1) of Directive 2004/38 provides that '[t]he procedures provided for by Articles 30 and 31 shall apply by analogy to all decisions restricting free movement of Union citizens and their family members on grounds other than public policy, public security or public health'. As Advocate General Wahl points out in his Opinion delivered in *Brey* (C-140/12, EU:C:2013:337), 'Union citizens undoubtedly enjoy the procedural guarantees referred to in Article 15 of the Directive, which cannot be circumvented through proceedings which deal not only with that person's entitlement to a benefit, but also with his right of residence altogether' (point 93).

97. Lastly, from the substantive point of view, it should essentially be borne in mind that in the particular case of economically inactive citizens, under Article 7(1)(b) of Directive 2004/38, the national authorities must examine whether those persons have 'sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State' during their period of residence and also have health insurance. I would mention at this point that the mere fact that a Union citizen has recourse to social assistance in the host Member State is not sufficient for him to be denied the right of residence,[83] but rather that, in order for this to occur, he must have become an *excessive burden* on the social assistance system of that State. When assessing whether this is the case, the national authorities must follow the guidelines established in the case-law of the Court, in particular the requirement of taking account of the circumstances of the particular case, referred to in the judgment in *Brey*[84] and, where appropriate, inform the claimant of any negative decision in the terms laid down in Article 30 of that directive.

98. That being said, and if it should be considered necessary to examine the lawfulness of the contested provisions of national law from that perspective, I consider that the Commission has not demonstrated that the United Kingdom is failing to comply with the conditions as to substance and form I have described above, so that from this point of view too this action for failure to fulfil obligations should be dismissed.

6. Summary

99. In conclusion, I consider that it does not constitute discrimination prohibited by Article 4 of Regulation No 883/2004 if national legislation provides that, when examining claims for social benefits such as child benefit or child tax credit, the Member State's authorities may carry out the checks necessary to ensure that nationals of other Member States claiming those benefits are lawfully resident in its territory. However, for that purpose, the authorities responsible for carrying out those checks will, in any case, from the procedural point of view, have to observe the principles described above, in particular the principle of proportionality, as well as the provisions of the second paragraph of Article 14(2), Article 15(1) and Articles 30 and 31 of Directive 2004/38.

V – Costs

100. Since I propose that the action should be dismissed, in accordance with Article 138(1) of the Rules of Procedure of the Court of Justice, the Commission must be ordered to pay the costs.

VI – Conclusion

101. In the light of the foregoing, I therefore propose that the Court should:

(1) dismiss the action;

(2) order the European Commission to pay the costs.

83 — Despite what the German-language version of Article 7(1)(b) of that directive appears to indicate; see, in that regard, the Opinion of Advocate General Wahl delivered in *Brey* (C-140/12, EU:C:2013:337), point 74 et seq.

84 — C-140/12, EU:C:2013:565, paragraph 64 et seq. I also agree with the argument put forward by Advocate General Wathelet in his Opinions delivered in *Alimanovic* (C-67/14, EU:C:2015:210), point 107 et seq., and *García Nieto* (C-299/14, EU:C:2015:366), point 85 et seq., to the effect that the national authorities should also take account for that purpose of other representative elements that demonstrate a real link between the Union citizen and the host Member State (ultimately, whether he is socially and economically integrated into that State which, in the final analysis, is what the United Kingdom asserts that it wishes to ensure), such as the fact of having worked in the past, a previous contribution history, dependent children in education (see the findings by the Court in the judgment in *Ibrahim*, C-310/08, EU:C:2010:89) or the existence of close ties of a personal nature with the Member State in question (see, in that regard, the judgments in *Prete*, C-367/11, EU:C:2012:668, paragraph 50, and *Stewart*, C-503/09, EU:C:2011:500, paragraph 100).