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Civis europeus sum? Social assistance and the right to reside in EU law.

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Civis Europeus Sum? Social Assistance and the Right to Reside in EU Law

This article examines the current status of EU law as regards making a right to social assistance dependent on having a legal right to reside in the 'host' member state. In particular, it looks at the recent decision by the Court of Justice of the European Union (CJEU) in Brey *and discusses whether this ruling helps to clarify the legal position*.

Introduction

Intra-EU migration has increased in recent decades[1]as have Member States concerns about the potential impact of such migration on welfare expenditure, and indeed on access to employment for 'home' nationals.[2] This has led to the introduction of 'residence' rules (in varying forms) in a number of Member States, including the UK.[3] Empirical studies suggest that there is little evidence to suggest that 'the main motivation of EU citizens to migrate and reside in a different Member State is benefit-related as opposed to work or family related'.[4] Similarly studies indicate that in most countries migrants are not more intensive users of welfare than home nationals.[5] Nonetheless such findings have not assuaged the concerns of (at least some) Member State governments who can, of course, counter that existing studies have taken place in the context of current residence-based restrictions.[6]

From a legal perspective, a key issue is whether such restrictions are compatible with EU law on citizenship and free movement of persons. In *Brey*[7] the CJEU ruled that EU law precluded the Austrian legislation which automatically – 'whatever the circumstances' – barred the grant of a compensatory pension supplement to an economically inactive national of another Member State on the grounds that he did not have legal right to reside in Austria, as the right of residence was conditional upon having sufficient resources not to apply for the benefit. Infringement proceedings are currently ongoing against the UK in relation to its right to reside rule and the *Brey* judgment would appear to have implications for the likely

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[1] ICF GHK, *A fact finding analysis on the impact on the Member States' social security systems of the entitlement of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence*, EU Commission, 2013.

[2] This issue is also highly debated. For the UK, see M. Ruhs and C. Vargas-Silva, *The Labour Market Effects of Immigration*, The Migration Observatory, 2014.

[3] See E. Gould, S. Carrera and K. Eisele (eds.) *Social Benefits and Migration: a contested relationship and policy challenges in the EU*, Centre for European Policy Studies, 2013.

[4] ICF GHK *op.cit.* p. 202.

[5] Ibid. See also C. Giulietti and M. Kahanec who review a number of empirical studies and conclude that there is 'comprehensive and exhaustive evidence that there is either weak or no support for the hypothesis that welfare acts as a magnet for immigration': 'Does generous welfare attract immigrants? Towards evidence-based policy-making' in E. Gould et al. *op. cit.* pp. 111- 127 at p. 124.

[6] The UK has, of course, introduced new 'tougher' residence rules which will involve a 'more robust' test of residence and employment-seeking. See the Jobseeker's Allowance (Habitual Residence) Amendment Regulations 2013 No. 3196 and Immigration (European Economic Area) (Amendment) (No. 2) Regulations 2013 No. 3032.

[7] Case C-140/12, *Brey* [2013] ECR I-000.

outcome of those proceedings. However, it is argued by the author that the Court's approach in this case is flawed and that it should not, in fact, be followed in future decisions.

It is necessary to begin by recalling briefly the UK legal context to the right to reside issue, including the case case law, in particular the Supreme Court decision in *Patmalniece.*

UK law and case law

The right to reside test

In brief, UK law has since 1994 had a requirement that, in order to be entitled to various non-contributory benefits, one must be habitually resident in the country. In 2004, in response to the accession of a large number of new Member States to the EU, a new 'right to reside' test was incorporated into the habitual residence test. This means that in order to be habitually resident one must have a legal right to reside in the UK. The statutory language, in short, provides that in order to qualify for relevant benefits a person must be 'in Great Britain'.[8] In order to be 'in Great Britain' one must be 'habitually resident' in the UK and, in order to be habitually resident, one must have a right to reside in the UK. All UK citizens have such a right while only certain non-UK national do so.[9] Therefore, it has been argued that the right to reside test discriminates (either directly or indirectly) on grounds of nationality contrary to EU law.

Patmalniece – right to reside upheld

After a number of decisions by the Court of Appeal which ruled that the right to reside was not incompatible with EU law (but which did not satisfactorily address the issues of EU law),[10] the issue was considered by the Supreme Court in *Patmalniece* which, by a 4-1 majority, upheld the right to reside test.[11] Ms. Patmalniece is a Latvian national (of Russian origin). She came to the United Kingdom in June 2000. She claimed asylum but this was refused in January 2004. However, no steps were taken to deport her. She was in receipt of an old age pension from the Latvian social security authorities and, in August 2005, she claimed the UK state pension credit. Her claim was refused on the ground that she did not have a right to reside in the United Kingdom.

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[8] See, for example, Income Support (General) Regulations 1987 No. 1967, 21(3) & 21AA; Job Seekers Allowance Regulations, 1996 No. 207, reg 85(4) & 85A; Employment and Support Allowance Regulations, 2008 No. 794, reg 70(1) & Sch 5 Part 1 para 11.

[9] The habitual residence and right to reside tests are also satisfied by persons residing or (or having a right to reside in) the Channel Islands, the Isle of Man or the Republic of Ireland.

[10] *Abdirahman v Secretary of State for Work and Pensions* [2007] EWCA Civ 657; *Kaczmarek v Secretary of State for Work and Pensions* [2008] EWCA Civ 1310. See M. Cousins, 'The right to reside and access to social security in the Courts of Appeal' (2008) 30(2) *Journal of Social Welfare and Family Law* 147-153; id. 'Case note on *Patmalniece*', (2010) 17(2) J.S.S.L. 126-131.

[11] *Patmalniece v Secretary of State for Work & Pensions* [2011] UKSC 11. See Mel Cousins, 'Case Analysis' (2011) 18(3) JSSL 136-142.

The first question considered by the Supreme Court was whether the right to reside involved direct or indirect discrimination against foreign nationals. Following the CJEU's ruling in *Bressol*,[12] the Supreme Court concluded that a right to reside condition is only potentially *indirectly* discriminatory.[13]

It was, however, conceded that the right to reside test would amount to indirect discrimination unless it would be justified on objective considerations independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions. This was really the critical issue in the case. The objective of the right to reside test (although presented in somewhat different ways at different times) was

> to safeguard the United Kingdom's social security system from exploitation by people who wished to come to this country not to work but to live off income related benefits … .[14]

Counsel for the Secretary of State put this in a more EU-compatible form by saying that

> A person would be eligible to receive state pension credit if he could show economic integration in the United Kingdom or a sufficient degree of social integration here.[15]

On the basis of earlier CJEU decisions such as *Collins* and *Bidar*,[16] it was clearly legitimate for the UK to wish to limit access to benefits to those with a 'genuine link' with the employment market in question (*Collins*) or, more relevant here, 'a certain degree of integration into the society' of the UK (*Bidar*). Thus, in principle it appeared that the right to reside rule was based on objective considerations, but was it independent of nationality and proportionate? Lord Hope focused on whether the requirement was independent of nationality and concluded that the justification advanced was

> relevant because the issues that arise with regard to the grant of a right of residence are so closely related to the issues that are raised by the appellant's claim to state pension credit. They are, at heart, the same because they are both concerned with a right of access to forms of social assistance in the host Member State.[17]

It was also a sufficient justification, in view of the importance that is attached to combating the risks of 'social tourism'.[18] Finally, he concluded that the rule was independent of nationality because its aim was to deter social tourism by persons who were not socially or economically integrated within the UK based, not on their nationality, but 'where they come from'.[19]

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[12] Case C–73/08, *Bressol* [2010] ECR I-2735. See S. Garben 'Case note' (2010) 47 C.M.L. Rev. 1493-1510.

[13] Lord Walker at [73].

[14] At [38].

[15] Quoted at [42].

[16] *Case* C-138/02 *Collins* [2004] *ECR* I-2703; *Case* C-209/03 *Bidar* [2005] *ECR* I-2119.

[17] At [51].

[18] At [51] citing what Advocate General Geelhoed said in *Trojani* at [18] of his opinion as to social tourism.

[19] At [52].

Lady Hale took rather a different route to arrive at the same result, focusing on EU law on the right to reside. She argued that it was logical, in answering the question as to whether it is legitimate to impose a residence requirement, to look at the European law on the right to reside. She took took the view that where a national of another Member State has the right to reside under the national law of the host country, he or she is also entitled to claim benefits on the same terms as nationals of the host country. She took the CJEU's ruling in *Trojani* to the effect that

> once it is ascertained that a person in a situation such as that of the claimant in the main proceedings is in possession of a residence permit, he may rely on article 12 EC in order to be granted a social assistance benefit.[20]

as giving 'a fairly clear indication that it is open to Member States to make entitlement to such benefits dependent on the right to reside in the host country ... '.[21]

Lord Walker took a very different view. While agreeing that *Bressol* meant that the case must be viewed as involving indirect discrimination, he concluded that a distinction on the basis of the right to reside was intrinsically based on nationality. He said, 'Even though classified as indirect discrimination, it is not capable of justification because the proposed justification, once examined, is founded on nationality.'[22] Thus the Supreme Court in *Patmalniece* upheld the right to reside case in a case invovling a non-economically active person and a (means-tested) social assistance payment on the basis that it was objectively justified.

Zalewska – Work Registration Scheme upheld

The right to reside test was also considered, albeit somewhat indirectly, in *Zalewska.*[23] In this case an A8 national[24] who had worked in Northern Ireland for several years (but not in accordance with the Worker Registration Scheme (WRS)) did not have a right to reside and was refused income support. This decision was challenged before the courts but the challenge focussed on the proportionality of the WRS on the facts on the case. The Supreme Court, by a narrow majority, upheld the proportionality of the WRS. While the ruling had obvious implications for the right to reside, the Supreme Court did not give detailed attention to the compatibility of the test with EU law and only passing reference was made to this decision in the subsequent *Patmalniece* case.[25]

Mirga – no case-by-case proportionality review

[20] Case C–456/02 *Trojani* [2004] ECR I–7573 at [46].

[21] At [106].

[22] At [79].

[23] *Zalewska v Department for Social Development* [2008] UKHL 67.

[24] A8 nationals are nationals of the eight countries which acceded to the EU in 2004 and who had, initially, limited rights to free movement.

[25] Lord Walker (dissenting) in Patmalniece found 'it of no assistance in this appeal': *Zalewska* at [74].

More recently, *Mirga*[26] involved a refusal of income support to an A8 national who had lived for several years in the UK and also worked there for a period (though not in compliance with the WRS) but who did not have a right to reside. It was argued, inter alia, that this outcome was disproportionate on the facts of the case but Laws LJ dismissed the suggestion that any refusal of Income Support for a failure of full compliance by an A8 national with the terms of the WRS would potentially be subject to challenge on proportionality grounds by reference to the individual facts on the basis that the Court in *Zalewska* had upheld the proportionality of the WRS in principle.[27]

AS v HMRC – right to reside test incompatible with EU law

Finally, to date, in *AS v HMRC (CB)*[28]in a case involving child benefit (not, of course, a means-tested payment), the Northern Ireland Chief Social Security Commissioner distinguished *Patmalniece* and held that, in relation to the facts of that case, the right to reside test did breach EU law. This decision would appear to conflict with the approach taken in *Mirga* and it is understood that the Northern Ireland decision is under appeal.

EU Infringement proceedings

The EU Commission has also commenced infringement proceedings against the UK in relation to the compatibility of the test with EU law and in May 2013 announced that it had referred the case to the CJEU.[29] The Commission considers that the criteria concerning habitual residence laid down by EU law are strict enough and ensure that only those people who have actually moved their centre of interest to a Member State are considered habitually resident there. It argues that a thorough and strict application of these criteria for determining habitual residence constitutes a powerful tool for Member States to make sure that these social security benefits are only granted to those genuinely residing habitually within their territory. The "right to reside" test is an additional condition for entitlement to the benefits in question which has been imposed unilaterally by the UK. The Commission points out that UK nationals have a "right to reside" in the UK solely on the basis of their UK citizenship, whereas other EU nationals have to meet additional conditions in order to pass this "right to reside" test. Therefore, it argues that the UK discriminates unfairly against nationals from other Member States in breach of EU rules on the coordination of social security systems.

Brey

[26] *Mirga v Secretary of State for Work and Pensions* [2012] EWCA Civ 1952.

[27] *Mirga* at [16]-[17]. The argument before the Court was put rather more narrowly, i.e. that the WRS scheme would be legally ineffective in relation to any person whose return to their home state would or might violate such fundamental rights to private and family life set out in Article 7 of the EU Charter of Fundamental Rights or Article 8 of the European Convention on Human Rights but the court of appeal took the view that these arguments were also vitiated by the general upholding of the WRS in *Zalewska.*

[28] [2013] NICom 15. See Mel Cousins, 'Case Analysis' (2013) 20(2) JSSL 46-50.

[29] IP/11/1118, 29 September 2011; IP/13/475, 30 May 2013.

Facts and law

Mr. Brey, a German national (of Russian origin), and his wife (also a German national) moved to Austria in March 2011 intending to take up permanent residence. They appear to have had no formal links with Austria. Mr. Brey was entitled to German social benefits of about €1000 per month but had to pay rent of over €500. He applied for an Austrian compensatory pension supplement (Ausgleichzulage). One of the qualification conditions was that the person be habitually and lawfully resident in Austria. This supplement was refused on the basis that he did not have sufficient resources and therefore could not be lawfully resident. This was on the basis of article 7(1)(b) of Directive 2004/38/EC (as implemented by national law), which states that persons have a right of residence *provided* they

> have sufficient resources for themselves and their family members not to become a[n unreasonable] 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.[30]

Ultimately the issue reached the Austrian Supreme Court (*Oberster Gerichtshof*) where it was argued that the scope of 'social assistance' for the purposes of the Directive should be interpreted in the same way as under Regulation 883/2004 on con-ordination of social security. It was suggested that because the Court of Justice had previously ruled that the compensatory supplement was a special non-contributory benefit for the purposes of the Regulation[31] (a categorisation distinct from that of social assistance) it was not caught by article 7(1)(b) of the Directive. Accordingly the national court referred the following question:

> 'Is a compensatory supplement to be regarded as a "social assistance" benefit within the terms contemplated in Article 7(1)(b) of [the Directive]?'

The national court set out two competing hypothesis. One (supported by Mr. Brey and the EU Commission) argued that the Directive and the Regulation should be interpreted in a harmonious and uniform fashion. The Regulation excludes 'social assistance' from its scope, but covers 'special non-contributory' cash benefits. As the compensatory supplement was held to be a special non-contributory benefit, it does not constitute social assistance under the Regulation and, in consequence, it would follow that it should not constitute social assistance under the Directive. Alternatively (a view supported by Austria and the six other Member States which appeared before the Court) , the notion of 'social assistance' as used in the Directive is linked to the particular aim of that Directive and must, therefore, be different from the notion of 'social assistance' as used in the Regulation. Accordingly, the notion of social assistance as used in the Directive would cover the provision of basic welfare by a Member State out of general tax revenue, which would include the compensatory supplement.

[30] The word 'unreasonable' has been imported into the Court's interpretation of article 7 as it appears in recital 10 of the Directive which provides that 'Persons exercising their right of residence should not … become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence'.

[31] Case C-160/02 *Skalka* [2004] ECR I-5613.

One of the complicating factors in the *Brey* case was that the German version of article 7(1) of the Directive (in reality a mistranslation) replaced the reference to not becoming an [unreasonable] burden on the national social assistance system with the requirement that the persons 'not need to have recourse to social assistance benefits of the host Member State'. As the Advocate General pointed out this 'would seem to imply that no recourse at all may be had to the social assistance system of the host Member State'.[32] Both the Advocate General and the Court attached no weight to this wording, with the Court pointing out that

> it is settled case-law that the wording used in one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in that regard.[33]

The Austrian legislation reflected the German-language wording of the Directive and again appeared to suggest an automatic bar to access to social benefits.

The Advocate General

The Advocate General would have confined consideration to the question asked and proposed that the Court rule that the concepts of 'social assistance' in the Regulation and Directive were not the same and that the compensatory supplement fell within the definition of social assistance for the purposes of Directive 2004/38. Going on to consider the issue of whether the national requirement of law residence was compatible with the Directive, the Advocate General focussed on the Austrian legislation in question. He proposed that

> rules which make the right to reside conditional upon not having recourse to the social assistance system of the host Member State and which do not provide for an individual assessment of a Union citizen's economic capability are incompatible with Articles 8(4) and 14(3) of the Directive.[34]

Finally he considered (in some detail) the issue of whether granting a compensatory supplement would constitute an unreasonable burden on Austria, concluding that it would. He opined that

> The unreasonableness lies in the fact that payment of the compensatory supplement [a monthly payment of €326.82] is an indefinitely recurring event, yet Mr Brey is unable to demonstrate any prior links to Austrian society that would justify those payments. Were he to have forged a link to Austrian society, for instance, by having worked, resided and paid taxes there on a previous occasion, the situation would be different.[35]

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[32] Opinion at 74.

[33] Judgment at [74]. A second complicating factor was that the Austrian authorities (for reasons not explained in the proceedings) had issued Mr. Brey with a residence certificate for EEA citizens in March 2011 shortly after the time of his move to Austria (and shortly after the initial refusal of social assistance). This anomaly (if such it is) is a national issue and is not considered further here. See the opinion of the Advocate General at [90]-[96].

[34] Opinion at [81].

[35] At [88].

Thus (although this did not form part of the formal conclusion) he would have indicated that the national legislation (if interpreted literally) was incompatible with EU law but that, in any case, Mr. Brey would not satisfy the residence requirement as he would be an unreasonable burden on the Austrian social assistance system and, therefore, he would not qualify for the compensatory supplement.

The CJEU

However, the Court took a rather different approach. Although it agreed with the Advocate General's conclusions that the compensatory supplement was social assistance, it reformulated the question asked by the Court to ask

> whether EU law – in particular, Directive 2004/38 – should be interpreted as precluding national legislation, such as that at issue in the main proceedings, which does not allow the grant of a benefit, such as the compensatory supplement …, to a national of another Member State who is not economically active, on the grounds that … he does not meet the necessary requirements for obtaining the legal right to reside on the territory of the first Member State …, since such a right of residence is conditional upon that national having sufficient resources not to apply for the benefit.[36]

Scope of 'social assistance'

The Court accepted that the aims of the Regulation and Directive (and the specific provisions engaged) were different. While Regulation 883/2004 was intended to ensure that Union citizens who have made use of the right to freedom of movement for workers retain the right to certain social security benefits granted by their Member State of origin, Directive 2004/38 allows the host Member State to impose legitimate restrictions in connection with the grant of such benefits to Union citizens who do not or no longer have worker status, so that those citizens do not become an unreasonable burden on the social assistance system of that Member State. Therefore, the concept of 'social assistance system' as used in Article 7(1)(b) could not, contrary to the Commission's argument, be confined to those social assistance benefits which do not fall within the scope of Regulation 883/2004.[37]

Rather its scope must be defined by reference to the objective of Article 7(1)(b) and 'not by reference to formal criteria' (whatever that means). Accordingly, social assistance for the purposes of Article 7

> must be interpreted as covering all assistance introduced by the public authorities, whether at national, regional or local level, that can be claimed by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family and who, by reason of that fact, may become a burden on the public finances of the host Member State during his period of residence which could have

[36] Judgement at [32].

[37] Judgement at [57]-[58]

> consequences for the overall level of assistance which may be granted by that State.[38]

The Court, unlike the Advocate General, did not specifically refer to the similar definition of 'social assistance' adopted under the Long-Term Residence Directive and the Family Reunification Directives.[39] However, two of the cases cited by the Court- *Chakroun* and *Kamberaj* - deal with these two Directives. The definition of social assistance set out in *Brey* is close to (but not identical with) the definitions provided in these two cases.[40]

The Court readily concluded that the compensatory supplement fell under the Austrian social assistance system given that it had already ruled in *Skalka*, that it was intended to ensure a minimum means of subsistence and was funded in full by the public authorities.[41]

The legality of a right of residence requirement

The Court considered whether a Member State might, in principle, make the grant of a benefit covered by Regulation 883/2004 conditional upon a national of another Member State obtaining a legal right of residence. It pointed out that article 70(4) of the Regulation[42] sets out a 'conflict rule' to avoid both the concurrent application of several national systems and to ensure that persons are not left without any cover.[43] It did not, however, create the right to special non-contributory cash benefits which was a matter for each Member State.[44] Therefore, Regulation 883/2004 did not prevent the application of a right of residence requirement.

The Court also stated that it

> has consistently held that there is nothing to prevent, in principle, the granting of social security benefits to Union citizens who are not economically active being

[38] At [61] citing Case C-209/03 *Bidar* [2005] ECR I-2119, at [56]; Case C-291/05 *Eind* [2007] ECR I-10719 at [29] and Case C-158/07 *Förster* [2008] ECR I-8507 at [48]; and also, 'by analogy', Case C-578/08 *Chakroun* [2010] ECR I-1839, at [46], and C-571/10 *Kamberaj* [2012] ECR I-0000, at [91].

[39] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents and Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification. See the opinion at [58]-[67].

[40] In *Chakroun* the Court stated that 'the concept of 'social assistance' in the [Family Reunification] Directive refers to assistance granted by the public authorities, whether at national, regional or local level, which can be claimed by an individual, …, who does not have stable and regular resources which are sufficient to maintain himself and the members of his family and who, by reason of that fact, is likely to become a burden on the social assistance system of the host Member State during his period of residence'. In *Kamberaj* the Court refereed to 'social assistance or social protection benefits granted by the public authorities, at national, regional or local level, which enable individuals to meet their basic needs such as food, accommodation and health'.

[41] At [62].

[42] Which provides that SNCBs 'shall be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation. Such benefits shall be provided by and at the expense of the institution of the place of residence.'

[43] Judgement at [39]-[40].

[44] At [40].

> made conditional upon those citizens meeting the necessary requirements for obtaining a legal right of residence in the host Member State.[45]

In fact, none of the cases cited fully support this statement. In *Martinez Sala,*[46] for example, the Court simply stated that a person 'lawfully resident in the territory of the host Member State' could rely on the non-discrimination provisions of the Treaty in relation to access to social benefits. This does not necessarily imply (let alone hold) that Member States may make a right to benefits *conditional* on lawful residence. However, it seems that this (mis)reading of the Court's jurisprudence has become entrenched.[47]

Nonetheless, the Court went on to say that

> it is important that the requirements for obtaining that right of residence – such as … the need to have sufficient resources not to apply for the compensatory supplement – are themselves consistent with EU law.[48]

It went on to discuss this issue.

The requirement of sufficient resources

The Court accepted that the fact that a non-economically active person might be eligible for the supplement due to inadequate resources could be an indication that that person does not have sufficient resources to avoid becoming an unreasonable burden on the social assistance system of the host Member. However, it held that the national authorities could not draw such conclusions without first carrying out an overall assessment of the specific burden which granting that benefit would place on the national social assistance system as a whole, by reference to the personal circumstances characterising the individual situation of the person concerned.[49]

It pointed out that, first, there was nothing in Directive 2004/38 to preclude EU nationals from receiving social security benefits in the host Member State and, to the contrary, several provisions specifically provide for such receipt.[50] Second, Article 8(4) of Directive 2004/38 expressly states that Member States may not lay down a fixed amount which they will regard as 'sufficient resources', but must take into account the personal situation of the person concerned. Third, recital 16 in the preamble to Directive 2004/38

[45] Judgment at [44] citing Case C-85/96, *Martínez Sala* [1998] ECR I-2691, paragraphs 61 to 63; Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraphs 32 and 33; Case C-456/02 *Trojani* [2004] ECR I-7573, paragraphs 42 and 43; Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 37; and Case C-158/07 *Förster* [2008] ECR I-8507, paragraph 39.

[46] *Martínez Sala* [1998] ECR I-2691.

[47] See also the Advocate General statement (opinion at [80]) that 'the Court has held in various circumstances that Member States may require lawful residence before granting social assistance benefits, provided that such a requirement complies with EU law'.

[48] At [45]. Though, of course, this requirement is set out in EU law, viz. article 7(i)(b) of Directive 2004/38.

[49] At [63]-[64].

[50] At [65] et seq. Presumably the Court means social assistance benefits. It cites articles 14 and 24 of Directive 2004/38.

provides that, before adopting an expulsion measure, and to determine whether a person receiving social assistance has become an unreasonable burden on its social assistance system, the host Member State should examine whether the person concerned is experiencing temporary difficulties and take into account the duration of residence of the person concerned, his personal circumstances, and the amount of aid which has been granted to him. Fourth, since the right to freedom of movement is a fundamental principle of EU law, the conditions laid down in Article 7(1)(b) must be construed narrowly and in compliance with the limits imposed by EU law and the principle of proportionality.

In the crucial part of the judgment, the Court stated that

> By making the right of residence for a period of longer than three months conditional upon the person concerned not becoming an 'unreasonable' burden on the social assistance 'system' of the host Member State, Article 7(1)(b) of Directive 2004/38, interpreted in the light of recital 10 to that directive, means that the competent national authorities have the power to assess, taking into account a range of factors in the light of the principle of proportionality, whether the grant of a social security benefit could place a burden on that Member State's social assistance system as a whole. Directive 2004/38 thus recognises a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary.[51]

However, under Austrian law,

> the mere fact that a national of another Member State who is not economically active has applied for that benefit is sufficient to preclude that national from receiving it, regardless of the duration of residence, the amount of the benefit and the period for which it is available, that is to say, regardless of the burden which that benefit places on the host Member State's social assistance system as a whole.[52]

Such an automatic bar, the Court concluded, does not enable the competent authorities of the host Member State to carry out an overall assessment of the specific burden which granting that benefit would place on the social assistance system as a whole by reference to the personal circumstances characterising the individual situation of the person concerned. The Court indicated that the national authorities should have regard to the amount and the regularity of the income which the person 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. Unlike the Advocate General (and indeed many previous Court rulings) the Court did not refer to the person's links to the Member State nor to his degree of social and economic integration into the Member State.

On the basis of this analysis, the Court concluded that Article 7(1)(b), Article 8(4) and Article 24(1) and (2) of Directive 2004/38 preclude national legislation which automatically – whatever the circumstances – bars the grant of a benefit, such as the compensatory supplement, to a non-economically active EU national on the grounds that he or she does

[51] At [72].

[52] At [76].

not meet the requirements for obtaining the legal right to reside in the Member State, since obtaining that right of residence is conditional upon that national having sufficient resources not to apply for the benefit.[53]

Discussion

With respect, this logic of this decision is hard to follow. There are two separate issues at play in this case. First, should Mr. Brey have a right of legal residence in Austria (an issue not directly before the Court)? In deciding this issue, it is clear that the Austrian authorities are required to apply an individualised assessment of whether he will be an unreasonable burden on the State. Second, there is the issue of his claim for a compensatory supplement. Austrian law provides that in order to qualify for this benefit, he must have a legal right of residence (which would involve the individualised assessment required under the Directive referred to above). There is nothing in Directive 2004/38 which grants the right to a social assistance payment (as opposed to a right of residence) conditional upon not becoming an unreasonable burden on the State. Nor does the Court adequately explain why such a right should be read into the Directive. The fact that it does not specifically preclude a right to benefits does not, conversely, imply that it creates such a right. Nor does the fact that certain provisions assume that a person may have received assistance under national law. Article 24 does set out a right to equal treatment (subject to the exceptions in article 24(2)) but the Court never considered the issue from an equal treatment perspective. The Court's statement that an automatic bar on a right to benefit (in the absence of a right of residence) would prevent an overall assessment of the specific burden on the social assistance system by reference to the individual's personal circumstances is simply factually incorrect since such an assessment can be carried out as part of the person's application for a right of residence.

The Court did not refer at all to the approach adopted in previous cases such as *Collins* (concerning habitual residence) where the habitual residence rule was seen as a barrier to free movement which required to be justified in order to be compatible with EU law.[54] Arguably, this is the approach by which the compatibility of the right to reside with EU law should be analysed.

Conclusion

The Court and the Advocate General were clearly correct to rule that the concepts of 'social assistance' in the Regulation and Directive were not the same. While it might seem logical that two EU laws adopted in the same year and using the same term might be interpreted in a consistent manner, this, of course was never envisaged by the Union legislative process. Indeed, to give the same meaning (as proposed by the Commission) would clearly have been contrary to the expectations of (at least part of) the Union legislature.[55]

[53] At [80].

[54] *Case* C-138/02 *Collins* [2004] *ECR* I-2703 at [65].

[55] Admittedly not the first time the Court would have done this.

The Advocate General confined his review to the specific facts of the case and the applicable law. Given the fact that Austrian law (arising from the mistranslation of the Directive) apparently both meant that a person could not qualify for a right of residence if he or she applied for social assistance and could not apply for social assistance without a right of residence, the Advocate General was clearly correct to rule that this was in breach of EU law. Nonetheless, the Advocate General was also correct to point out that granting a right to social assistance to Mr. Brey would be likely to impose an unreasonable burden on the state.

For unexplained reasons, the Court did not follow the Advocate General and adopted a broader perspective. Arguably the correct approach would have been for the Court to evaluate the legality of the residence requirement on the basis of the fundamental principles of EU law. The Court might have approached the case on the basis that the requirement of legal residence involved indirect nationality discrimination (as the Advocate General, albeit briefly, did).[56] Alternatively (and arguably preferably), the Court might have seen the requirement as a barrier to freedom of movement. In either case, objective justification of the requirement would have been required. Instead it adopted an evaluation framework based on its interpretation of Directive 2004/38 and embraced a strained reading of that Directive to find that the residence requirement was incompatible with the Directive itself.

If the Court had adopted the correct approach (i.e. by applying the fundamental principles of EU law), could the right of residence requirement be justified? Arguably it could have in Mr. Brey's case. He – unlike Ms. Patmalniece or (even more so) Ms. A.S. - had apparently no formal contacts with the host state whatsoever (other than a desire to live there). Although I believe that EU law requires that the right to reside requirement should be applied in a proportionate manner, arguably the Court came to the wrong conclusion in *Brey*, i.e. that an automatic ban on access to social assistance for persons without a legal right of residence is necessarily incompatible with EU law. In addition, the basis of the *Brey* decision would appear to be legally incorrect. There is no logical reason why the fact that a person may not qualify for legal residence under the Directive if she will be an unreasonable burden on the Member State implies that a requirement of legal residence for the purposes of social security is only compatible with EU law if it involves an individualised consideration by the social security authorities of whether or not a person will become an unreasonable burden on the Member State. In fact, the logic of the Directive is that a person should apply for residence (which will include a consideration of whether or not she will become an unreasonable burden). If he or she qualifies for residence, s/he may also qualify for social assistance. If not, not. If a right of residence requirement is inconsistent with EU law, it is surely with the broader Treaty principles of non-discrimination and/or free movement rather than with the specific provision of Directive 2004/38/EC.

While, at first blush, the *Brey* decision seems like an important step forward in establishing that the right to reside test must be applied in a proportionate manner, on closer reading it merely muddies the waters (even further). Given the pending infringement proceedings concerning the UK right to reside test before the Court of Justice, it will be interesting to see the tactics adopted by the different sides and, more importantly the approach adopted by

[56] Opinion at [79-81].

the Court. Given the Court's reluctance to acknowledge its own errors, an argument which focusses on Treaty principles and confines *Brey* to its own very specific facts may be the best approach. Given this, how could the CJEU approach the pending challenge to the UK rules? There are perhaps three possible approaches. First, the Court takes a "bright line" approach and the test is objectively justified.[57] Second, the residence test is not objectively justified, because it is not proportionate. Finally, I would suggest the most likely answer to come from the CJEU, is that the right to reside test is not justified unless it is applied in a proportionate manner (to be determined by the national courts).

[57] As in *Förster v Hoofddirectie van de Informatie Beheer Groep* (C-158/07) [2008] E.C.R. I-8507.