



## Reports of Cases

### JUDGMENT OF THE COURT (First Chamber)

14 June 2016\*

(Failure of a Member State to fulfil obligations — Coordination of social security systems — Regulation (EC) No 883/2004 — Article 4 — Equal treatment as regards access to social security benefits — Right of residence — Directive 2004/38/EC — National legislation under which child benefit and child tax credit are not granted to nationals of other Member States who do not have a right of lawful residence)

In Case C-308/14,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 27 June 2014,

**European Commission**, represented by D. Martin and M. Wilderspin, acting as Agents,

applicant,

v

**United Kingdom of Great Britain and Northern Ireland**, represented by M. Holt and J. Beeko, acting as Agents, and J. Coppel QC,

defendant,

THE COURT (First Chamber),

composed of A. Tizzano, Vice-President of the Court, acting as President of the First Chamber, F. Biltgen, E. Levits, M. Berger (Rapporteur) and S. Rodin, Judges,

Advocate General: P. Cruz Villalón,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 4 June 2015,

after hearing the Opinion of the Advocate General at the sitting on 6 October 2015,

gives the following

\* Language of the case: English.

## Judgment

- 1 By its application, the European Commission requests the Court to declare that, by the requirement that a claimant for child benefit or child tax credit must have a right to reside in the United Kingdom of Great Britain and Northern Ireland, that Member State has failed to comply with its obligations under Article 4 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum at OJ 2004 L 200, p. 1).

### Legal context

#### *EU law*

Regulation No 883/2004

- 2 Article 1(j) and (z) of Regulation No 883/2004 contains the following definitions:

‘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 allowances mentioned in Annex I.’

- 3 Article 3(1)(j) of Regulation No 883/2004 provides:

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

...

(j) family benefits.’

- 4 Article 4 of Regulation No 883/2004, headed ‘Equality of treatment’, provides:

‘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.’

- 5 Article 11(1) and (3) of Regulation No 883/2004 states:

‘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/her benefits under the legislation of one or more other Member States.'

6 Article 67 of Regulation No 883/2004 provides:

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

Regulation (EC) No 987/2009

7 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) provides in Article 11, headed 'Elements for determining residence':

'1. Where there is a difference of views between the institutions of two or more Member States about the determination of the residence of a person to whom the basic Regulation applies, these institutions shall establish by common agreement the centre of interests of the person concerned, based on an overall assessment of all available information relating to relevant facts, which may include, as appropriate:

- (a) the duration and continuity of presence on the territory of the Member States concerned;
- (b) the person's situation, including:
  - (i) the nature and the specific characteristics of any activity pursued, in particular the place where such activity is habitually pursued, the stability of the activity, and the duration of any work contract;
  - (ii) his family status and family ties;
  - (iii) the exercise of any non-remunerated activity;
  - (iv) in the case of students, the source of their income;
  - (v) his housing situation, in particular how permanent it is;
  - (vi) the Member State in which the person is deemed to reside for taxation purposes.

2. Where the consideration of the various criteria based on relevant facts as set out in paragraph 1 does not lead to agreement between the institutions concerned, the person's intention, as it appears from such facts and circumstances, especially the reasons that led the person to move, shall be considered to be decisive for establishing that person's actual place of residence.'

Directive 2004/38/EC

8 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States 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, and corrigenda at OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 27, and OJ 2005 L 197, p. 34) provides in Article 7, headed ‘Right of residence for more than three months’:

‘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; or
- (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 twelve 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 six 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.

...’

9 By virtue of Article 14(1) to (3) of Directive 2004/38:

‘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.'

10 Article 15(1) of Directive 2004/38 states:

'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.'

11 Article 24 of Directive 2004/38, headed 'Equal treatment', provides:

'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.'

#### *United Kingdom law*

#### Legislation relating to child benefit

12 Section 141 of the Social Security Contributions and Benefits Act 1992 ('the 1992 Act') provides:

'A person who is responsible for one or more children or qualifying young persons in any week shall be entitled, subject to the provisions of this Part of this Act, to a benefit ... for that week in respect of the child or qualifying young person, or each of the children or qualifying young persons, for whom he is responsible.'

13 The benefit referred to in section 141 of the 1992 Act ('child benefit') is a benefit intended, in particular, to meet some of the costs borne by a person responsible for one or more children. A payment can be made for each child, a higher payment being made for the first child than for subsequent children. Child benefit is a universal non-contributory benefit the cost of which is met out of general taxation. However, higher-income child-benefit claimants are subject to a tax charge whereby they must pay back an amount up to the benefit received.

14 Section 146 of the 1992 Act provides:

'(1) No child benefit shall be payable in respect of a child or qualifying young person for a week unless he is in Great Britain in that week.'

(2) No person shall be entitled to child benefit for a week unless he is in Great Britain in that week.

(3) Circumstances may be prescribed in which any person is to be treated for the purposes of subsection (1) or (2) above as being, or as not being, in Great Britain.'

15 Regulation 23 of the Child Benefit (General) Regulations 2006 (SI 2006/223) provides:

'(1) A person shall be treated as not being in Great Britain for the purposes of section 146(2) of [the 1992 Act] if he is not ordinarily resident in the United Kingdom.

(2) Paragraph (1) does not apply to a Crown servant posted overseas or his partner.

(3) A person who is in Great Britain as a result of his deportation, expulsion or other removal by compulsion of law from another country to Great Britain shall be treated as being ordinarily resident in the United Kingdom.

(4) A person shall be treated as not being in Great Britain for the purposes of section 146(2) of [the 1992 Act] where he makes a claim for child benefit on or after 1st May 2004 and does not have a right to reside in the United Kingdom.'

16 Equivalent provisions exist in respect of claims for child benefit that are made in Northern Ireland. They are, first, section 142 of the Social Security Contributions and Benefits (Northern Ireland) Act 1992, a provision which requires the claimant to be 'in Northern Ireland' in the week in question, and secondly, regulation 27 of the Child Benefit (General) Regulations 2006, which sets out conditions similar to those laid down by regulation 23 thereof as regards claims made in Great Britain.

#### Legislation relating to tax credits

17 The Tax Credits Act 2002 lays down a child tax credit regime. According to the explanation provided by the United Kingdom in its defence, that regime was introduced in order to consolidate support provided for families under the tax and benefit system, including several pre-existing forms of income-related support for children, within a single social benefit. The objective pursued by the enactment of the Tax Credits Act 2002 is said to be the combating of child poverty. Child tax credit is paid to a person or persons who are responsible for one or more children (section 8 of the Tax Credits Act 2002). It is a means-tested benefit, the amount of which decreases on a sliding scale once family income exceeds a threshold amount and which depends on the number of children in the family. This tax credit regime replaced various payments that were made to recipients of means-tested benefits on the basis of their being responsible for children. Child tax credit is a benefit the cost of which is met out of general taxation.

18 Section 3 of the Tax Credits Act 2002, headed 'Claims', provides:

'...

(3) A claim for a tax credit may be made—

(a) jointly by the members of a married couple or unmarried couple both of whom are aged at least sixteen and are in the United Kingdom, or

(b) by a person who is aged at least sixteen and is in the United Kingdom but is not entitled to make a claim under paragraph (a) (jointly with another).

...

(7) Circumstances may be prescribed in which a person is to be treated for the purposes of this Part as being, or as not being, in the United Kingdom.’

19 Regulation 3 of the Tax Credits (Residence) Regulations 2003 (SI 2003/654) states:

‘(1) A person shall be treated as not being in the United Kingdom for the purposes of Part 1 of the [Tax Credits Act 2002] if he is not ordinarily resident in the United Kingdom.

...

(4) For the purposes of working tax credit, a person shall be treated as being ordinarily resident if he is exercising in the United Kingdom his rights as a worker pursuant to Council Regulation (EEC) No 1612/68 [of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475),] as amended by [Directive 2004/38], or Commission Regulation (EEC) No 1251/70 [of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State (OJ, English Special Edition 1970 (II), p. 402)] or he is a person with a right to reside in the United Kingdom pursuant to [Directive 2004/38].

(5) A person shall be treated as not being in the United Kingdom for the purposes of Part 1 of the [Tax Credits Act 2002] where he—

- (a) makes a claim for child tax credit ... on or after 1st May 2004; and
- (b) does not have a right to reside in the United Kingdom.’

Immigration Act 1971

20 Section 2 of the Immigration Act 1971 provides:

‘Statement of right of abode in the United Kingdom

(1) A person is under this Act to have the right of abode in the United Kingdom if—

(a) he is a British citizen; or

(b) he is a Commonwealth citizen who—

- (i) immediately before the commencement of the British Nationality Act 1981 was a Commonwealth citizen having the right of abode in the United Kingdom by virtue of section 2(1)(d) or section 2(2) of this Act as then in force; and
- (ii) has not ceased to be a Commonwealth citizen in the meanwhile. ...’

### **Pre-litigation procedure**

21 After receiving numerous complaints from nationals of other Member States resident in the United Kingdom that the competent United Kingdom authorities had refused to grant them certain social benefits on the ground that they did not have a right to reside in that Member State, the Commission sent a request for clarification to the United Kingdom in 2008.

22 The United Kingdom confirmed, by two letters dated 1 October 2008 and 20 January 2009, that, under national legislation, whilst the right to reside in the United Kingdom is conferred on all United Kingdom nationals, in certain circumstances nationals of other Member States are not considered to have a right to reside. According to the United Kingdom, that restriction is based on the concept of ‘right of residence’ within the meaning of Directive 2004/38 and on the limitations upon that right

which were established by the directive, in particular the requirement that an economically inactive person must have sufficient financial resources to avoid becoming an unreasonable burden on the social assistance system of the host Member State.

- 23 On 4 June 2010 the Commission sent the United Kingdom a letter of formal notice regarding the provisions of its legislation under which, if claimants are to qualify for certain benefits, they must, as a precondition to their being considered habitually resident in the United Kingdom, have the right to reside there ('the right to reside test').
- 24 By letter of 30 July 2010, the United Kingdom replied to the letter of formal notice, stating that its national system was not discriminatory and that the right to reside test was justified as a proportionate measure to ensure that benefits were paid to persons sufficiently integrated in the United Kingdom.
- 25 On 29 September 2011 the Commission issued a reasoned opinion, to which the United Kingdom replied by letter dated 29 November 2011.
- 26 As the Commission was not satisfied with that reply, it brought the present action.

## **The action**

### *Scope of the action*

- 27 In the light of the judgment of 19 September 2013 in *Brey* (C-140/12, EU:C:2013:565), the Commission decided to confine its action to child benefit and child tax credit ('the social benefits at issue'), to the exclusion of the 'special non-contributory cash benefits' that were also the subject of the reasoned opinion and which, in accordance with that judgment of the Court, can be classified as 'social assistance' within the meaning of Article 7(1)(b) of Directive 2004/38.

### *Substance*

#### Arguments of the parties

- 28 The main complaint put forward by the Commission against the United Kingdom is that, by requiring a person claiming the social benefits at issue to satisfy the right to reside test in order to be treated as habitually resident in that Member State, the United Kingdom has added a condition that does not appear in Regulation No 883/2004. That condition deprives persons who do not meet it of cover under the social security legislation of one of the Member States, cover which that regulation is intended to ensure.
- 29 According to the Commission, by virtue of Article 11(3)(e) of Regulation No 883/2004 an economically inactive person is, in principle, subject to the legislation of the Member State of residence. Article 1(j) defines 'residence', for the purposes of the regulation, as the place where a person habitually resides, the term 'habitual residence' having an autonomous meaning in EU law.
- 30 In the Commission's submission, under the Court's settled case-law, in particular paragraph 29 of the judgment of 25 February 1999 in *Swaddling* (C-90/97, EU:C:1999:96), that term designates the place where the habitual centre of interests of the person concerned is to be found. In order to determine that centre of interests, account should be taken in particular of the worker's family situation, the reasons which have led him to move, the length and continuity of his residence, whether he is in stable employment and his intention as it appears from all the relevant circumstances.

- 31 More specifically, that place is to be determined in the light of the factual circumstances and the situation of the persons concerned regardless of their legal status in the host Member State and of whether they have a right to reside in its territory on the basis, for example, of Directive 2004/38. Therefore, Regulation No 883/2004 confers on the concept of ‘residence’ a specific meaning which is independent of the meaning attributed to it in other measures of EU law or in national law and is not subject to any legal pre-conditions.
- 32 The purpose of Article 11 of Regulation No 883/2004 is not to harmonise Member States’ substantive law but, rather, to provide a system of conflict rules the effect of which is to divest the national legislature of the power to determine the ambit and the conditions for the application of its own national legislation on the matter. That system therefore has the aim, on the one hand, of ensuring that only one national system of social security is applicable and, on the other hand, of guaranteeing that persons covered by Regulation No 883/2004 are not left without social security cover because there is no legislation which is applicable to them.
- 33 In the alternative, the Commission submits that, by imposing a condition for entitlement to certain social security benefits which its own nationals automatically meet, such as the right to reside test, the United Kingdom has created a situation involving direct discrimination against nationals of other Member States and has therefore infringed Article 4 of Regulation No 883/2004.
- 34 According to the Commission, in the course of the pre-litigation procedure the United Kingdom changed position, contending initially that the right to reside test is merely one of the matters to be checked in order to determine whether a person is habitually resident in the United Kingdom and subsequently that it is a condition distinct from habitual residence, which, though discriminatory, is justified.
- 35 The Commission, relying on the Advocate General’s Opinion in the case which gave rise to the judgment of 13 April 2010 in *Bressol and Others* (C-73/08, EU:C:2010:181), submits that the right to reside test constitutes direct discrimination based on nationality, given that it involves a condition that applies only to foreign nationals because United Kingdom nationals who are resident in the United Kingdom satisfy it automatically.
- 36 Furthermore, even if it were to be accepted that the right to reside test results in indirect discrimination only, as the United Kingdom asserts, the latter, according to the Commission, has not put forward any argument to show that the unequal treatment in question is appropriate and proportionate to the aim pursued by the national legislation concerned of ensuring that there is a genuine link between the benefit claimant and the host Member State.
- 37 In addition, the Commission contests the argument put forward by the United Kingdom that economically inactive persons should not become a burden on the welfare system of the host Member State unless they have a sufficient degree of connection to that State. The Commission accepts that a host Member State may wish to ensure that the link between the benefit claimant and that State exists, but, in the case of social security benefits, it is the EU legislature itself, through Regulation No 883/2004, which has established the means of testing whether that link exists — that is to say, in this instance, by means of the habitual residence criterion — and the Member States may make no changes to the provisions of that regulation or couple them with additional requirements.
- 38 In its defence, the United Kingdom contests the main complaint put forward by the Commission by relying, in particular, on the judgment of 19 September 2013 in *Brey* (C-140/12, EU:C:2013:565, point 44), in which the Court, after rejecting arguments identical to those which the Commission puts forward in the present instance, 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 requirements for obtaining a legal right of residence in the host Member State’.

- 39 The United Kingdom explains that the Court also held that Article 70(4) of Regulation No 883/2004, which, like Article 11 thereof, lays down a ‘conflict rule’ the aim of which is to prevent the concurrent application of a number of national legislative systems to the same situation and to ensure that persons covered by the regulation are not left without social security cover because there is no legislation that is applicable to them, is not intended to lay down the conditions creating the right to the social benefits in question, namely special non-contributory cash benefits, so that it is in principle for the legislation of each Member State to lay down those conditions. In the United Kingdom’s submission, the same reasoning applies to the conflict rule in Article 11 of Regulation No 883/2004, which performs the same function as Article 70(4) thereof — which relates specifically to special non-contributory cash benefits — for the purpose of determining the legislation to which the claimant is subject.
- 40 As regards the complaint relied on by the Commission in the alternative alleging direct discrimination, referred to in paragraph 33 of the present judgment, the United Kingdom maintains that this complaint is not set out in the reasoned opinion which the Commission sent to it during the pre-litigation procedure and appears for the first time in the application, so that the Court should declare it inadmissible.
- 41 Furthermore, the United Kingdom submits that the Court has already held on numerous occasions that it is lawful to require economically inactive EU nationals to demonstrate that they have a right of residence as a condition for qualifying for social security benefits and that in Directive 2004/38 the EU legislature expressly authorises host Member States to make their intervention subject to such a condition, in order that those nationals do not become an unreasonable burden on the social assistance system of those States. The principle of equal treatment referred to in Article 4 of Regulation No 883/2004 must be read in the light of that requirement.
- 42 Finally, the United Kingdom observes that the right to reside test is only one of the three cumulative conditions which must be satisfied in order to demonstrate that the claimant ‘is in’ the United Kingdom, for the purposes of the national legislation. The other two conditions, namely presence in the territory and ordinary residence, may or may not be satisfied regardless of the claimant’s nationality, so that a United Kingdom national will not automatically satisfy the condition of ‘being in’ the United Kingdom, which confers entitlement to the social benefits at issue.
- 43 The United Kingdom acknowledges that those conditions are more easily satisfied by its own nationals than by nationals of other Member States and that the measure at issue is indirectly discriminatory. However, relying on the grounds set out by the Court in paragraph 44 of the judgment of 19 September 2013 in *Brey* (C-140/12, EU:C:2013:565), which fall within a similar context, the United Kingdom submits that the measure is objectively justified by the need to protect public finances, given that the social benefits at issue are funded not from recipients’ contributions but from taxation. Nor is there any indication that the measure is disproportionate for the purpose of attaining the objective pursued, in accordance with the guidance set out in paragraphs 71 to 78 of that judgment of the Court.
- 44 The Commission submits in its reply, as regards the main complaint, that the judgment of 19 September 2013 in *Brey* (C-140/12, EU:C:2013:565) concerned only the application of Directive 2004/38 to special non-contributory cash benefits, which have characteristics of both social security and social assistance, whereas the present case 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 this connection, the Commission notes that, in paragraph 44 of that judgment, there is a problem of divergent translation between the English and German versions, as the former uses the words ‘social security benefits’ whereas in the latter, which is the authentic version, it is the wider concept of ‘*Sozialleistungen*’ (‘social benefits’) that is used.

- 45 In addition, the Commission contends that the United Kingdom 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, impedes it by introducing a barrier to that freedom, which takes the form of discrimination on the basis of nationality. That has the consequence that a person may not be entitled to the social benefits at issue either in his State of origin, in which he is no longer habitually resident, or in the host State if he has no right of residence there.
- 46 Finally, so far as concerns the complaint relied upon in the alternative, the Commission contests the United Kingdom's interpretation of the conflict rule laid down in Article 11 of Regulation No 883/2004, because it follows from the judgment of 19 September 2013 in *Brey* (C-140/12, EU:C:2013:565) that the principle that Member States may legitimately impose restrictions in order to prevent a Union citizen hosted by them becoming an unreasonable burden on their social assistance system is restricted to social assistance and does not extend to social security benefits.
- 47 Furthermore, as regards any justification of the condition under the right to reside test, the Commission maintains that the United Kingdom does not put forward any matter relating to the condition's proportionality in the light of the objective pursued by the national legislation. The right to reside test is an automatic mechanism that systematically and ineluctably bars claimants who do not satisfy it from being paid benefits, regardless of their personal situation and of the extent to which they have paid tax and social security contributions in the United Kingdom. That mechanism therefore does not permit the complex individual assessment which the Court requires of host Member States according to the judgment of 19 September 2013 in *Brey* (C-140/12, EU:C:2013:565).
- 48 In its rejoinder, the United Kingdom emphasises that its national law is applicable under the conflict rule laid down by Regulation No 883/2004 and that a person habitually resident in its territory may, despite everything, not be entitled to the social benefits at issue.
- 49 As regards a divergence between the language versions of the judgment of 19 September 2013 in *Brey* (C-140/12, EU:C:2013:565), the United Kingdom submits that the term 'social benefits' is broader than 'social security benefits' and that, whilst, in that judgment, the Court used the first term instead of the second in the German and French versions, that broadens the scope of the principle laid down in paragraph 44 of the judgment, which also covers social security benefits. According to the United Kingdom, that judgment does not in any way indicate that the reasoning set out by the Court is confined exclusively to special non-contributory cash benefits, a point which was indeed confirmed by the judgment of 11 November 2014 in *Dano* (C-333/13, EU:C:2014:2358).
- 50 The United Kingdom further submits that it is difficult to conceive that Member States are not required to pay special non-contributory cash benefits, which guarantee a basic, minimum level of income, to Union citizens with no right of residence, but would, on the other hand, be required to pay them benefits such as the social benefits at issue and which go beyond the guarantee of a basic, minimum level of income, given that the latter benefits, being funded from taxation, also have the potential to impose an unreasonable burden on the public finances of the host Member State, within the meaning of the judgment of 19 September 2013 in *Brey* (C-140/12, EU:C:2013:565).
- 51 The United Kingdom adds that the social benefits at issue display in any event some characteristics of social assistance, even though this is not a condition that must be satisfied in order for the principle established in the judgment of 19 September 2013 in *Brey* (C-140/12, EU:C:2013:565), which concerns 'social benefits' generally, to be applicable also to the social benefits at issue. In the United Kingdom's submission, the Court confirmed in the judgment of 11 November 2014 in *Dano* (C-333/13, EU:C:2014:2358) that only economically inactive Union citizens whose residence complies with the conditions in Article 7(1)(b) of Directive 2004/38 can claim a right of equal treatment with nationals so far as concerns access to social benefits.

- 52 Finally, the United Kingdom submits that, in contending for the first time in its reply that the right to reside test is ‘an automatic mechanism’ which does not permit the circumstances of the particular case to be assessed as required by the Court in the judgment of 19 September 2013 in *Brey* (C-140/12, EU:C:2013:565), the Commission puts forward a new complaint, which must on that basis, in accordance with Article 127 of the Rules of Procedure of the Court of Justice, be declared inadmissible.
- 53 The United Kingdom also submits that the view of how the right to reside test operates, as set out by the Commission in this new complaint, is incorrect. In practice, the administrative department responsible for the social benefits at issue takes into account, amongst other data, information provided by the Department for Work and Pensions in order to determine whether a person has claimed social assistance. That information enables the administrative department to decide whether the claimant has a right of residence in the United Kingdom and whether he is therefore eligible for the social benefits at issue. When it is not possible to decide whether the claimant has a right of residence in the United Kingdom, an individual assessment of his personal circumstances is carried out, including in relation to the social security contributions which he has paid and to whether he is actively seeking work and has a genuine chance of being engaged.

#### Findings of the Court

##### – Classification of the social benefits at issue

- 54 In order to examine the merits of the present action for failure to fulfil obligations, it is necessary to determine, as a preliminary point, whether the social benefits at issue must be classified as ‘social assistance’ or as ‘social security benefits’.
- 55 It should be recalled that this action for failure to fulfil obligations concerns child benefit and child tax credit, that is to say, two cash benefits which have the objective of helping to cover family expenses and are funded not from recipients’ contributions but from compulsory taxation.
- 56 Neither of those benefits has been entered by the United Kingdom in Annex X to Regulation No 883/2004 and it is not in dispute between the parties that they are not special non-contributory cash benefits within the meaning of Article 70 of that regulation.
- 57 As regards child benefit, under section 141 of the 1992 Act a person who is responsible for at least one child is entitled, subject to the provisions of that Act, to a weekly benefit for each child.
- 58 It is undisputed that child benefit is a social benefit intended, in particular, to meet some of the costs that must be borne by a person responsible for one or more children. In principle, it is a universal benefit which is granted to any person claiming it. However, claimants having a high income must repay, in the context of their tax obligations, an amount up to the benefit received.
- 59 As regards child tax credit, it is also undisputed that it is a cash benefit paid to any person responsible for one or more children, the amount of which varies according to family income, the number of such children and other factors concerning the individual situation of the family concerned. Despite its name, child tax credit is a sum which the competent authority pays periodically to the recipients and which seems to be associated with their status as taxpayers. This benefit replaced a range of additional payments which were made to persons claiming various income-linked maintenance allowances in respect of children for whom they were responsible, and the overall aim of which was to combat child poverty.

60 According to the Court's case-law, benefits which are granted automatically to families that meet certain objective criteria relating in particular to their size, income and capital resources, without any individual and discretionary assessment of personal needs, and which are intended to meet family expenses must be regarded as social security benefits (see to this effect, in particular, judgments of 16 July 1992 in *Hughes*, C-78/91, EU:C:1992:331, paragraph 22, and of 10 October 1996 in *Hoever and Zachow*, C-245/94 and C-312/94, EU:C:1996:379, paragraph 27).

61 The result of applying the criteria referred to in the previous paragraph of the present judgment to the social benefits at issue is that the latter must be classified as 'social security benefits', as referred to in Article 3(1)(j) of Regulation No 883/2004, read in conjunction with Article 1(z) thereof.

– The main complaint

62 By the main complaint relied upon by it in support of the present action, the Commission criticises the United Kingdom for making grant of the social benefits at issue conditional on the claimant meeting the right to reside test in addition to the test, laid down in Article 11(3)(e) of Regulation No 883/2004, read in conjunction with Article 1(j) thereof, that he 'habitually resides' in the territory of the host Member State. According to the Commission, examination of the right to reside test thus gives rise to an additional condition for which no provision is made.

63 Article 11(3)(e) of Regulation No 883/2004, upon which the Commission relies, sets out a 'conflict rule' for determining the national legislation applicable to payment of the social security benefits listed in Article 3(1) of the regulation — which include family benefits — that may be claimed by persons other than those to whom Article 11(3)(a) to (d) applies, that is to say, in particular, economically inactive persons.

64 Article 11(3)(e) of Regulation No 883/2004 is intended not only to prevent the concurrent application of a number of national legislative systems to a given situation and the complications which may ensue, but also to ensure that persons covered by that regulation are not left without social security cover because there is no legislation which is applicable to them (see, in particular, judgment of 19 September 2013 in *Brey*, C-140/12, EU:C:2013:565, paragraph 40 and the case-law cited).

65 On the other hand, that provision as such is not intended to lay down the conditions creating the right to social security benefits. It is in principle for the legislation of each Member State to lay down those conditions (see, to this effect, judgments of 19 September 2013 in *Brey*, C-140/12, EU:C:2013:565, paragraph 41 and the case-law cited, and of 11 November 2014 in *Dano*, C-333/13, EU:C:2014:2358, paragraph 89).

66 It cannot therefore be inferred from Article 11(3)(e) of Regulation No 883/2004, read in conjunction with Article 1(j) thereof, that EU law precludes a national provision under which entitlement to social benefits, such as the social benefits at issue, is conditional upon the claimant having a right to reside lawfully in the Member State concerned.

67 Regulation No 883/2004 does not set up a common scheme of social security, but allows different national social security schemes to exist and its sole objective is to ensure the coordination of those schemes in order to guarantee effective exercise of freedom of movement for persons. It thus allows different schemes to continue to exist, creating different claims on different institutions against which the claimant possesses direct rights by virtue either of national law alone or of national law supplemented, where necessary, by EU law (judgment of 19 September 2013 in *Brey*, C-140/12, EU:C:2013:565, paragraph 43).

- 68 It is clear from the Court's case-law that there is nothing to prevent, in principle, the grant of social benefits to Union citizens who are not economically active being made subject to the requirement that those citizens fulfil the conditions for possessing a right to reside lawfully in the host Member State (see to this effect, in particular, judgments of 19 September 2013 in *Brey*, C-140/12, EU:C:2013:565, paragraph 44, and of 11 November 2014 in *Dano*, C-333/13, EU:C:2014:2358, paragraph 83).
- 69 The conflict rule laid down in Article 11(3)(e) of Regulation No 883/2004 is accordingly, contrary to the Commission's submissions, not distorted by the right to reside test, as that test forms an integral part of the conditions for grant of the social benefits at issue.
- 70 That being so, the argument relied upon by the Commission that a person who does not satisfy the conditions that must be met in order to be eligible for the social benefits at issue is in a situation in which neither United Kingdom law nor any other law is applicable to him cannot succeed.
- 71 Such a situation is not different from the situation of a claimant who does not satisfy for any other reason one of the conditions that must be met in order to be eligible for a family benefit and who, on that basis, is not in fact entitled to such a benefit in any Member State. That would be due not to the fact that no law of a Member State is applicable to him, but to the fact that he does not satisfy the substantive conditions laid down by the Member State whose legislation is applicable to him by virtue of the conflict rules.
- 72 In this connection, it should also be noted that, from its reply to the reasoned opinion onwards, the United Kingdom has consistently disputed that it has sought to make verification that the claimant is habitually resident in its territory subject to the condition in particular that he has a right to reside lawfully there. As the Advocate General has observed, in essence, in point 54 of his Opinion, there is nothing in the documents before the Court showing that the United Kingdom intended to link the right to reside test to the checking of habitual residence for the purposes of Article 11(3)(e) of Regulation No 883/2004. As the United Kingdom submitted at the hearing, legality of the claimant's residence in its territory is a substantive condition which economically inactive persons must meet in order to be eligible for the social benefits at issue.
- 73 In the light of the foregoing considerations, since the Commission has not shown that the right to reside test introduced by the United Kingdom legislation affects, in itself, Article 11(3)(e) of Regulation No 883/2004, read in conjunction with Article 1(j) thereof, the main complaint put forward by the Commission must be dismissed.

– The complaint in the alternative

- 74 In the alternative, if it were to be held that verification of whether the right to reside test is met is not, as such, incorporated into verification of whether the person claiming the social benefits at issue is habitually resident in the United Kingdom and that the checking of whether that test is met is carried out autonomously, the Commission contends that the introduction of the right to reside test in the national legislation inevitably results in direct, or at least indirect, discrimination, prohibited by Article 4 of Regulation No 883/2004.
- 75 As stated in paragraph 68 of the present judgment, there is nothing to prevent, in principle, the grant of social benefits to Union citizens who are not economically active being made subject to the substantive condition that those citizens meet the necessary requirements for possessing a right to reside lawfully in the host Member State.

- 76 Nevertheless, a host Member State which, for the purpose of granting social benefits, such as the social benefits at issue, requires a national of another Member State to be residing in its territory lawfully commits indirect discrimination.
- 77 Indeed, it is clear from settled case-law of the Court that a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect nationals of other Member States more than nationals of the host State and there is a consequent risk that it will place the former at a particular disadvantage (see, to this effect, judgment of 13 April 2010 in *Bressol and Others*, C-73/08, EU:C:2010:181, paragraph 41).
- 78 In the present action, the national legislation requires persons claiming the benefits at issue to possess a right to reside in the United Kingdom. Thus, that legislation gives rise to unequal treatment between United Kingdom nationals and nationals of the other Member States as such a residence condition is more easily satisfied by United Kingdom nationals, who more often than not are habitually resident in the United Kingdom, than by nationals of other Member States, whose residence, by contrast, is generally in a Member State other than the United Kingdom (see, by analogy, judgment of 13 April 2010 in *Bressol and Others*, C-73/08, EU:C:2010:181, paragraph 45).
- 79 In order to be justified, such indirect discrimination must be appropriate for securing the attainment of a legitimate objective and cannot go beyond what is necessary to attain that objective (see to this effect, in particular, judgment of 20 June 2013 in *Giersch and Others*, C-20/12, EU:C:2013:411, paragraph 46).
- 80 In that regard, it is clear from the Court's case-law that the need to protect the finances of the host Member State justifies in principle the possibility of checking whether residence is lawful when a social benefit is granted in particular to persons from other Member States who are not economically active, as such grant could have consequences for the overall level of assistance which may be accorded by that State (see to this effect, in particular, judgments of 20 September 2001 in *Grzelczyk*, C-184/99, EU:C:2001:458, paragraph 44; of 15 March 2005 in *Bidar*, C-209/03, EU:C:2005:169, paragraph 56; of 19 September 2013 in *Brey*, C-140/12, EU:C:2013:565, paragraph 61; and of 11 November 2014 in *Dano*, C-333/13, EU:C:2014:2358, paragraph 63).
- 81 So far as concerns the proportionality of the right to reside test, as the Advocate General has observed in point 92 of his Opinion, verification by the national authorities, in connection with the grant of the social benefits at issue, that the claimant is not unlawfully present in their territory must be regarded as a situation involving checks on the lawfulness of the residence of Union citizens, under the second subparagraph of Article 14(2) of Directive 2004/38, and must therefore comply with the requirements set out in the directive.
- 82 It should be recalled that, under Article 14(2) of Directive 2004/38, Union citizens and their family members are to enjoy the right of residence referred to in Articles 7, 12 and 13 of the directive 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 family members satisfy the conditions set out in those articles, Member States may verify if those conditions are fulfilled. Article 14(2) provides that this verification is not to be carried out systematically.
- 83 It is apparent from the observations made by the United Kingdom at the hearing before the Court that, for each of the social benefits at issue, the claimant must provide, on the claim form, a set of data which reveal whether or not there is a right to reside in the United Kingdom, those data being checked subsequently by the authorities responsible for granting the benefit concerned. It is only in specific cases that claimants are required to prove that they in fact enjoy a right to reside lawfully in United Kingdom territory, as declared by them in the claim form.

- 84 It is thus evident from the information available to the Court that, contrary to the Commission's submissions, the checking of compliance with the conditions laid down by Directive 2004/38 for existence of a right of residence is not carried out systematically and consequently is not contrary to the requirements of Article 14(2) of the directive. It is only in the event of doubt that the United Kingdom authorities effect the verification necessary to determine whether the claimant satisfies the conditions laid down by Directive 2004/38, in particular those set out in Article 7, and, therefore, whether he has a right to reside lawfully in United Kingdom territory, for the purposes of the directive.
- 85 In this context, the Commission, which has the task of proving the existence of the alleged infringement and of providing the Court with the evidence necessary for it to determine whether the infringement is made out (see, in particular, judgment of 23 December 2015 in *Commission v Greece*, C-180/14, EU:C:2015:840, paragraph 60 and the case-law cited), has not provided evidence or arguments showing that such checking does not satisfy the conditions of proportionality, that it is not appropriate for securing the attainment of the objective of protecting public finances or that it goes beyond what is necessary to attain that objective.
- 86 It follows from the foregoing that the fact that, under the national legislation at issue in the present action, for the purpose of granting the social benefits at issue the competent United Kingdom authorities are to require that the residence in their territory of nationals of other Member States who claim such benefits must be lawful does not amount to discrimination prohibited under Article 4 of Regulation No 883/2004.
- 87 Consequently, the action must be dismissed in its entirety.

### **Costs**

- 88 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the United Kingdom has applied for costs and the Commission has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

- 1. Dismisses the action;**
- 2. Orders the European Commission to pay the costs.**

[Signatures]