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A Momentary Blip or a Step Forward in Revisionist Free Movement? – Case C-308/14 *European Commission v. United Kingdom of Great Britain and Northern Ireland (14 June 2016)*

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INTRODUCTION

The judgment given by the European Court of Justice (CJEU) in European Commission v. United Kingdom[1] finds that the United Kingdom is entitled to apply a 'right to reside' test before granting social security benefits to non-UK national EU citizens under the rules of Regulation 883/2004.[2] It ultimately dismisses the Commission's action for infringement. The ruling raises important questions on the relation between Regulation 883/2004 and Directive 2004/38,[3] and on the boundary between free movement of workers and free movement of citizens. It also sets in doubt the scope of a number of well-tested statuses and definitions that characterize EU law on free movement of persons. For these reasons, while it may appear at first sight as a predictable judicial response to an inflammatory political and historical context – the judgment was delivered just a few days before the UK referendum on EU membership – it is also a ruling that touches upon some key 'constitutional' questions as to the nature of free movement and the role of European supranational citizenship. In particular, it continues, and gives new impetus to, a 'revisionist' judicial trend in the context of free movement of not economically active EU citizens.

1 FACTUAL AND LEGAL BACKGROUND

The case was founded in complaints received by the Commission from non-UK national EU citizens resident in the United Kingdom in respect of the 'right to reside' requirement for obtaining child tax credits and child benefits under United Kingdom legislation.[4] Following a lengthy pre-litigation procedure, [5] the Commission commenced infringement proceedings against the United Kingdom.

Child benefits and child tax credit are meant to provide support to cover family expenses and are governed, respectively, by the Social Security Contributions and Benefits Act 2002 and the Tax Credit Act 2002. Claimants for benefits under both Acts must have a legal right to reside in the United Kingdom in order to qualify for the relevant benefit.[6]

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[1] Case C-308/14 *European Commission v United Kingdom* EU:C:2016:436 of 14 June 2016.

[2] Regulation (EC) 883/2004 of 29th April 2004, OJ L166 30.04.2004, p.1. Herein after Regulation 883/2004.

[3] Directive 2004/38/EC of 29th April 2004, OJ L158 30.04.2004, p.77. Herein after Directive 2004/38.

[4] Section 141/146 of the Social Security Contributions and Benefits Act 1992, section 23 of the Child Benefit (General) Regulations 2006 (SI 2006/223) for Child Benefit. Section 3 of the Tax Credit Act 2002 and Regulation Tax Credits (Residence) Regulations 2003 (SI 2003/654) for Child Tax Credits.

[5] The details of the pre-litigation procedure are set out in paras. 21. to 26. of the Case C-308/14 *European Commission v United Kingdom*.

[6] Requirements for eligibility for child benefits and child tax credits under the Social Security Contributions and Benefits Act 2002 and the Tax Credit Act 2002 respectively, are laid out in complementary statutory regulations. Claimants must meet three cumulative criteria, one of which is that they have a legal right to reside

In the action, the Commission raised two complaints against the United Kingdom. According to the main complaint, by making the eligibility for the benefits in question conditional on meeting a 'right to reside' test, the United Kingdom was importing an additional unwarranted requirement in Regulation 883/2004 on the coordination of social security systems among the Member States.[7] The Commission emphasized that Regulation 883/2004 defines residence just as habitual residence,[8] which has an autonomous meaning for EU law purposes. Habitual residence is to be determined on the basis of factual circumstances such as the worker's family situation, the reasons which led him to move, the length and continuity of his residence, whether he has stable employment and his intentions to remain in the host Member State in the long-term.[9]

The second complaint, proposed in the alternative, was that the UK right to reside test constituted direct discrimination against nationals of other Member States[10] in breach of Article 4 of Regulation 883/2004.[11] The direct discrimination was in that UK nationals would automatically meet the right to reside requirement, in contrast to non-UK national EU migrants to whom only the right to reside test would de facto apply.

In response to the Commission's main complaint, the United Kingdom argued that the provisions of Regulation 883/2004 only entail conflict rules to avoid concurrent application of different national social security systems, and not substantive rules on conditions creating the right to the relevant social benefits.[12] The United Kingdom also relied on the *Brey*[13] judgment to submit that the Member States retain the power to lay down the latter rules and conditions, including legal residence rules.[14]

With regard to the Commission's alternative complaint,[15] the United Kingdom did acknowledge that the legal residence requirement was harder to meet for non-UK nationals than for UK nationals. However it submitted that the discrimination was indirect rather than direct, as the requirement was one of three cumulative eligibility conditions applying both to UK and non-UK nationals.[16] This indirect discrimination was justified and proportionate in light of the legitimate objective – expressly authorised by Directive 2004/38 and acknowledged by the Court in *Brey*[17] - of preventing non-economically active EU migrants from becoming a burden on a Member State's welfare system.[18].

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in the UK under EU law or otherwise. To have a EU law right to reside, a claimant who does not qualify as a worker must have sufficient resources and comprehensive sickness insurance, in line with Article 7(1)(b) of Directive 2004/38.

[7] Regulation 883/2004.

[8] Case C-308/ 14 *European Commission v United Kingdom*, para. 28. Regulation 883/2004, Article 2(j).

[9] See Article 11(1) Regulation 987/2009 and Case C-90/97 *Robin Swaddling v Adjudication Officer* EU:C:1999:96.

[10] Case C-308/14 *European Commission v United Kingdom*, para. 33.

[11] Regulation 883/2004, Article 4 – 'Equality of treatment'.

[12] Case C-308/14 *European Commission v United Kingdom*, para. 39.

[13] Case C-140/12 *Pensionsversicherungsanstalt v Brey* EU:C:2013:565; [2014] 1 C.M.L.R. 37.

[14] Case C-308/14 *European Commission v United Kingdom*, para. 38.

[15] The United Kingdom also submitted that the Court should declare the alternative complaint inadmissible as the Commission had not included the complaint in the reasoned opinion during the pre-litigation procedure. This suggestion was however not followed by the Court which proceeded to examine the alternative complaint in full. See C-308/14 *European Commission v United Kingdom*, para. 40.

[16] The other two eligibility conditions for the benefits require that in order for a claimant to qualify they must be present in the territory and have ordinary residence in the United Kingdom. Case C-308/14 *European Commission v United Kingdom*, para. 42.

[17] Case C-308/14 *European Commission v United Kingdom*, para. 41. and 43., and Case C-140/12 *Pensionsversicherungsanstalt v Brey*.

[18] Directive 2004/38, Article 14(1) –(3).

The Commission disagreed on both the justification and proportionality of the UK legal residence requirement. In particular, contrary to the United Kingdom position, it emphasized that the financial burden justification referred to in *Brey*[19] was meant for social assistance benefits only, and not also for social security benefits.[20]

1.1 OPINION OF ADVOCATE GENERAL CRUZ VILLALÓN

The Opinion of Advocate General Cruz Villalón delivered on 6th October 2015 sided with the United Kingdom, recommending dismissal of the Commission's action.[21]

The Advocate General began the assessment by considering the nature of the social benefits at issue and concluding that they qualified as social security.[22]

On examination of the two complaints put forward by the Commission, the Advocate General dismissed the main complaint in its entirety. He considered that the question of whether the legal residence requirement was a legitimate addition to the habitual residence requirement in Regulation 883/2004 – the question that was central to the main complaint- was not determining. The real gist of the claims raised by the Commission was rather in whether a separate examination of the legal residence of benefits' claimants, as conducted in the UK, complied with the equal treatment rule of Article 4 of Regulation 883/2004.[23]

As to the alternative complaint, the Advocate General distinguished three key issues.[24] The first regarded whether a Member State is obliged to provide benefits to EU citizens who are not legally resident.[25] In this respect, the Advocate General found that a Member State was under no such obligation. On the contrary, he highlighted that freedom of movement is not an absolute right but is subject to conditions and limitations as clearly stated in Article 20(2) TFEU.[26] The opinion went on to clarify that Regulation 883/2004 must be read in light of Directive 2004/38.[27]Hence, a difference in treatment between UK and non-UK nationals in respect to legal residence is inherent in the system and does not affect the applicability of the equal treatment provision under article 4 of Regulation 883/2004. [28]

The second issue centred on whether, notwithstanding article 4 of Regulation 883/2004, a Member State was entitled to check the lawfulness of residence of EU citizens when processing their claims for benefits.[29] The Advocate General acknowledged that this led to a difference in treatment between

[19] Case C-140/12 *Pensionsversicherungsanstalt v Brey*.
[20] Case C-308/14 *European Commission v United Kingdom*, para. 46.
[21] Case C-308/14 *European Commission v United Kingdom*, Opinion of *AG Cruz Villalón.*
[22] Ibid, para. 74. The Advocate General did not consider that the qualification of the benefits as social security brought them outside the scope of Directive 2004/38, instead he stated that there was nothing in the case law to indicate that the requirement of legal residence was confined to social assistance benefits or the special non-contributory cash benefits.
[23] Ibid, para. 55.
[24] Ibid, para. 58. to 60.
[25] Ibid, para. 58. Legal residence as defined by Article 7(1)(b) Directive 2004/38.
[26] Ibid, para. 69. and 71. See also Article 20(2) Treaty on the Functioning of the European Union states 'These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder'.
[27] Ibid, para. 73. The Advocate General stated in his Opinion that if the Regulation and Directive were to be taken as completely separate instruments it would have the counterproductive effect on neutralising conditions and limitations, and it would ultimately effect the workability of the EU legal order for instruments not to be read cohesively.
[28] Ibid, para. 75-77, see also Article 4 of Regulation 883/2004.
[29] Ibid, para. 59.

non-UK national EU citizens and United Kingdom nationals.[30] However, he concluded that the verification of legal residence was justified in order to protect a Member State's public finances.[31]

Finally, the Advocate General engaged in some considerations pertaining to the procedure involved in the verification of the lawfulness of residence, suggesting that the Commission had failed to demonstrate a breach of applicable EU rules in this respect.[32]

1.2 JUDGMENT OF THE COURT

The First Chamber rendered its judgment on 14th June 2016. It mostly sided with the United Kingdom, reaching the same conclusion as the Advocate General albeit with an approach more in keeping with established doctrines. The action was ultimately dismissed in full.

As a preliminary step, the Court determined that the child tax credit and child benefit at issue in the case were social security benefits.[33] To reach this conclusion it relied on previous case law,[34] according to which the main feature that differentiates social security from social assistance benefits is that the former are not awarded on the basis of an individual assessment of needs.[35]

The Court rejected the main complaint put forward by the Commission, namely that the legal residence test was an undue addition to the test of habitual residence provided for in Regulation 883/2004. The Court adopted the United Kingdom's and Advocate General's view that Regulation 883/2004 only aims at governing potential conflicts among different national social security systems.[36] It does not lay down substantive conditions for creating the right to a social security benefit, leaving national law free to take the lead in this latter respect.[37]Also, the Court reiterated its reasoning in the judgment in *Brey*,[38] in the sense that there is nothing to prevent the grant of social benefits to EU citizens who are not economically active being made subject to the requirement of having lawful residence in the host Member State.[39]

Moving to the alternative complaint, the Court did recognise that the legal residence test amounted to indirect discrimination.[40] It found that the 'right to reside' test was intrinsically liable to affect nationals of another Member State more than UK nationals, as the latter are more likely to be habitually resident in the UK and to meet the test.[41]

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[30] Ibid, para. 83.
[31] Ibid, para. 84.
[32] Ibid, para. 60. and 86, 93-98.
[33] Case C-308/14 *European Commission v United Kingdom*, para. 61.
[34] Case C-78/91 *Hughes* EU:C:1992:331 , para. 22., Joined Cases Case C-245/94 and Case C-312/94 *Hoever and Zachow* and EU:C:1996:379, para. 27.
[35]Case C-308/14 *European Commission v United Kingdom*, para. 60.
[36] Ibid, para. 67.
[37] Ibid, para. 65.
[38] Case C-140/12 *Pensionsversicherungsanstalt v Brey.*
[39] Ibid, para. 43 and C-308/14 *European Commission v United Kingdom*, para. 68.
[40] Case C-308/14 *European Commission v United Kingdom*, para. 76.
[41] Case C-308/14 European Commission v United Kingdom, para. 78 the Court acknowledged that the residence condition would be more easily satisfied by UK nationals than by nationals of other Member States, see also Case C-73/08 *Bressol v Gouvernement de la Communauté française* EU:C:2010:181/, para. 41.

The Court went on to consider whether the indirect discrimination was justified. [42] Predictably, it found an appropriate justification in the legitimate objective to protect the finances of a Member State, particularly in case of not economically active migrants.

Finally, the Court discussed proportionality. In doing so, it linked proportionality in this context to compliance with Article 14(2) of Directive 2004/38[43] which states that the verification of lawfulness of residence of EU citizens must not be carried out systematically, ultimately finding that the check on the lawfulness of residence of claimants was proportionate as it was not systematic. The Court concluded by stating that the Commission had failed to provide sufficient evidence to show that the measure was disproportionate,[44] effectively reversing the burden of proof for proportionality.[45]

2 COMMENT

The judgment solves some of the ambiguities surrounding the relationship between Directive 2004/38 and Regulation 883/2004 but it also ends up blurring a number of categories that have long been at the heart of the regulation of free movement of persons. On the one hand it seems to sit well in the context of the most recent judicial trend on free movement of the not economically active, on the other hand it leads to question to what extent the Court is acting as a constitutional adjudicator, and to what extent it is responding to a peculiar historical and political context.

2.1 SOCIAL SECURITY BECOMES SUBJECT TO THE LEGAL RESIDENCE AND FINANCIAL BURDEN TESTS

If one were to distil a simple rule out of the complexities of this judgment, the rule would probably be that not only the entitlement of EU migrants to social assistance but also their entitlement to social security is subject to legal residence and related financial burden tests. The rule is not completely new. The Court had already gone in this direction in the *Brey* case, where it had suggested that its case law had 'consistently held' that nothing prevents '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'.[46] However in that case, despite referring, perhaps for a linguistic glitch,[47] to social security, the Court was faced with an issue pertaining to social assistance benefits.[48] Also, the ruling eventually protected the

[42] The test to be applied is as set out in Case C-20/12 *Giersch v État du Grand-Duché de Luxembourg* EU:C:2013:41 , para. 46.
[43] Article 14(2) of Directive 2004/38 states that the verification of lawfulness of residence of EU citizens must not be carried out systematically.
[44] Case C-308/14 *European Commission v United Kingdom*, para. 85
[45] See Charlotte O'Brien, Don't think of the children! CJEU approves automatic exclusions from family benefits in Case C-308/14 Commission v UK, *http://eulawanalysis.blogspot.co.uk/2016/06/dont-think-of-children-cjeu-approves.html*. In a long line of cases the Court has maintained that it is for the Member States to show that a measure found to infringe free movement rights is justified and proportionate. See also Case C-20/12 *Giersch v État du Grand-Duché de Luxembourg* EU:C:2013:41.
[46] Case C-140/12 *Pensionsversicherungsanstalt v Brey*, para. 44.
[47] As hinted by the Commission in *Commission v United Kingdom*. See *Case C-308/14 European Commission v United Kingdom*, para. 44.
[48] Also, the case law that the Court quoted in support of its statement in *Brey* actually stands for a slightly different rule: that not economically active citizens who are lawfully resident in a Member State are entitled to non-discrimination in respect of social assistance. The rule that the Court is announcing in *Brey* is a possible, but not compelled corollary of this rule. See Case C-140/12 *Pensionsversicherungsanstalt v Brey* para. 44; C-85/96 *María Martínez Sala v Freistaat Bayern* EU:C:1998:217, para. 61-63; Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*. EU:C:2001:458 para. 32-33; Case C-456/03 *Michel Trojani v Centre public d'aide sociale de Bruxelles* EU:C:2004:488, para. 42-43; Case C-209/03 *The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills*

interests of the not economically active claimant EU citizen. The judgment in *Commission vs. United Kingdom* goes one step further and sets a rule that the Court had just hinted in *Brey*[49] on firmer grounds. In this sense it is a pivotal development in the Court's case-law which may have far-reaching implications.

The judgment achieves this result by de facto subjecting Regulation 883/2004 to Directive 2004/38, so that the rules of the former are found to apply only to an EU citizen who has satisfied the conditions set forth in the latter. This finding clarifies a long-standing ambiguity.[50] It also reconciles the concept of residence across the two legislative instruments: habitual residence, as defined in Regulation 883/2004, implies legal residence in the terms of Directive 2004/38. Both the Advocate General's opinion and the Court's judgment support the above findings. However they reason differently to reach the same result.

Advocate General Cruz Villalón discusses the relation between Regulation 883/2004 and Directive 2004/38 explicitly. His opinion ultimately reinforces, in this sense, Advocate General Wathelet's point of view in *Dano*[51] that Regulation 883/2004 is not a self-contained regime,[52] and cannot be interpreted in a way that would neutralise the conditions and limitations attached to the freedom of movement.[53] The Opinion highlights that Regulation 883/2004 is a key element of the legal regime of free movement of persons and is designed to facilitate the exercise of the relevant freedom. In order to do this effectively, in the Advocate General's view, Regulation 883/2004 must comply with the legal conditions which are attached to the freedom of movement and residence of EU citizens. This includes the legal conditions laid out in Directive 2004/38.[54] In coming to this finding the Advocate General disregards the Commission's assertion that the concept of residence in Regulation 883/2004 is not subject to any legal pre-conditions;[55] in the opposite direction, he finds that Directive 2004/38 should remain fully effective within the framework of Regulation 883/2004.[56]

The Court takes a more nuanced approach and never directly acknowledges in the judgment the link between Regulation 883/2004 and Directive 2004/38. Through insisting that Regulation 883/2004 only creates a conflict of rules system, the Court re-emphasizes that it is for the Member States to lay down the conditions for entitlement to social security benefits.[57] The Court refers to its judgments in *Brey*[58] and *Dano*[59] in support of this argument. Relying further on *Brey* and *Dano*, the Court then adds that nothing in principle prevents the grant of social benefits to non-economically active EU citizens being made subject on their complying with the requirements to have a right to lawful residence.[60] The relevant requirements, although not overtly mentioned by the Court, are laid out in Directive 2004/38. The Court only explicitly mentions Directive 2004/38 in the course of its

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EU:C:2005:169, para. 37;Case C-158/07 *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep*. EU:C:2008:630, para. 39.

[49] Case C-140/12 *Pensionsversicherungsanstalt v Brey.*

[50] See generally R. White 'Revisiting the Free Movement of Workers' Fordham Int'l L.J 33(5) 2011 1564, 1579, see also D. Thym, 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens' CML 52 2015 17, 21.

[51] Case C- 333/13 *Elisabeta Dano v Jobcenter Leipzig* EU:C:2014:2358.

[52] See D. Thym 'When Union Citizens turn into Illegal Migrants: the Dano Case' E.L.Rev 40(2) 2015 499.

[53] Case C-308/ 14 *European Commission v United Kingdom*, Opinion para. 73.

[54] Ibid para. 71.

[55] Ibid para. 72.

[56] Ibid, para. 72.

[57] Case C-308/ 14 *European Commission v United Kingdom*, para. 65.

[58] Case C-140/12 *Pensionsversicherungsanstalt v Brey.*

[59] Case C- 333/13 *Elisabeta Dano v Jobcenter.*

[60] Case C-308/14 *European Commission v United Kingdom*, para. 68.

assessment of the alternative Commission's complaint and with regard to the proportionality of the right to reside test.[61]

It has taken 12 years for a connection between the two legislative instruments to come to fruition, albeit somewhat discreetly. This may reflect the fact that previous EU citizenship case law mostly focused on social assistance as opposed to social security, which is the core of Regulation 883/2004. In any case, the Court's approach to the issue remains somewhat ambiguous and leaves a margin of manoeuvre for future case-law.[62] The judgment does however represent a new milestone in the evolution of the Court's doctrine on free movement of not-economically active EU citizens.

2.2 FREE MOVEMENT OF THE NOT ECONOMICALLY ACTIVE: CONTINUING A TREND?

At first sight, the judgment of the Court appears to continue a recent trend, which has seen the Court revert its 'classic' expansionist approach to free movement rights for non-economically active EU citizens.[63] This trend began in part with *Brey*.[64] The ruling in *Brey*[65] can be seen at first sight as supporting the Court's traditional, protective approach to free movement of not economically active citizens. The Court in fact rules that EU law precludes national legislation automatically barring the grant of a benefit to a not economically active citizen on the grounds that he does not meet requirements for legal residence.[66] However the Court plants the seeds of a change of approach in this case, by emphasizing in dicta that Member States are allowed to subject the grant of social benefits to legal residence conditions.[67] In this way the Court begins to depart from the indeterminacy of its traditional position on residence rights.[68]

In post-*Brey*[69] case law, the Court further tightens its position on legal residence requirements, on the one hand reinterpreting Directive 2004/38 in a restrictive sense, and on the other one carving out exceptions from the *Brey*[70] rule barring automatic benefit exclusions in case of residence rights' shortfalls. In the former respect, *Dano*[71] expressly allows host Member States to withhold benefits from migrant EU citizens who do not meet the residence requirements under Directive 2004/38.[72] The Court confirms that the principle of equal treatment is not applicable in such situations, in an attempt

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[61] Ibid parap 81-82.
[62] See H. de Waele, 'EU Citizenship: Revisiting its Meaning, Place and Potential' E.J.M.L 12 2010 319 – argues that EU citizenship is in a state of permanent flux.
[63] See for the 'classic' case law Case C-85/96 *María Martínez Sala v Freistaat Bayern; Case C-456/03 Michel Trojani v Centre public d'aide sociale de Bruxelles;* Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* EU:C:2001:458 .
[64] Case C-140/12 *Pensionsversicherungsanstalt v Brey.*
[65] Ibid.
[66] Ibid, para. 66.
[67] Case C-308/ 14 *European Commission v United Kingdom*, para. 75.
[68] In previous case law involving questions of residence, the Court either eschewed the question, by relying on Member States' determinations in this respect, and rather focusing on issues of non-discrimination; see Case C-85/96 *María Martínez Sala v Freistaat Bayern* and Case C-456/03 *Michel Trojani v Centre public d'aide sociale de Bruxelles*; or insisted on the direct effect of Union citizens' rights of residence descending from the Treaties. Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* EU:C:2001:385, Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* EU:C:2004:639.
[69] Case C-140/12 *Pensionsversicherungsanstalt v Brey.*
[70] Case C-140/12 *Pensionsversicherungsanstalt v Brey.*
[71] Case C- 333/13 *Elisabeta Dano v Jobcenter* . See also D. Thym 'When Union Citizens turn into Illegal Migrants: the Dano Case' E.L.Rev 40(2) 2015 499, 250.
[72] See generally S. Peers, 'Benefit Tourism by EU citizens: the CJEU just says No' http://eulawanalysis.blogspot.co.uk/2014/11/benefit-tourism-by-eu-citizens-cjeu.html.

to mitigate concerns over 'benefits tourism'.[73] In the latter respect, in *Alimanovic*[74], the Court held that jobseekers can be excluded from the enjoyment of social assistance benefits even without an individual assessment of their circumstances, as Directive 2004/38 itself establishes a gradual system regarding the retention of 'worker' status which takes into consideration various factors characterising the individual situation of each applicant.[75] More recently, in *Garcia Nieto*[76] the Court adds to the trend by holding that Member States may exclude EU citizens other than workers and self-employed persons from social assistance benefits during the first three months of residence in accordance with Article 6(1) of Directive 2004/38, even without an individual assessment.[77]

These judgments stand in stark contrast to previous case law through which the Court consolidated rights to free movement for not economically active EU citizens, such as *Martinez Sala*[78] and *Trojani.*[79] The ruling in *Commission vs. United Kingdom*, by impliedly coordinating the operation of Regulation 883/2004 and that of Directive 2004/38, goes yet one step further. Maurizio Ferrera has argued that the rules of residence 'buffer' the external walls of welfare systems. The judgment in this case can be seen as confirming this argument.[80]

2.3 BLURRING THE BOUNDARY BETWEEN CITIZENS AND WORKERS

Indeed the judgment 'buffers' the Member States' welfare systems, by blurring the boundaries between a number of well-established categories upon which European citizenship case law has relied firmly for over a decade. These include social security and social assistance, workers and non-workers and ultimately, national and non-national.

A first boundary that the judgment blurs, as explained earlier, is the one between social assistance and social security. Financial burden and genuine link tests that had been elaborated in the case law mostly with reference to social assistance claims are now extended to social security claims.[81] This in turn has implications for the distinction between workers and non-economically active citizens, as the rule in the case potentially subjects workers' claims for social security benefits to the same requirements that apply to non-economically active citizens.

This will not be an issue for full-time, stable workers, whose rights of residence are not under discussion.[82] It may however raise issues in respect of marginal workers, those whose workers' status as well as self-sufficiency are debatable; thoughts go to persons who are not employed full time, or are not in a stable occupation, or are former workers. In the wake of this judgment, they may not be considered to have sufficient resources to be legally resident under Directive 2004/38, so as to qualify for social security benefits under the rules of Regulation 883/2004.

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[73] Case C- 333/13 Elisabeta Dano v Jobcenter, paras. 69, 74 and 78. 'Benefits tourism' is also termed 'welfare tourism', see also S. Giubboni 'Free Movement of Persons and European Solidarity' ELJ 13(3) 2097 360, 372 – the Court is mindful of the risk and political importance attached to 'welfare tourism'.
[74] Case C-67/14 *Jobcenter Berlin Neukölln v Nazifa Alimanovic* EU:C:2015:597.
[75] Ibid, paras. 59 and 60.
[76] Case C-299/14 *Arbeit Jobcenter Kreis Recklinghausen v Jovanna García-Nieto* EU:C:2016:114
[77] Ibid, para. 43-44 and 46-48.
[78]Case C-85/96 *María Martínez Sala v Freistaat Bayern*.
[79] Case C-456/03 *Michel Trojani v Centre public d'aide sociale de Bruxelles*, see also F. Strumia 'Citizenship and Free Movement: European and American Features of a Judicial Formula for Increased Comity' Colum.J.Eur.L 12 2005 713.
[80] M. Ferrera, "Towards an open social citizenship: The New Boundaries of Welfare in the European Union" in G. De Burca (ed.), *EU Law and the Welfare State* (London: OUP, 2005), p.30.
[81] See Case C-138/02 *Brian Francis Collins v Secretary of State for Work and Pensions* EU:C:2004:172 and Case C-140/12 *Pensionsversicherungsanstalt v Brey*.
[82] Article 7 of Directive 2004/38.

Some marginal migrant workers may be left as a result in a protection gap, where they are not eligible for social security in the host Member State because they do not meet the requirements for legal residence, yet they are not eligible in the home Member State either because they are not resident. As the Commission pointed out,[83] this was an effect that Regulation 883/2004 sought to preclude.

A further, less evident, implication of the judgment in *Commission vs. United Kingdom* is the potential, silent overruling of the inclusive EU law definition of worker. The Court, in interpreting the definition of worker for EU law purposes, has always set a very low threshold.[84] A person doing part-time work qualifies as a worker, as does a person whose earnings are below the minimum level for subsistence.[85] The Court went as far as to state that whether an individual requires further financial assistance, beyond his earnings, in order to reach subsistence level, is irrelevant for purposes of qualifying as a worker.[86] However, those individuals who fall on the border between the class of workers and that of non-economically active may now have to prove that they are self-sufficient and hence legally resident, in order to qualify for social security benefits. Hence, even if formally still meeting the definition of worker, de facto they risk being treated according to the criteria applicable to the not economically active.

Additionally, the judgment de facto draws a sharper line between the condition of nationals of a Member State and non-national EU citizens, despite the principle of non-discrimination on the basis of nationality that has long sustained the architecture of free movement of persons, in an 'ever closer Union' spirit.[87] The judgment reduces the bite of this principle, by giving larger room to financial burden justifications that the Member States may adduce. Now migrant EU workers will potentially face financial burden tests before being eligible for social security, even though through working and paying taxes in the host Member State they contribute to the welfare system.

While the Court, through its early case law on European citizenship, generalised the right to free movement and residence,[88] making it a veritable right of citizenship,[89] it now stretches and generalizes the underlying condition: that is, that migrant European citizens cannot become a burden on the finances of the host Member State and in several cases need to demonstrate a genuine link before being eligible for benefits.

Ultimately, the judgment in *Commission vs. United Kingdom* suggests a reverse cross-pollination of citizenship law and workers law:[90] if in earlier case law, the rights belonging to the latter were

[83] Case C-308/ 14 *European Commission v United Kingdom*, para. 32.
[84] See D. Thym, 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens' CML 52 2015 17, 43.
[85] See Case C-53/81 *D.M. Levin v Staatssecretaris van Justitie*. EU:C:1982:105; Case C-66/85 *Deborah Lawrie-Blum v Land Baden-Württemberg* EU:C:1986:284.
[86] Case C-139/85 *R. H. Kempf v Staatssecretaris van Justitie* EU:C:1986:223.
[87] Found in the preamble of the Treaty of Rome establishing the European Union. See also S. O'Leary, 'Developing an Ever Closer Union between the Peoples of Europe? A Reappraisal of the Case Law of the Court of Justice on the Free Movement of Persons and EU Citizenship' YEL 2008 167 - the Court has contributed in no small measure in trying to achieve this.
[88] See Case C-85/96 *María Martínez Sala v Freistaat Bayern*; Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* EU:C:2001:385; Case C-456/03 *Michel Trojani v Centre public d'aide sociale de Bruxelles.*
[89] See F. Strumia 'Citizenship and Free Movement: European and American Features of a Judicial Formula for Increased Comity' Colum.J.Eur.L 12 2005 713, 714. See also S. O'Leary, 'Developing an Ever Closer Union between the Peoples of Europe? A Reappraisal of the Case Law of the Court of Justice on the Free Movement of Persons and EU Citizenship' YEL 2008 167, 180 – the Court has been bold in citizenship cases in the past.
[90] S. O'Leary, 'Developing an Ever Closer Union between the Peoples of Europe? A Reappraisal of the Case Law of the Court of Justice on the Free Movement of Persons and EU Citizenship' YEL 2008 167, 168.

extended to the former, now it is the limits and conditions belonging to the former that pass into the latter, with an overall resulting restrictive effect on free movement rights. The wider context in which the case was decided, with generalized political tensions across the EU over immigration levels, and the peculiar situation of the UK, may of course have played a role.[91]

2.4 THE WIDER POLITICAL CONTEXT AND THE ROLE OF THE COURT

Tensions felt in many Member States regarding loss of autonomy in the face of the EU and worries over immigration control provide an important background to this judgment.[92] Similar tensions informed the debates surrounding the United Kingdom referendum on the future of its membership in the EU, which just a few days after the judgment was delivered yielded a 'Leave' majority. Beyond the immediate situation in the United Kingdom, the EU has faced challenges over recent years, which have affected its perceived legitimacy and popularity. These include the handling of the refugee crisis as well as the handling of the economic crisis affecting the Euro-zone.[93]

This peculiar background scenario leads to the question to what extent the judgment in C*ommission vs. United Kingdom* was a response to a contingent historical and political situation. On the one hand the question links to one of Weiler's reflections on of the relationship between law and politics in the EU; this relation is not carved in constitutional stone but is instead one which can more adequately be characterised as a 'precarious equilibrium'.[94] On the other hand, it prompts a reflection on the role that the Court is playing in this case. Is the Court acting as a constitutional court? Or is it providing an impulsive judgment in response to an immediate context?

In the former respect, Niamh Nic Shuibhne suggests that a constitutional court is one that respects values of fairness, integrity and imagination.[95] It is questionable whether this case strikes a fair balance between the protection of the interests of migrant EU citizens and the interest of the Member States (and their citizens) in the viability of public finances. As for integrity, 'constitutional courts should explain how new judgments either fit with existing case law or are deliberately intended to signal a departure from it—and why'.[96] In this respect, while the case seems to fit in a trend as examined above, the remaining elements of ambiguity suggest that the Court does not entirely protect system integrity. Nor is the judgment particularly imaginative in advancing new values through making novel law.[97] Continuing again a trend begun with *Dano*, it rather relies on a restrictive interpretation of well-tested rules. It is true that the European Court of Justice is not a conventional constitutional court[98] and so this must be taken into consideration when assessing is judgments.

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[91] See D. Thym, 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens' CML 52 2015 17, 20 – there has always been political debate over the rights of the non-economically active in host Member States. See also Editorial Comments 'Free Movement of Persons in the European Union: Salvaging the Dream Whilst Explaining the Nightmare' C.M.L 51 2015 729.

[92] Institute for Public Research Report, A. Glennie and J. Pennington, 'Europe, Free Movement and the UK: Charting a New Course' – found that the issue had become increasingly politicized since 2004 and it was one of the most contentious areas of the debate with worries over uneven flows of people, see p.9-12.

[93] Institute for Public Research Report, A. Glennie and J. Pennington, 'Europe, Free Movement and the UK: Charting a New Course', see p.9-17.

[94] J. H. H. Weiler, 'The Community System: the Dual Character of Supranationalism', 1 Y.E.L. 1 1981, 267-306.

[95] N. Nic Shuibhne, *The Coherence of EU Free Movement Law*, Oxford University Press 2013, p.9

[96] N. Nic Shuibhne, *The Coherence of EU Free Movement Law*, Oxford University Press 2013, p.11.

[97] Ibid., p. 9.

[98] Ibid p.12. See also M. Dougan, 'Judicial activism or constitutional interaction? Union citizenship' in H Micklitz and B de Witte (eds.), of the Member States (Intersentia, 2012) 113. – the Court also acts as a policy-maker.

Turning to the second aspect, whether the Court is acting out of a contingent impulse, in one respect the Court's approach departs from previous rules and suggests that this is an impulsive response rather than a careful constitutional judgment. This is through the reversal of the burden of proof for proportionality,[99] which has traditionally been the task of the Member States to prove.

The Court explicitly states that it would have been the task of the Commission to prove the alleged infringement by providing evidence to show that the checks carried out by the United Kingdom were not proportionate.[100] The reversal is subtle as it relies on the peculiar role of the Commission in the context of an action for infringement. However it could represent a sign of the Court showing leniency to the Member States by putting the responsibility on the Commission.

A further sign in this sense is that the Court was satisfied by the UK justification for the indirect discrimination merely being 'public finances', without requiring any evidence to support this.[101] This lends credit to the argument that the judgment was driven by the *telos* 'to avoid offending the UK government at all costs' and that the Court manipulated legal rules to reach the outcome.[102]

This 'manipulation' may be due to the political context within which the case arose.[103]It has been suggested that uncertainty as to the political reactions to a judicial decision can affect judges' behaviour.[104] And judicial decisions are certainly not made in a political vacuum.[105] This was a difficult case to keep on neutral terrain and to reason in sound 'constitutional' terms, at the time when it was decided, on the verge of the UK-EU referendum. While arguably serving the political interest of a Member State, it continues however an established trend, and by altering boundaries and categories it pre-announces further 'constitutional' revisionism in the field of free movement and EU citizenship.

3 CONCLUSION

A rather technical judgment setting the relation of two well-known pieces of EU legislation in clearer terms ultimately sends shockwaves through legal statuses - worker, citizen, not-economically active person, and definitions - residence, financial burden, genuine link - that have long constellated EU law on free movement of persons. While ultimately leaving some of these statuses and definitions in a limbo, *European Commission v. United Kingdom* moves an important step ahead in the re-hardening of an economic model of supranational citizenship in the EU. The judgment is in keeping with recent

[99] C. O'Brien 'Don't think of the children! CJEU approves automatic exclusions from family benefits in Case C-308/14 Commission v UK' http://eulawanalysis.blogspot.co.uk/2016/06/dont-think-of-children-cjeu-approves.html published 16th June 2016.
[100] Case C-308/ 14 *European Commission v United Kingdom*, Para. 85.
[101] C. O'Brien 'Don't think of the children! CJEU approves automatic exclusions from family benefits in Case C-308/14 Commission v UK' http://eulawanalysis.blogspot.co.uk/2016/06/dont-think-of-children-cjeu-approves.html published 16th June 2016, - O'Brien states that this justification was 'swiftly dealt with'.
[102] C. O'Brien 'Don't think of the children! CJEU approves automatic exclusions from family benefits in Case C-308/14 Commission v UK' http://eulawanalysis.blogspot.co.uk/2016/06/dont-think-of-children-cjeu-approves.html published 16th June 2016.
[103] See generally D. Thym 'When Union Citizens turn into Illegal Migrants: the Dano Case' E.L.Rev 40(2) 2015 499, 253 – suggests that the shift towards doctrinal conservatism seen in *Dano* could be an attempt to evade further criticism.
[104] See O. Larsson and D. Naurin 'Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU; IO 70(2) 2016 377, 377.
[105] See D. Sindbjerg Martinsen, 'Judicial Influence on Policy Outputs? The Political Constraints of Legal Integration in the European Union', CPS 48(12) 2015 1622, 1626. Also see See M. Everson and C. Joerges, 'Reconfiguring the Politics–Law Relationship in the Integration Project through Conflicts–Law Constitutionalism', ELJ 18(5) 2012, 644, 644.

case law in this sense. However, what exactly this renewed model of economic citizenship is set to look like remains in part an open question. It is a question left to ponder to the deliberations of ongoing political debates, as well as to the constitutional twists and turns of future case law.