IN THE UPPER TRIBUNAL **Case No** CPC/5400/2014
ADMINISTRATIVE APPEALS CHAMBER

Before UPPER TRIBUNAL JUDGE WARD

Attendances:

For the Appellant: Mr Tom de la Mare QC, appearing pro bono, instructed by the AIRE Centre

For the Respondent: Ms Katherine Apps, instructed by Government Legal Service

Second interim decision: In the circumstances of the present case, where it is not in dispute that for a period prior to her claim for state pension credit the appellant had comprehensive sickness insurance cover and (as was conceded) sufficient resources for the purposes of Art 7(1)(b) of Directive 2004/38/EC ("the Directive"), it is necessary, pursuant to the decision of the Court of Justice of the European Union in C-140/12 *Brey* to carry out – in accordance with the requirements under, inter alia, Articles 7(1)(b) and 8(4) of the Directive – an overall assessment of the specific burden which granting that benefit would place on the social assistance system as a whole by reference to the personal circumstances characterising the individual situation of the person concerned. No such assessment having been carried out by either the respondent or the First-tier Tribunal, Directions are given in para [65] below to enable the Upper Tribunal to do so prior to remaking the decision under s.12 of Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

1. This decision is supplemental to an interim decision dated 27 October 2015 in which I found the decision of the First-tier Tribunal ("FtT") to have been in error of law and set it aside. I reserved the aspect of the appeal which is the subject of the present decision for further submissions, as I was considering making a reference under Article 267 to the Court of Justice of the European Union ("CJEU"), although neither party in response invited me to do so at that point. Among the points on which I found against the appellant was that I held it not to be disproportionate to enforce against her the requirement for comprehensive sickness insurance cover ("CSIC"), imposed by Article 7(1)(b) of the Directive, a point as to which Mr de la Mare reserves the position with regard to a potential challenge in the Court of Appeal. The consequence of my ruling on that point was that the appellant was unable to establish a permanent right to reside, based on 5 years' residence in accordance with the Directive, under Article 16 thereof.

2. The subject-matter of the present decision is an important one, given the line of recent decisions of the CJEU and the Supreme Court: to what extent, if at all, does what was said in C-140/12 *Pensionsversicherungsanstalt v Brey* [2014] 1 WLR 1080 regarding the need for a personalised assessment of a claimant's situation have continuing relevance, following the subsequent decisions of the CJEU in C-333/13 *Dano v Jobcenter Leipzig* [2015] 1 WLR 2519, C-67/14 *Jobcenter Berlin Neukölln v Alimanovic* [2016] QB 308 and C-299/14 *Garcia-Nieto* [2016] 1 WLR 3089 and that of the Supreme Court in *Mirga and Samin v SSWP* [2016] UKSC1?

3. It is helpful to begin with the facts as they were known to be down to the date of the DWP's decision under appeal, 15 July 2013, refusing the appellant's claim for state pension credit made with effect from 17 January 2013 on the ground that she lacked the right to reside.

4. The appellant was born in August 1929 and is a Dutch national. She had lived in the Netherlands until 1947 and thereafter had lived in a variety of countries around the world, all of them outside the European Union, until 2006, when she had come to the UK, where she had since remained.

5. Her late husband, who had died in 1994, had been a British Citizen. She has a son living in South Africa and a daughter living in Mexico. A further son lives in the UK with his wife and five children and has a small agricultural business producing a profit of £7,225 pa in the tax year 2011/12. Her children are British nationals.

6. On arriving in the UK in 2006 she had approximately £53,000 in savings. At the time of her claim on 17 January 2013 she had fractionally over £5,000 in her bank accounts. Her savings had been eroded to defray her living expenses.

7. In 2011 the appellant had claimed a Dutch Old Age Pension. By decision dated 25 May 2011 her claim was refused on the ground that (a) she did not live in the Netherlands and (b) an alternative route to entitlement, based on having lived in a Member State of the EU for at least six years after her 59th birthday was not at that point open to her as she had not yet fulfilled the alternative residence requirement. That requirement was fulfilled in 2012 and from December 2012 she received a Dutch state pension of €84.16 per month, the first payment backdated to August 2012. One agreed consequence of receipt of the Dutch state pension was that from that point, the UK was entitled to recharge the cost of any healthcare the appellant might require to the Netherlands pursuant to Article 25 of Regulation (EC) No 883/2004 (see, by reference to the predecessor legislation, *SG v Tameside MBC* [2010] UKUT 243(AAC) at [20]-[28]).

8. There is a certain lack of clarity concerning the assistance she received from other quarters. She received £25 per week from her daughter in law.

She received a charitable payment from a Dutch institution of £100 per calendar month. Her UK-based son helped towards the rent and paid for food. Her late husband having served in the British army, the appellant had been receiving payments from the Royal British Legion. At the time she was interviewed in connection with her claim in April 2013 the most recent such payment had been received in November 2012, and was in the sum of £234, intended to cover the quarter from 1 November to 31 January. Although the evidence suggested that the appellant could expect to hear further from the British Legion in February 2013, there was no evidence that by April 2013 she had in fact done so. The tribunal made no findings as to the amount or regularity of such payments (save for the payments made by the appellant's daughter-in-law), nor as to their sustainability.

9. Additionally, Mr de la Mare in oral submissions informed me that the British Legion payments had in fact continued and were now of £151 per month; the UK-based son provided help equating to £100 per month; the son in South Africa contributes a monthly sum (my note suggests I was told 500 Rand but the evidence at p184 indicates 5000 Rand - the current exchange rate is around £1: 16.74 Rand); and the appellant's daughter is said to meet groceries and clothing costs. The rent on the appellant's accommodation is said (now) to be £550 monthly and council tax some £100-£120 monthly.

10. Ms Apps had informed me at the outset of the hearing, without demur from Mr de la Mare, that he had indicated he was not proposing to rely on additional evidence. Nonetheless, as I concluded in my first interim decision that the decision of the First-tier Tribunal had been in error of law, I am able to find further facts and remake the decision. Of course, s12 (8) of the Social Security Act 1998 restricts consideration to the circumstances obtaining at the date of the DWP's decision under appeal, but at least some of the matters mentioned by Mr de la Mare might allow inferences to be drawn as to such circumstances, as at that date, if properly evidenced. However, before considering evidential matters further, it is necessary to identify if there is any further legal question which requires to be addressed.

11. I set out the most relevant extracts of the Treaty on the Functioning of the European Union ("TFEU") and the Directive. There has been no suggestion that the Immigration (European Economic Area) Regulations 2006, which implemented the Directive in the UK, are to materially different effect, so they are not set out here. I then turn to describing in brief and as neutrally as possible the main authorities which have featured in argument, before turning to the parties' submissions.

The TFEU

12. Article 20 provides (among other matters) that every person holding the nationality of a Member State shall be a citizen of the Union ; that citizens of the Union shall have the right to move and reside freely within the territory of the Member States; and that such a right "shall be exercised in accordance

with the conditions and limits defined by the Treaties and by the measures adopted thereunder." Article 21 provides that:

> "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect."

The Directive

13. The most relevant recitals for present purposes are as follows:

> "(10) Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore, the right of residence for Union citizens and their family members for periods in excess of three months should be subject to conditions.
>
> (16) As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion. In no case should an expulsion measure be adopted against workers, self-employed persons or job-seekers as defined by the Court of Justice save on grounds of public policy or public security."

14. The right of residence on the basis of self sufficiency and the conditions attaching to it are set out in Article 7(1):

> "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:
>
> …
>
> (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;
>
> …"

15. Article 8 allows host Member States to require Union citizens to register with the relevant authorities where periods of residence longer than three months are concerned. So far as relevant, it provides:

> "3. For the registration certificate to be issued, Member States may only require that
>
> …
>
> – Union citizens to whom point (b) of Article 7(1) applies present a valid identity card or passport and provide proof that they satisfy the conditions laid down therein.
>
> 4. Member States may not lay down a fixed amount which they regard as "sufficient resources"**,** but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State."

16. It is useful for the purposes of the ensuing discussion to set out also Articles 14 and 24:

> Article 14
>
> "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."
>
> Article 24
>
> "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."

Brey

17. *Brey* concerned an Austrian special non-contributory cash benefit, which was subject to a right to reside test in a way which is materially identical to state pension credit. Mr and Mrs Brey, German nationals, moved from Germany to Austria in March 2011. Whilst in Germany, Mr Brey had been receiving an invalidity pension and a care allowance. Mrs Brey had received a basic benefit, but because of their move to Austria, the latter ceased from 1 April 2011. Mr Brey claimed the Austrian benefit with effect from 1 April 2011 on the basis that their resources were insufficient. The claim was refused on 2 March 2011. On 22 March 2011 a different Austrian administrative body issued Mr and Mrs Brey with EEA citizen registration certificates.

18. The referring court's concern was with whether the benefit in question amounted to "social assistance" within the meaning of the Directive. The CJEU however, took the opportunity, contrary to the suggestion at [27-28] of the Advocate General's Opinion, to reformulate the issues more widely, in particular examining the automatic linkage between failure, on the ground of insufficiency of resources, to have the right to reside and the inability to claim. I return below to the detail of its reasoning but meanwhile note the Court's view that:

> "72. By making the right of residence for a period of longer than three months conditional upon the person concerned not becoming an 'unreasonable' burden on the social assistance 'system' of the host Member State, Article 7(1)(b) of Directive 2004/38, interpreted in the light of recital 10 to that directive, means that the competent national authorities have the power to assess, taking into account a range of factors in the light of the principle of proportionality, whether the grant of a social security benefit could place a burden on that Member State's social assistance system as a whole. Directive 2004/38 thus recognises a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary (see, by analogy, *Grzelczyk*, paragraph 44; *Bidar*, paragraph 56; and *Förster*, paragraph 48).
>
> …

75. It can be seen from paragraphs 64 to 72 above that the mere fact that a national of a Member State receives social assistance is not sufficient to show that he constitutes an unreasonable burden on the social assistance system of the host Member State.

76. As regards the legislation at issue in the main proceedings, it is clear from the explanation provided by the Austrian Government at the hearing that, although the amount of the compensatory supplement depends on the financial situation of the person concerned as measured against the reference amount fixed for granting that supplement, the mere fact that a national of another Member State who is not economically active has applied for that benefit is sufficient to preclude that national from receiving it, regardless of the duration of residence, the amount of the benefit and the period for which it is available, that is to say, regardless of the burden which that benefit places on the host Member State's social assistance system as a whole.

77. Such a mechanism, whereby nationals of other Member States who are not economically active are automatically barred by the host Member State from receiving a particular social security benefit, even for the period following the first three months of residence referred to in Article 24(2) of Directive 2004/38, does not enable the competent authorities of the host Member State, where the resources of the person concerned fall short of the reference amount for the grant of that benefit, to carry out – in accordance with the requirements under, inter alia, Articles 7(1)(b) and 8(4) of that directive and the principle of proportionality – an overall assessment of the specific burden which granting that benefit would place on the social assistance system as a whole by reference to the personal circumstances characterising the individual situation of the person concerned.

78. In particular, in a case such as that before the referring court, it is important that the competent authorities of the host Member State are able, when examining the application of a Union citizen who is not economically active and is in Mr Brey's position, to take into account, inter alia, the following: the amount and the regularity of the income which he receives; the fact that those factors have led those authorities to issue him with a certificate of residence; and the period during which the benefit applied for is likely to be granted to him. In addition, in order to ascertain more precisely the extent of the burden which that grant would place on the national social assistance system, it may be relevant, as the Commission argued at the hearing, to determine the proportion of the beneficiaries of that benefit who are Union citizens in receipt of a retirement pension in another Member State."

Dano

19. Ms Dano, a Romanian, had come to Germany without any work record and not with the intention of seeking work and applied for the relevant German subsistence benefits for herself and her children at a point where they had been in Germany for more than three months. Although the decision records that she received assistance from her sister, there is no suggestion that this got Ms Dano anywhere near being self-sufficient within Article 7(1)(b). The question arose of whether Article 24(1) of the Directive and Article 4 of Regulation 883/2004 (which deal with equal treatment on the grounds of nationality) enabled Ms Dano to claim the relevant benefits on the same basis as a German national. It was held (at [69]) that a person could only do so if their residence complied with the conditions of the Directive and so at [73] that it was necessary to examine whether Ms Dano met the requirements of Article 7(1)(b), with the conclusion at [81] that she did not. The process was summarised at [80]:

> "Therefore, the financial situation of each person concerned should be examined specifically, without taking account of the social benefits claimed, in order to determine whether he meets the condition of having sufficient resources to qualify for a right of residence under Article 7(1)(b) of Directive 2004/38."

Alimanovic

20. Ms Alimanovic and her children were Swedish nationals. She and the oldest child had for a while found temporary jobs, lasting for less than a year, before becoming unemployed and seeking the relevant German subsistence benefits. Because of the short time for which she had been employed, her ability to retain "worker" status under Article 7(3) of the Directive had expired. Her claim accordingly fell to be considered on the basis that she was a jobseeker and was, after a change in law permitting such a step to be taken, revised so as to refuse it. Ms Alimanovic was held not to be able to rely on the principle of non-discrimination so as to claim the same right to the benefits as a German national would have had. In the case of jobseekers, a Member State's obligations were governed by Article 24(2) of the Directive, which expressly allows Member States not to confer entitlement to social assistance on jobseekers in the position of Ms Alimanovic. That was a derogation from the overall requirement for equal treatment and, in essence, Germany was only doing what that provision said it could. As the CJEU put it:

> "57. Although, according to the referring court, Ms Alimanovic and her daughter Sonita may rely on that provision to establish a right of residence even after the expiry of the period referred to in Article 7(3)(c) of Directive 2004/38, for a period, covered by Article 14(4)(b) thereof, which entitles them to equal treatment with the nationals of the host Member State so far as access to social assistance is concerned, it must nevertheless be observed that, in such a case, the host Member State may rely on the derogation in Article 24(2) of that directive in order not to grant that citizen the social assistance sought.

> 58. It follows from the express reference in Article 24(2) of Directive 2004/38 to Article 14(4)(b) thereof that the host Member State may refuse to grant any social assistance to a Union citizen whose right of residence is based solely on that latter provision.
>
> 59. It must be stated in this connection that, although the Court has held that Directive 2004/38 requires a Member State to take account of the individual situation of the person concerned before it adopts an expulsion measure or finds that the residence of that person is placing an unreasonable burden on its social assistance system (judgment in *Brey*, C-140/12, EU:C:2013:565, paragraphs 64, 69 and 78), no such individual assessment is necessary in circumstances such as those at issue in the main proceedings.
>
> 60. Directive 2004/38, establishing a gradual system as regards the retention of the status of 'worker' which seeks to safeguard the right of residence and access to social assistance, itself takes into consideration various factors characterising the individual situation of each applicant for social assistance and, in particular, the duration of the exercise of any economic activity.
>
> 61. By enabling those concerned to know, without any ambiguity, what their rights and obligations are, the criterion referred to both in Paragraph 7(1) of Book II, read in conjunction with Paragraph 2(3) of the Law on freedom of movement, and in Article 7(3)(c) of Directive 2004/38, namely a period of six months after the cessation of employment during which the right to social assistance is retained, is consequently such as to guarantee a significant level of legal certainty and transparency in the context of the award of social assistance by way of basic provision, while complying with the principle of proportionality.
>
> 62. Moreover, as regards the individual assessment for the purposes of making an overall appraisal of the burden which the grant of a specific benefit would place on the national system of social assistance at issue in the main proceedings as a whole, it must be observed that the assistance awarded to a single applicant can scarcely be described as an 'unreasonable burden' for a Member State, within the meaning of Article 14(1) of Directive 2004/38. However, while an individual claim might not place the Member State concerned under an unreasonable burden, the accumulation of all the individual claims which would be submitted to it would be bound to do so.

It is paragraphs 59 to 62 of the above which, in particular, have led to the uncertainties which the present decision seeks to address.

Garcia-Nieto

21. The person whose status was in issue was in the first three months of his residence in the host Member State, covered by Article 6 of the Directive. Such people are the other category of people who, with jobseekers, are excluded from the right to equal treatment by Article 24(2) of the Directive. It was held accordingly to be legitimate to refuse him the subsistence benefit claimed. The case thus reiterates *Alimanovic*, applied to a different, but related, legal context.

Mirga

22. Ms Mirga, a Polish national, had come to the United Kingdom as a child. She had worked for a while, but not for a sufficient period to meet the requirements of the Worker Registration Scheme then applicable to Polish and other A8 nationals. She had worked briefly on two subsequent occasions, but in work which was not registered. She became pregnant and being estranged from her father who was himself ill and her mother having died, she claimed income support.

23. It was argued for Ms Mirga firstly that her rights under Article 8 ECHR meant that she could not be removed from the UK and accordingly that her right of residence under Art 21 TFEU could not be cut back; or that if it could, it could only be done if it would be proportionate, a question which involved considering whether granting income support to her would place an unreasonable burden on the social assistance system of the UK, something as to which there had been no inquiry: see [38]. Lord Neuberger considered that *Dano* and *Alimanovic* had clarified that Ms Mirga's argument must fail. After a review of those cases and of *Brey*, Lord Neuberger concluded at [54] that *Alimanovic*

> "confirmed that a Union citizen can claim equal treatment with nationals of a country, at least in relation to social assistance, only if he or she can satisfy the conditions for lawful residence in that country."

As he saw no reason to distinguish the application of the law to Ms Mirga by reason of her having been subject to the additional provision relating to A8 nationals, it followed that that limb of her argument failed.

24. The second limb of Ms Mirga's argument was that it was disproportionate to refuse her social assistance in all the circumstances of her case, in particular as no assessment had been carried out of the burden that it would impose if she were to be granted the social assistance she sought.

25. Lord Neuberger, having distinguished C-413/99 *Baumbast,* turned at [64] to *Brey.* Having summarised the case and noted its unusual feature in that Mr Brey had been issued with a certificate of residence by the Austrian government yet was turned down for benefit on the ground of a lack of the right to reside, continued at [66]:

> "…However, it is not necessary to address that point further, as it appears to me that the reasoning in *Brey* cannot assist the appellants

on the instant appeals, in the light of the subsequent reasoning of the Grand Chamber in the subsequent decisions in *Dano* and *Alimanovic*.

67. The observations of the Grand Chamber in *Dano* discussed in para 53 above are in point. In *Alimanovic*, para 59, the Grand Chamber specifically mentioned that the court in *Brey* had stated that "a member state [was required] to take account of the individual situation of the person concerned before it … finds that the residence of that person is placing an unreasonable burden on its social assistance system". However, the Grand Chamber went on to say that "no such individual assessment is necessary in circumstances such as those in issue in this case". In para 60, the Grand Chamber explained that:

> "Directive 2004/38, establishing a gradual system as regards the retention of the status of 'worker' which seeks to safeguard the right of residence and access to social assistance, itself takes into consideration various factors characterising the individual situation of each applicant for social assistance and, in particular, the duration of the exercise of any economic activity."

The court then went on to explain that article 7 of the 2004 Directive, when read with other provisions, "guarantees a significant level of legal certainty and transparency in the context of the award of social assistance by way of basic provision, while complying with the principle of proportionality". (In this connection, the Grand Chamber took a different view from that taken by Advocate General Wathelet in paras 105-111 of his Opinion, upon which Mr Drabble had understandably relied.)

68. In my view, this makes good sense: it seems unrealistic to require "an individual examination of each particular case". I note that this was a proposition which the Second Chamber rejected, albeit in a somewhat different (and probably less striking) context, on the ground that "the management of the regime concerned must remain technically and economically viable" - see *Dansk Jurist-og Økonomforbund v Indenrigs-og Sundshedsministeriet* (Case C-546/11) [2014] ICR 1, para 70, which was cited with approval in the present context by Advocate General Wahl in *Dano* at para 132 of his Opinion.

69. Where a national of another member state is not a worker, self-employed or a student, and has no, or very limited, means of support and no medical insurance (as is sadly the position of Ms Mirga and Mr Samin), it would severely undermine the whole thrust and purpose of the 2004 Directive if proportionality could be invoked to entitle that person to have the right of residence and social assistance in another member state, save perhaps in extreme circumstances. It would also place a substantial burden on a host member state if it had to carry out a proportionality exercise in every case where the right of residence (or indeed the right against discrimination) was invoked.

> 70. Even if there is a category of exceptional cases where proportionality could come into play, I do not consider that either Ms Mirga or Mr Samin could possibly satisfy it. They were in a wholly different position from Mr Baumbast: he was not seeking social assistance, he fell short of the self-sufficiency criteria to a very small extent indeed, and he had worked in this country for many years. By contrast Ms Mirga and Mr Samin were seeking social assistance, neither of them had any significant means of support or any medical insurance, and neither had worked for sustained periods in this country. The whole point of their appeals was to enable them to receive social assistance, and at least the main point of the self-sufficiency test is to assist applicants who would be very unlikely to need social assistance."

The Appellant's submissions (in summary)

26. As to *Brey*, Mr de la Mare submits:

a. it prohibits automatic linkages between possession of a right to reside and the availability of benefits of the type with which *Brey* (and the present case) is concerned which have the consequence that a person claiming the benefit will inevitably be found not to be self-sufficient;

b. the question is whether a person has sufficient resources to avoid becoming an unreasonable burden on the host nation's social assistance scheme: see the Advocate General at [88] and the Court at [77]; also *VP v SSWP (JSA)* [2014] UKUT 0032 (AAC) at [87]. Sufficiency of resources and whether a person is an unreasonable burden are separate but related concepts (and it follows that a person may to a degree lack resources but that the burden they impose is a reasonable one).

c. in cases under Art 7(1)(b), some form of individual assessment is required which takes into account the circumstances of the claimant and all like cases in order to assess the burden which granting a benefit would impose on the host Member State;

d. the range of factors is a reasonably wide one and is at the discretion of the Member State concerned;

e. one purpose of such assessment is to identify those who have a real and genuine link with the Member State concerned compared with those with no previous connection;

f. where "very strong" integration exists to a degree which will be found in few other cases, the burden will not be an unreasonable one;

g. the individual assessment which is required forms part of the test of proportionality so as to make sure the degree of interference with a person's rights of free movement is no more than required. It is accepted that that

proposition is subject to the need for the individual to show that exceptional factors are in play so as to trigger the need for a *Brey* analysis;

h. because it is derived from proportionality, the burden of proof is on the Secretary of State to show that granting the benefit would represent an unreasonable burden. In support, he relies upon C-503/09 *Stewart v SSWP* [2012] 1 CMLR 13; and

i. there is no warrant for collapsing the test into a narrow set of circumstances – in particular to limit its application to where the assistance to be provided would be of short duration.

27. As to the other principal authorities, Mr de la Mare submits:

a. none bears on the continuing correctness of *Brey*, in that none concerned a case under Art 7(1)(b);

b. *Dano* was a "benefit tourism" case. Ms Dano was not a jobseeker. In legal terms the case concerned the ambit of the non-discrimination duty under Art 24. The Court based its decision on avoiding undermining the Directive's provisions: [74]. The inequality of treatment which Ms Dano experienced flowed from the very structure of the Directive (in particular Art 24): [75-78];

c. *Alimanovic* concerned people who had been workers but only for limited periods of time and were no longer able to retain "worker" status, but rather were jobseekers. The situation of workers is different, in that ab initio there is no need to show sufficiency of reassures. For such people the Directive sets up a gradated scheme based on differential length of past employment, reflecting degrees of integration in the host Member State. The Court required the logic of that regime to be respected. Para [59] indicates that the *Brey* test is still good law where it applies, but it did not do so to former workers, now jobseekers, such as Ms Alimanovic: for those people [60] indicates that the Directive's own "gradual system" is to prevail. The proposition at [62] that "while an individual claim might not place the member state concerned under an unreasonable burden, the accumulation of all the other individual claims which would be submitted to it would be bound to do so" is consistent with his reading of *Brey*: that what is required is to take the cohort of claimants whose circumstances are the same as those of the claimant concerned and gross up in order to determine the effect on the Member State's social assistance budget;

d. *Garcia-Nieto* has the same logic as *Alimanovic,* in a different but related context. Mr Garcia-Nieto's rights were under Article 6 (initial right for the first three months). Article 24(2) contained an express derogation permitting social assistance not to be given to such people, so it was a question of upholding the structure of the Directive. As in *Alimanovic*, attempted reliance on *Brey* in the case was based on seeking to apply the latter away from its natural home, in order to circumvent the Directive;

e. Mr de la Mare's initial submission was that *Mirga* was a case concerning former workers or jobseekers, not an Art 7(1)(b) case. The Supreme Court rejected an argument that the European Convention on Human Rights could be relied upon so as to prevent the claimant's rights under Art 21 TFEU from being defeated. It was not, as I had put to him in argument, that *Mirga* concerned people who needed to be self-sufficient if they were to have a right to reside, but were not. His answer was that the only way to make sense of the Supreme Court's answer at [67] on the proportionality issue was that they were treating Ms Mirga as a person with no economic independence (like Ms Dano) or as someone who had now lost worker status (like Ms Alimanovic). Paras [68]-[70] of the decision in *Mirga* were *obiter;* and

f. As to proportionality, the categorisation in *Mirga* of *Baumbast* as a "near miss" case if anything helps the present appellant on the basis that her failure to obtain her Dutch pension earlier, and with it CSIC, was in the nature of a "technical breach".

28. In the light of the above, Mr de la Mare submits:

a. although the Secretary of State accepts that *Brey* applies to someone in the claimant's position, that acceptance is on the basis that the scope of *Brey* is narrowed virtually out of existence;

b. what the record of the DWP's decision under appeal shows is not the application of *Brey* which he submits is required (or indeed any application of *Brey*); on the contrary, it shows the sort of automatic disentitling from social assistance which *Brey* held to be impermissible;

c. contrary to what is said in *VP* at [79], *Brey* is not only concerned with a situation where a person has previously been self-sufficient but that situation no longer obtains, although that factor may help build a more persuasive case;

d. in any event, on the evidence, as at the date of her claim for state pension credit (17 January 2013) she had (and had had for a while) both CSIC by virtue of the Netherlands retirement pension she had by then been awarded and some £5000 capital, which she was eroding relatively slowly because of the various other sources of funds available to her;

e. a proper *Brey* assessment of the claimant would take into account a range of factors and would apply them to calculating the collective burden. This would be "at most" all cases of elderly EEA nationals, who: (i) are widows of British Nationals; (ii) with British National children; (iii) who have long depended on such children and (iv) have long lived with them in the UK [this on the facts has to be understood as meaning in the UK rather than sharing a household] such that it would be an Article 8 ECHR breach to remove them; (v) who could have obtained permanent residence but for a technical failing to get CSIC put in place earlier; and (vi) who now have CSIC in place;

f. it would take into account that if she had been well advised, she would have claimed the Netherlands benefit in 2006 and would have had comprehensive sickness cover and (her remaining capital at that time being commensurately greater) sufficient resources, entitling her to a right of permanent residence by the time of her claim for pension credit;

g. if the appellant's husband were still alive, he would have had the right to reside as a British citizen and the appellant, his wife, with him;

h. if the appellant had applied for a residence certificate at any point from December 2012 onwards she would have been entitled to one.

i. further, it is material that had the appellant's son been a Dutch national working in the UK, the appellant would have had a good claim, but as he is a British Citizen, she does not – in effect so-called "reverse discrimination". The cases relied upon by Ms Apps are about whether a situation falls within EU law. In this case EU law is in play by virtue of the appellant's EEA nationality and the receipt of a pension from another Member State, bringing her within the scope of Regulation 883/04;

j. while it is necessary to look at the collective effect on a Member State's finances, the correct test looks at the collective effect of claims made by a cohort with common features. In the present case, the claimant's circumstances and the degree of integration in the UK they reveal are such that the number of claims made by EU nationals in similar circumstances is likely to be minimal. It is appropriate for the Upper Tribunal to have regard to that cohort rather than the more general of claimants from EU Member States indicated by the evidence on which the respondent seeks to rely;

k. applying the above, the appellant had sufficient resources to avoid becoming an unreasonable burden; and

l. if however the Upper Tribunal is minded to conclude that *Brey* is either wrong or is to be interpreted so narrowly as to deprive of it practical effect, a reference should be made to the CJEU under Art 267 TFEU.

The Respondent's submissions (in summary)

29. As to *Brey*, Ms Apps submits:

a. whilst her written submission had indicated that "where a claimant is pursuing precisely the same argument as the claimant in *Brey*, in the same circumstances, *Brey* requires the respondent to consider the claimant's circumstances in the round before concluding that the claimant is not self-sufficient" and that the appellant's argument was said to be "similar" to that of the claimant in *Brey* rather than "precisely the same", it became clear that her submission was not that, because of any finely nuanced distinction around the identical nature (or otherwise) of the argument being pursued in the present case *Brey* did not apply, but rather that *Brey* was correctly applied to the appellant's case;

b. the respondent resists any attempt to expand the reasoning in *Brey* to other circumstances;

c. the appellant is not precluded from having a right to reside, merely by the fact that she has claimed pension credit: see *Brey* at [66];

d. para 72 of *Brey* should be interpreted in the light of *Garcia-Nieto* and *Alimanovic*;

e. while in theory it is possible for a person to claim state pension credit while lacking the right to reside, relying on *Brey*, the doctrine has a very narrow field of application; and

f. the respondent was entitled to find on the facts that the appellant could not establish she was self-sufficient at the date of claim because of her limited income, savings and the help provided by her son towards her rent and by way of payment for her groceries.

30. As to the other principal cases:

a. *Alimanovic* confirmed that Art 24 of the Directive does not preclude national legislation from excluding from social assistance those who have lost their right to reside through no longer retaining worker status. At [59] *Alimanovic* confirms that *Brey* could not apply to the circumstances in the case, but does not overrule *Brey* on its own facts. *Alimanovic* is also relied upon for para [62] for the proposition that "while an individual claim might not place the Member State concerned under an unreasonable burden, the accumulation of all the individual claims which would be submitted to it would be bound to do so";

b. *Garcia-Nieto* confirms that those falling within Art 6 can be excluded from special non-contributory cash benefits which also constitute social assistance. Ms Apps relies on dicta by the CJEU at [39] referring to the objective set out in recital 10 to the preamble of "preventing Union citizens who are nationals of other member States from becoming an unreasonable burden on the social assistance of the host Member State and at [45] reiterating the objective pursued by the Directive of "maintaining the financial equilibrium of the social assistance system of the Member States";

c. it is accepted that *Dano* is distinguishable in that Ms Dano had never been self-sufficient, but the present appellant, like Mr Brey, once had been. (It does however provide authority at [80] – see [19] above - for the proposition that the effect of *Dano* is that had the present appellant in fact received pension credit, the UK would have been entitled to disregard that income in assessing whether she had sufficient resources and whether she would be an unreasonable burden); and

d. it is accepted that *Mirga* is not a case which deals with those who like, Mr Brey and the present appellant, were once self-sufficient but are no longer. The case does however reiterate the principle that an individual should not become "an unreasonable burden": see recitals 10 and 16 and articles 14 and

24(2) of the Directive. At [69] it holds that the principle would be severely undermined if a host Member State had to carry out a proportionality exercise in every case where a person is not a worker, self-employed, student or self-sufficient. Ms Mirga and Mr Samin were none of the above and the inference is that to have allowed their claims would have resulted in an unreasonable burden on the UK.

31. In the light of the above, Ms Apps submits that:

a. the only remaining question between the parties is whether, on an individualised assessment (of the type envisaged in *Brey*) the Appellant would become an "unreasonable burden" on the UK (as envisaged in Articles 7(1)(b), 8(4), 14(1) and recitals 10 and 16 of the Directive);

b. the appellant was not refused pension credit solely because she had applied for it: see the FtT's findings at [6]-[21] of its decision;

c. her past resources had been irreparably depleted and at the time she claimed benefit she lacked sufficient resources;

d. reverse discrimination is not contrary to EU law: C-94/96 *Land Nordrhein-Westfalen v Uecker* [1997] 3 CMLR 963 at [23]. When the CJEU has been encouraged to depart from its case law and find that EU law is breached by less favourable treatment of the Member State's own nationals, it has declined to do so: see e.g. C-212/06 *Government of the French Community v Flemish Government* [2008] 2 CMLR 31;

e. the focus of a *Brey* inquiry is a factual one on the evidence presented. Hypothetical consideration of the situations such as if the appellant's husband were still alive, or if the appellant had made an application for a residence card, is not to the point;

f. the cohort is not as small as Mr de la Mare suggests. The CJEU in *Brey* did not accept the indications in the Advocate General's Opinion at [86-88] that matters of personal history going to links with a Member State were relevant, so the pool is on any view a less restricted one than Mr de la Mare suggests. On the evidence now filed[1] there were 1070 new claims for pension credit made by EEA nationals in 2015 and 1590 in 2016. Of those 29% failed the Habitual Residence Test (of which the Right to Reside is an integral component) in 2015 (the grounds on which they failed are not in evidence), and 25% in 2016. Most people who claim pension credit do so for a substantial period: within the appellant's age bracket 88% have claimed for 5 years or more. A finding that the appellant has the right to reside would confer on her a right not only to pension credit but also to housing benefit. From this it cannot be assumed that the appellant would not pose an unreasonable

[1] "Analysis of EEA Migrants' Access to Income-Related Benefits measures- Analysis relating to the measures introduced to restrict access to income-related benefits for EEA migrants from December 2013", Department for Work and Pensions, August 2016

burden or that "widening the scope of *Brey*" would not risk benefiting a substantial cohort of similar claims;

(g) later in submissions she appeared to go further and suggest that in any event, it is not necessary to look at other comparable cases and it is not possible to look at other claimants on the DWP's systems. It is the individual's financial circumstances that are relevant; and

(h) *Mirga*, *Alimanovic*, *Dano* and *Garcia-Nieto* "consider the framework and principles of the Directive as a whole and as such, are binding on the Upper Tribunal."

Consideration of the case law

32. The cases referred to immediately above are indeed binding on the Upper Tribunal (so is *Brey)*. The question is, rather, for what proposition(s) any of them is authority. *Alimanovic* establishes that *Brey* does not apply to the circumstances with which *Alimanovic* is concerned. *Dano* is readily distinguishable for the reasons submitted by Mr de la Mare at [27b]. *Garcia-Nieto* is consistent with *Alimanovic*, but otherwise adds little. I agree with Ms Apps that the cases reiterate that protecting the finances of Member States against people who may become an unreasonable burden is an objective of the Directive, reflected in recital 10, but *Brey* at [54-57] had already explicitly addressed that recital in reaching the conclusion that the Directive allowed the imposition of "legitimate" restrictions in connection with the grant of benefits and gone on to consider what sort of restriction was "legitimate". I further accept that the authorities show a disinclination on the part of the CJEU to expand the ambit of *Brey* to other circumstances, but the present decision does not expand it to other circumstances. However, no matter how much one reads *Brey* in the light of the subsequent decisions, whilst they limit the types of right under the Directive to which *Brey* can be applied, none of them in any way suggests that *Brey,* where it does apply, is no longer good law, or has otherwise become irrelevant. There is in fact little or no dispute of substance between the parties as to the direct consequences of the operative decisions themselves in the CJEU cases post-*Brey*. I accept Mr de la Mare's analysis summarised at [27 a-d]. Such dispute as there is goes to the relevance of dicta in those cases when *Brey* is being interpreted and are addressed so far as necessary in my discussion of *Brey* below.

33. *Mirga* requires particularly careful attention. At [45] Lord Neuberger held:

> "Accordingly, when one turns to the 2003 Accession Treaty and the 2004 Directive, I consider that, because Ms Mirga has not done 12 months' work in this country, she cannot claim to be a "worker", and, because she is not a "jobseeker", "self-employed", a "student", or "self-sufficient", it would seem to follow that she can be validly denied a right of residence in the UK, and therefore can be excluded from social assistance. In those circumstances, it must follow that article 21.1 TFEU cannot assist her."

34. I do not accept Mr de la Mare's initial submission ([27e]) that *Mirga* was a case about a former worker or jobseeker and he did seem to modify that position in the course of argument. Ms Mirga had not fulfilled the requirements of the Worker Registration Scheme and was not looking for work. The decision's potential ambit goes wider than former workers and jobseekers to those without resources, but there is in my view one key difference which means that it is not determinative of the present case. In that case there was no evidence that Ms Mirga had any resources at all, whereas here the appellant on any view had some, her earlier self-sufficiency was and is conceded, and the question, rather, was whether, when she claimed, they were sufficient for her not to become an [sc. unreasonable] burden on the social assistance system.

35. At [66], having summarised aspects of *Brey*, including noting why because of the emphasis on the certificate of residence he considered it an "unusual case", Lord Neuberger holds that:

> "[T]he reasoning in *Brey* cannot assist the appellants on the instant appeals, in the light of the subsequent reasoning of the Grand Chamber in the subsequent decisions in the *Dano* and *Alimanovic* cases.

36. As to *Dano*, he was referring back to [53] of his judgment:

> "53. In para 61 of *Dano*, the Grand Chamber described the right under article 18 of the TFEU as having been "given more specific expression in article 24 of [the 2004 Directive]". In para 63, citing *Brey*, para 61, the court pointed out that if someone has recourse to "assistance schemes established by the public authorities", he may "during his period of residence, become a burden on the public finances of the host member state which could have consequences for the overall level of assistance which may be granted by that state". In para 69, it was made clear that "a Union citizen can claim equal treatment with nationals of the host member state only if his residence in the territory of the host member state complies with the conditions of [the 2004 Directive]". In para 73, the court summarised the effect of article 7(1) of the 2004 Directive, and said in the following paragraph that, if "persons who do not have a right of residence under [the 2004 Directive] may claim entitlement to social benefits under the same conditions as those applicable to nationals [that] would run counter to an objective of the Directive". In para 76, the purpose of article 7(1)(b) of the 2004 Directive was described as being "to prevent economically inactive Union citizens from using the host member state's welfare system to fund their means of subsistence". Finally, in para 80 the Grand Chamber said that a person's "financial situation … should be examined specifically … in order to determine whether he meets the condition of having sufficient resources to qualify … under article 7.1(b)".

37. Lord Neuberger's reliance on *Dano* thus includes its para 80. In *Dano* there had been a finding of fact by the referring court ([81]) that Ms Dano did not have sufficient resources. The question for the CJEU was therefore not how to assess whether a person has sufficient resources when such an assessment is required, but the legality of provision applied to her on the basis that she did not. In the context of a proportionality submission in respect of Ms Mirga, who it appears was likewise without resources, one can understand how *Dano* came to be applied.

38. Nonetheless, even *Dano* is not suggesting that an examination of an individual's circumstances is not required – as para 80, quoted above, makes clear, quite the opposite. The exercise is guided by Art 8(4) – that it is not permissible to lay down a fixed amount which constitutes "sufficient resources" but must take into account the personal situation of the person concerned.

39. I do not read [72] of *Brey* as creating a free-standing test based on proportionality but rather as saying that Art 7(1)(b), on which Art 8(4) is parasitic, enables an assessment which involves an exercise in proportionality in balancing the burden on the host Member State against the demands of "a certain degree of financial solidarity" towards nationals of other Member States. It is an area where, by analogy with Art 7(3)(c) forming part of the gradated system for retaining worker status discussed in *Alimanovic* at [61], the Directive itself provides a mechanism for a proportionate response to be achieved. In my view, it is a process of applying the Directive – in particular Arts 7(1)(b) and 8(4), with whatever element of proportionality may be considered inbuilt within them,- with which the present case is at least potentially concerned, as distinct from the second ground in *Mirga*, which was concerned with using proportionality so as to undermine it. In my view therefore, the issue to which Mr de la Mare's submission at 27f is directed does not arise; but if it did, it is unsustainable anyway on view of the content of the letter dated 25 May 2011 from the Soziale Verzekeringsbank indicating that, at that point, the appellant did not qualify for a Dutch pension.

40. I do not agree with Mr de la Mare that paras 68 to 70 of *Mirga* were obiter; rather, they were in my view an integral part of the Supreme Court's reasoning why the provisions of the Directive should not – at least in non-exceptional cases -be undermined through individual proportionality assessments. However, it seems to me that such remarks, readily understandable in the context of demands for individual proportionality assessments, would have no purchase upon an examination mandated by the Directive itself. Although Mr de la Mare suggested that *Mirga* might provide a gloss on the obligation to conduct a *Brey* style assessment by requiring that the case be an exceptional one as, he submitted, the appellant's was, I am doubtful whether that is right. In the context of the use of proportionality to undermine the Directive, the clear implication is if it is possible at all, it could only be in an exceptional case and that does imply some kind of threshold test. But the role of proportionality in Arts 7(1) and 8(4) is different. *Brey* itself

provides no warrant for a threshold test. It is a question of applying the Directive in accordance with its terms. However the point was not fully argued and if there be such a threshold in cases of this type, I find that the appellant's personal circumstances (as hereafter explained), in particular her age and her wide-ranging sources of financial or other help, are sufficient to meet such a threshold.

41. Mr de la Mare suggests ([26h]) that the burden of demonstrating that granting a benefit would be an unreasonable burden is on the respondent. *Lucy Stewart*, on which he relies, does not really deal with the burden of proof but in any event it was a case in which the UK was contending that particular domestic legislation should be upheld as proportionate and so it is unsurprising that the UK made the running to justify it. That is not the context of the present case, which concerns whether the requirements of the Directive have been correctly applied. It is fair to observe though that if one were to apply the principle in *Kerr v Department for Social Development* [2004] UKHL 23; [2004] 1 WLR 1372, which addresses the responsibilities of both claimants and the department, matters going to the collective impact of making an award are likely, if within either party's knowledge, to be within that of the department. What happens if that principle does not enable sufficient information to be obtained will have to be considered as and when it arises.

42. As to *Alimanovic*, Lord Neuberger noted how it had decided that no *Brey*-style assessment was required in the circumstances of that case. He cites para [60] of *Alimanovic* where the CJEU explains that the gradated system for retaining worker status takes into account a suitable range of factors. He then goes on to observe:

> "The court then went on to explain that article 7 of the 2004 Directive, when read with other provisions, "guarantees a significant level of legal certainty and transparency in the context of the award of social assistance by way of basic provision, while complying with the principle of proportionality"."

43. What the CJEU had actually said at [61] of *Alimanovic* was this:

> "By enabling those concerned to know, without any ambiguity, what their rights and obligations are, the criterion referred to both in Paragraph 7(1) of Book II, read in conjunction with Paragraph 2(3) of the Law on freedom of movement, and in Article 7(3)(c) of Directive 2004/38, namely a period of six months after the cessation of employment during which the right to social assistance is retained, is consequently such as to guarantee a significant level of legal certainty and transparency in the context of the award of social assistance by way of basic provision, while complying with the principle of proportionality."

Article 7(1) of the Directive is where rights of residence for more than three months are set out. In the passage quoted immediately above, though, the

CJEU was referring to Paragraph 7(1) of Book II, which referred to the relevant German benefits legislation containing the exclusion for jobseekers, the Sozialgesetzbuch Zweites Buch – see the definition in [3] of the judgment and the discussion at [14] and [15]. There is evident scope for confusion of the identically numbered provisions. In [61] of *Alimanovic* the only provision from the Directive which the CJEU was endorsing for its legal certainty and transparency was Article 7(3)(c). It was in my respectful view not making a point by reference to Article 7 as a whole.

44. The point is however academic if I am correct in my view that [61] of *Alimanovic* was not being relied upon by the Supreme Court in order to say that the whole of Article 7 of the Directive has the features noted at [60] of *Alimanovic.* The Supreme Court in my respectful view was, rather, relying on the CJEU's endorsement of a rule-based approach in the circumstances of *Alimanovic* rather than a case-by-case one (as also in *Dansk Jurist*, noted at [68] of *Mirga*) in order to rebut the submission on behalf of Ms Mirga and Mr Samin that they should be permitted effectively a free-standing argument based on proportionality, when they did not and had not, complied with any of the limbs of Article 7. As I have indicated above, in my view that is a different question from the need for an assessment based on what the Directive itself requires.

45. I thus do not consider *Mirga* determinative of the matter I have to decide. Further, I accept Mr de la Mare's submission (with which Ms Apps is in at least broad agreement) that the CJEU's post-*Brey* cases have excluded *Brey* from applying outside its proper home of Art 7(1)(b), but have not overruled it. It is common ground that the case, where it applies, prohibits an automatic linkage between possession of the right to reside and the availability of a benefit such as state pension credit.

46. I turn accordingly to looking at the factors which *Brey* requires to be addressed, where the case does apply.

a. Under Article 8(4) it is the "personal situation" of the person concerned or, as expressed in *Brey* at [64], "the personal circumstances characterising the individual situation of the person concerned".

b. The relevance of amounts prescribed as a person's requirements by benefit legislation- *Brey* [63]

Failure to have the resources to meet the statutorily prescribed level of requirements "could be an indication" that the person lacks sufficient resources to avoid becoming an unreasonable burden. However, [64] is in uncompromising terms: the competent authorities cannot draw such conclusions without carrying out the requisite assessment by reference to the claimant's personal circumstances. It does seem to me, though, that the two are capable of being reconciled to a degree e.g. if a person's prescribed requirements include a premium e.g. to reflect that they have a long-term illness, although there may yet be other relevant "personal circumstances".

I accept Mr de la Mare's submissions at [26b] and – subject to the discussion below about the cohort – [26c].

c. Factors bearing on the burden on the Member State's social assistance system: (i) duration of residence (ii) amount of the benefit and (iii) period for which it is available : *Brey* [76]

It is clear from the context of [76] that the three numbered factors are relevant to calculate the "burden". "Duration of residence" in this paragraph is in my view not looking at the degree of integration reflected in past residence in a Member State (which would not be relevant to calculating a future burden) but at the likely future duration of residence following the time when the assessment falls to be carried out. In the context of benefits which, like all the main means-tested benefits in the UK, are not time-limited, "the period for which [the benefit] is available" does not add much to the "duration of residence", but some benefits across Europe may be time-limited. The same overall idea is expressed at [78] as "the period during which the benefit applied for is likely to be granted to him".

d. Other (non-exhaustive) factors: factors going to income: *Brey* [78]

In a paragraph introduced by "in particular" and making clear that it is non-exhaustive, both the "amount" and the "regularity" of a person's income are said to be relevant. The paragraph also mentions "the fact that those factors have led those authorities to issue him with a certificate of residence": given that a certificate is declaratory of eligibility at a certain date, not constitutive, it seems to me that this can only go to the weight to be placed on certain evidence or the force attached to submissions. Mr Brey's residence certificate and the role it played in the decision is shrouded in mystery, as Lord Neuberger and others have acknowledged.

e. What about the recital 16 factors?

To recap what recital 16 says:

> "As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion. In no case should an expulsion measure be adopted against workers, self-employed persons or job-seekers as defined by the Court of Justice save on grounds of public policy or public security."

In *Mirga* at [46] Lord Neuberger observes that "the Directive distinguishes between the right of residence and the act of expulsion." There is no question

of the appellant being expelled. But is recital 16 to be confined to its apparent context of expulsion, or does it serve as a proxy for other situations where the existence of an "unreasonable burden" falls to be considered? *Brey* was not an expulsion case either. Unfortunately *Brey* [69] is not very clear:

> "Furthermore, it is clear from recital 16 in the preamble to Directive 2004/38 that, in order to determine whether a person receiving social assistance has become an unreasonable burden on its social assistance system, the host Member State should, before adopting an expulsion measure, examine whether the person concerned is experiencing temporary difficulties and take into account the duration of residence of the person concerned, his personal circumstances, and the amount of aid which has been granted to him."

The context of [69] looks back to [64], which is then followed by sections consisting of one or more paragraphs, prefaced by "First", "Second" "Furthermore" [i.e. the above paragraph] and "Lastly". Para [64] addresses the need for an assessment of the burden which granting that benefit would place on the national social assistance system. In my view the CJEU was relying on Article 16, outside its stated context of expulsion, in support of its view that personal circumstances need to be taken into account in assessing whether a claimant has sufficient resources for the purposes of Art 7(1)(b). However, I consider that caution may be needed in directly reading across considerations expressed in a manner appropriate to the context of expulsion, which envisages a situation of looking back, unlike a new benefit claim.

f. Temporary claims

I deal with this expressly in view of Mr de la Mare's submission at [26h]. The period during which the benefit is likely to be granted clearly is a relevant factor (*Brey [69]* and [78]). "Temporary difficulties", referred to in recital 16, are a factor which seems equally applicable in the context of an expulsion or of a benefit claim. Further, because most benefits are paid at periodic intervals, the less temporary a claim is, the greater the burden on a Member State's social assistance budget. It is thus likely, given the content of recital 10, that the temporary nature of a claim may carry considerable weight as may – in the contrary direction – an open-ended claim. I do however accept that conceptually the application of *Brey* is not limited to temporary claims.

Is there any indication of what was not considered relevant?

47. Paras 86 to 88 of the Advocate General's opinion refer to Mr Brey's lack of personal ties to Austria, the fact that he had not accumulated any significant periods of residence in Austria before making his application and the fact that the situation would have been different "were he to have forged a link to Austrian society, for instance by having worked, resided and paid taxes there on a previous occasion."

48. I can find no indication in the Court's judgment by its references to personal circumstances that it was endorsing the suggestion that this sort of detailed consideration of a claimant's past history was required. Discussion of prior integration is conspicuous by its absence from the judgment. It also seems to me highly doubtful that consideration of a claimant's past history could be reconciled with the regime of Article 8(3), which provides that:

> "For the registration certificate to be issued, Member States may only require that… Union citizens to whom point (a) of Article 7(1) applies present a valid identity card or passport and provide proof that they satisfy the conditions laid down therein."

This is clearly intended as a relatively light-touch regime and is in my view liable to be inconsistent with an examination of the extent of a person's pre-existing links with a country. I accept Ms Apps' submission that the Court chose deliberately not to follow the Advocate General's suggestion in this regard.

49. I derive a degree of further support for this view from the Directive's use of the term "personal circumstances". "Circumstances" are what "stands around" a person – how things are now. The French and German versions use "situation", which has a similar emphasis on the present. It is also clear that the general "direction of travel" in both the CJEU and Supreme Court, reflected in *Dansk Jurist*, *Alimanovic* and *Mirga*, would tend to support an interpretation which is less, rather than more, broad when it comes to the scope of an investigative obligation in this context. On a practical level, the matters needing to be examined must be such that it is realistically practicable for Member States to identify the consequences for their social assistance budget as a whole, without the need to incur such a level of expenditure on administration or information technology that it detracts from the viability of their social assistance scheme. To this extent, but no further, I go along with Ms Apps' submission at [31g].

50. It follows that the range of factors does not extend as far as Mr de la Mare's submission at [26 f and g].

Collective impact

51. What is required is a collective assessment. That much is clear from *Brey* [77] which refers to the "burden…on the social assistance system as a whole".

52. I derive only limited additional assistance in this respect from *Alimanovic* [62]. It is not clear that it was needed for the purposes of the decision that either someone met the requirements for retaining worker status or they did not and the provisions of the Directive in that regard, which were held to be sufficient, did not raise any question of whether an "unreasonable burden" would arise. Further, the paragraph addresses Article 14(1), which is concerned with the rights of EEA citizens in the first three months, which was not the position of Ms Alimanovic or her family. The CJEU's observation that

"the accumulation of all the individual claims which would be submitted to it would be bound to do so" can only be understood as the consequences if the gradated system for retaining worker status were, in effect, to be torn up. It cannot have intended (least of all in a case which did not involve Art 8(4)) to do away with the individual assessment which Art 8(4) of the Directive requires or to make it nugatory by saying that an individual assessment of a person's circumstances will always be outweighed by the total impact of claims In my view it neither adds to, nor detracts from, what is said in *Brey* at [77], where a case under Article 7(1)(b) is concerned.

53. I understood Ms Apps at one point to submit that it was not necessary to look at other comparable cases and that it sufficed to look at individual financial circumstances. If that was her submission, I do not agree with it. The authorities above establish that it is a collective assessment which is required. I have considered the issue of practicability at [49] above.

54. The only guidance on this aspect which can be derived from *Brey* itself is that it "may" be relevant to determine the proportion of beneficiaries of that benefit who are Union citizens in receipt of a retirement pension in another Member State: [78]. It is at first sight hard to see why this somewhat faintly argued point has been alighted upon. The burden on a Member State is far more likely to arise not from those who are beneficiaries of the benefit but from those who have been turned down or not even applied for it. Nor can I see how, without more, receipt of a retirement pension in another Member State is liable to produce sufficient data to enable the question to be addressed about the collective impact of granting a claim made by a particular claimant. It appears likely that the point has its origins in evidence filed by the Austrian government – see AG Wahl's Opinion at [3] – but that evidence did not suffice to get Austria home.

55. I have rejected at [48]-[49] the need to consider matters of past history. That has the effect of reducing somewhat the level of detail in the attributes needing to feature in the cohort. An assessment of collective impact may necessarily still be somewhat rough and ready, because of reasonable and proper limitations on the level of detail in respect of which information can be retrieved and in my view a tribunal should be astute to resist arguments that by reason of some relatively minor feature, the cohort is not a proper one.

56. I do not consider it is right to say more on this aspect. When the respondent encounters the need to make a *Brey*-style assessment, he will have to respond as best he may on the evidence at his disposal. As claimants' circumstances vary, so also may the case which the respondent needs to make in response and it would be wrong to pre-empt that.

The application of Brey

57. In my view, there is a logically prior question. I previously expressed the view in *VP* that the CJEU in *Brey* was concerned with where a right of residence had originally existed but had been lost. The same can be seen in,

for instance C-184/99 *Grzelczyk*. Mr de la Mare does not agree (see [28a]), but I stand by what I said in *VP* at [79]. Indeed, it is that very difference which is the primary reason for distinguishing the appellant's case from that of Ms Mirga.

58. The logic of my position about the need for a prior right of residence to have arisen is not affected by the submission, correct as it is, that a residence permit, such as held by Mr Brey, is declaratory not constitutive. It still follows that the Austrian authorities must have considered that Mr Brey had the resources when they issued the residence permit, even if we now know it was for a matter of days. In the present case, the appellant might have been successful in obtaining a residence certificate, had she applied for one, in December 2012 by which time, thanks to her Dutch pension, she had obtained CSIC, but that would have done no more than provide evidence that at that time she was considered to be a qualified person and thus that she was in a position similar to Mr Brey (albeit for longer).

59. In any event, the point canvassed in [57] and [58] is academic, as the respondent has conceded that the appellant had sufficient resources and latterly comprehensive sickness insurance cover. That concession obviates any need to explore various other difficult questions about what sufficiency of resources actually entails, some of which are canvassed in *VP* and in *SG v Tameside MBC.*

60. Accordingly on any view, the application of *Brey* is triggered. For the reasons above, none of the CJEU authorities, nor *Mirga*, exclude *Brey* from applying in its proper context of Article 7(1)(b).

61. While there may be scope for some debate around the edges of what is required, the DWP's decision of 15 July 2013 contains no indication at all that there was any consideration of whether the appellant's personal circumstances might be such as not to make her an unreasonable burden on the social assistance system of the UK, merely recording the decision maker's view that she is not a qualified person and cannot derive "family rights" from her son, he being a British citizen. Although the matter was then referred for reconsideration, where reference was made to the appellant's Dutch pension and the assistance provided by the Dutch charitable fund, whilst the decision records that "the Decision Maker has correctly decided that [the appellant] is not a qualified person", no explanation is provided which would enable me to conclude that an assessment compliant with *Brey* was carried out. Ms Apps seeks to persuade me that the appellant was not refused benefit merely "because she applied for it". On a somewhat pedantic view that is so, but it does not assist Ms Apps ([29a]) in demonstrating that a *Brey*-type assessment was carried out. Mr de la Mare's submission at [28a and b] is in my view made out. Nor was the DWP's failing in that regard cured by the First-tier Tribunal's decision, which treated the matter as a claim based on permanent residence, to which only the existence of CSIC was in issue, and it too failed to carry out a *Brey*-type assessment.

62. What then is required? The appellant's "circumstances" are those in which she finds herself. Contrary to Mr de la Mare's submission, I am not persuaded that past matters said to go to links with the UK are relevant to her "circumstances" within the meaning of *Brey* and Art 8(4). Nor are his appeals to what might have happened if circumstances had been different, such as those at [28 f-i]. (That at (f) is in my view unarguable in any event because of the content of the letter of 25 May 2011 (see[39])). It seems to me that (in the first instance and non-exhaustively) essentially what was (and is) needed is an assessment of her needs and resources. The "applicable amount" typically used in benefit calculations is a standardised notional figure for need and can provide a starting point but is not determinative. There is also the question of her rent and associated bills such as council tax. Equally there needs to be a proper assessment of her income, including the likely sustainability of payments (which is how I interpret "regularity": *Brey* [78]) or how else can the burden which granting the benefit would be to the UK be assessed? Whether it is seen as a form of income, or as a reduction in need, an adjustment would need to be made e.g. if a person receives regular benefits in kind that alleviate the need for expenditure- say a regular food delivery paid for by someone else. I reject as being contrary to authority, notably C-408/03 *Commission v Kingdom of Belgium*, Ms Apps' submission that help provided by the appellant's son was an indicator that she was not self-sufficient at the date of claim. Resources from third parties, including resources in kind, may be taken into account. Her age must be a relevant factor as is her stated – and understandable – intention to remain in the UK, near her son and his family in her advancing years. The requirement to consider "personal circumstances" means that there may, of course, be others.

63. I do not consider Mr de la Mare's argument relating to reverse discrimination assists him. If the appellant's son had been an EEA national who was carrying on a business in the UK, then the appellant might have had a right to reside as his dependent family member. Assuming dependency, the matter would turn on the son's status, on whose rights those of the appellant would depend. The son would have exercised freedom of movement rights and EU law would be engaged. On the actual facts, there is no indication that the son has made any use of freedom of movement rights and EU law is not engaged. Mr de la Mare's reading of the authorities cited by Ms Apps does not assist him and I agree with Ms Apps that if in such circumstances a national of a Member State experiences a disadvantage by virtue of the non-applicability of EU law to him, that is a matter for national law, which in this case does not assist him.

64. I have not seen fit to make a reference under Article 267 TFEU. Ms Apps does not invite me to do so. Mr de la Mare does, but only in the circumstances in [28l] above, which in the light of this decision are not made out. Further, *Brey* [78] makes clear that whether an "unreasonable burden" arises is a matter for the national courts.

65. Accordingly I find that the First-tier Tribunal did further err in law, in failing to conduct the assessment which *Brey* requires and that such an assessment needs to be carried out. It is most convenient to do that as part of the present Upper Tribunal proceedings, with a view to using the power provided by s.12 of the Tribunals, Courts and Enforcement Act 2007 to remake the decision. In my view it is preferable to allow an opportunity for the evidential gaps to be filled before reaching that decision.

66. For that purpose I make the following directions:

a. within 21 days of the date of the letter issuing this decision, the appellant must file and serve any further evidence on which she seeks to rely;

b. within 21 days of the date of service of material under a., the respondent must file and serve any further evidence on which he seeks to rely;

c. within 14 days of the date of service of material under b., the appellant may file and serve a written submission directed to the conclusions the Upper Tribunal should reach when carrying out a *Brey*-style assessment as interpreted in the present decision, on the evidence then available to it;

d. within 14 days of the date of service of the submission under c., the Respondent may file and serve a submission in response;

e. within 7 days after service of the submission under d., the appellant may file and serve a submission in reply;

f. if either party seeks a further oral hearing for the purposes covered by these Directions, they must indicate accordingly as soon as reasonably practicable after the perceived need for one has become apparent.

67. The true scope of *Brey* has been a subject of some difficulty in social security law for some time. Recent decisions of the CJEU have identified a number of areas to which it has no application. In a case where it still does, such as the present, I have given such guidance as I feel able on the material before me. The present decision suggests that the field of application of *Brey* is neither as narrow as Ms Apps might wish, nor as broad as Mr de la Mare might wish. How many cases which will succeed in the outcome, relying on the principle, will only be established with the benefit of experience.

CG Ward
Judge of the Upper Tribunal
2 February 2017