

## A tale of two citizens: The Brey-Dano proportionality gap in UK courts and tribunals

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### Abstract

The role of proportionality and individual assessments in EU residency and welfare access cases has changed significantly over the course of the last decade. This article demonstrates how a search for certainty and efficiency in this area of EU law has created greater uncertainty, more legal hurdles for citizens, and less consistency in decision-making at the national level. UK case law illustrates the difficulty faced by national authorities when interpreting and applying the rules relating to welfare access and proportionality. Ultimately, the law lacks the consistency and transparency that recent CJEU case law seeks to obtain, raising the question of whether the shift from the Court's previous, more flexible, case-by-case approach was desirable after all.

### Keywords

Citizenship, welfare, residency, free movement, proportionality

### Introduction

This article assesses how courts and tribunals in the United Kingdom (UK) have interpreted European Union (EU) law relating to welfare access for economically inactive citizens. Inconsistencies in Court of Justice of the European Union (CJEU) jurisprudence creates uncertainty for EU citizens and Member State authorities, by failing to unequivocally communicate how the principle of proportionality should be applied to decisions on welfare access. In *Brey*,<sup>1</sup> the CJEU held that only an in-depth consideration of the personal and financial situation of a citizen could lead to a proportionate decision to restrict their right

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1. C-140/12 *Pensionsversicherungsanstalt v Peter Brey* [2013] ECLI: EU:2013:565.

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to equal treatment. Later, in *Dano*,<sup>2</sup> the CJEU accepted that decisions could be systematic, without in-depth consideration of personal circumstances. This article provides a view of how this ‘proportionality gap’ is assessed and interpreted in UK case law, illustrating that the role of individual assessments has not been carved out sufficiently by the CJEU, thus undermining any attempt to create a clearer and more transparent approach to residency and welfare access. Moreover, this article demonstrates how *Brey* could have been honed into a suitable system for achieving both, if the CJEU had engaged further with individual assessments.

## I. The proportionality gap

Proportionality has been a key concept in most CJEU case law on equal treatment to welfare access for economically inactive EU citizens. *Prima facie*, proportionality is an adequate tool for managing the inherent tension between the free movement rights of citizens and the redistributive concerns of the Member States (Giubonni, 2007). The Court can assess (and set thresholds for) provisions that go beyond what is necessary to legitimately protect social assistance systems, into the territory of unjustifiable restrictions on EU free movement rights.

However, the success of proportionality for easing tensions without creating legal uncertainty may be hindered by a lack of guidance for Member States aiming to remain proportionate in their decision-making. The proportionality ‘gap’, for the purposes of this article, exists in the discrepancies between CJEU judgments that present near-polarised thresholds for Member States to act proportionately when applying free movement law. The uncertainty exacerbates the open-textured, ambiguous nature of some of the conditions of residency that can limit access to equal treatment for welfare.

Decisions on welfare access for mobile EU citizens depend upon their residency status. Those who fall under the definition of ‘worker’ are entitled to equal treatment regarding all tax and social advantages, as per Art.7(2) Regulation 492/2011.<sup>3</sup> All other citizens are subject to some form of restriction on their equal treatment. Art.24(2) of Directive 2004/38/EC (CRD)<sup>4</sup> stipulates that Member States do not have to offer social assistance to jobseekers, or citizens in their first three months of residency, and that mobile students are not entitled to maintenance loans or grants.

Significant ambiguity about welfare access exists for all categories of economically inactive citizens. The focus of this article is those who are economically inactive, have been resident in the Member State for more than three months, and do not hold the status of a jobseeker<sup>5</sup> or a student.<sup>6</sup> Until these citizens meet the criteria for permanent residency,<sup>7</sup> restrictions on welfare access operate through the parameters of Article 7(1)(b) CRD, which requires them to have ‘sufficient resources’ so as to not become an ‘unreasonable burden’ on the social assistance system of the host

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2. C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* [2014] ECLI: EU:2014:2358.

3. Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L 141.

4. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77 (‘CRD’).

5. *ibid*, Article 14(4)(b) sets out the residency conditions of jobseekers.

6. *ibid*, Article 7(1)(c) sets out the residency conditions of students.

7. *ibid*, Article 16: Citizens must reside lawfully and continuously for a period of 5 years to acquire permanent residence.

state.<sup>8</sup> There is no specific definition of what would constitute ‘sufficient’ resources in the CRD. Member States may not lay down a specific monetary amount that constitutes ‘sufficient resources’, as they must take into consideration the personal circumstances of the individual concerned;<sup>9</sup> they also cannot require citizens to have more than the minimum resources a national would have before they could claim social assistance; or more than the minimum social security pension.<sup>10</sup> Aside from these guidelines, the interpretation of what is ‘sufficient’ is left to Member States.

As a result of CJEU interpretation, residency requirements have become unusually rigorous restrictions on free movement rights. In the absence of a concrete definition of ‘sufficient resources’, the scope of residency rights, and therefore equal treatment rights, has been left as a matter of national interpretation. That Member States tend to interpret the residency conditions as strictly as CJEU judgments permit (Heindlmaier and Blauburger, 2017; Jacqueson, 2016; Kramer et al, 2018) is understandable, but assumes a level of clarity and consistency that does not always exist in EU law. UK jurisprudence illustrates that when the CJEU adopts vastly different approaches on how to consider the sufficiency of resources in a proportionate manner, such as in *Brey* and *Dano*, Member State authorities’ attempts to reconcile these approaches create greater uncertainty and inconsistency in the application of EU law.

The issue of benefits access, residency and restriction is complex and fraught with legal, political, economic and social tension. The law is charged with the difficult task of reconciling free movement, equal treatment, and citizenship rights with national redistributive concerns. The Court acknowledges the limits on Member State responsibility for economically inactive citizens, but imbues upon Member States the obligation to reflect before refusing benefits. The necessity and scope of the duty to pause between a welfare benefits claim and exclusion determines the parameters of the proportionality obligation placed upon Member States’ national authorities. The following section will consider the parameters of proportionality in the pre-*Brey* case law from of the CJEU, and how it was interpreted in the UK courts.

## 2. Pre-*Brey* Proportionality: a perspective from UK courts

The CJEU has consistently found residency requirements to be a restriction on the general right to free movement and residency, that must be applied in compliance with EU law.<sup>11</sup> This is manifested in the obligations for Member States to pay due regard to the principle of proportionality.<sup>12</sup> For Member States to do this, their national authorities must be granted sufficient guidance on what the principle of proportionality actually requires, in the application of residency conditions. The CJEU in *Baumbast*<sup>13</sup> gave little instruction on proportionality, only that national measures must be necessary to achieve the legitimate objective pursued by the Member State. The Court did not

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8. It should be noted that a similar requirement applies to students, who must *declare* that they have sufficient resources as per CRD, Article 7(1)(c).

9. *ibid*, Article 8(4).

10. *ibid*.

11. C-413/99 *Baumbast and R v Secretary of State for the Home Department*, ECLI: EU:2002:493; C-85/96 *María Martínez Sala v Freistaat Bayern*, ECLI: EU:1998:217; C-140/12 *Pensionsversicherungsanstalt v Peter Brey* ECLI: EU:2013:565.

12. C-456/02 *Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS)* [2004] ECLI: EU:2004:488 [34]; *Baumbast* *ibid* [91].

13. *Baumbast* (n.11).

explain in full why the refusal of the right to reside went beyond what is necessary ‘in those circumstances’,<sup>14</sup> of a citizen falling just short of the condition to have comprehensive sickness insurance. This could comprise a citizen who falls short of establishing residency under the Directive, or citizens who cannot establish residency under the Directive but should nonetheless be granted the right to reside. The former is the most likely interpretation. The Court concluded that citizens who are no longer economically active can enjoy a right to reside via a direct application of their Treaty rights, but these are still subject to the limitations and conditions of the residency Directives.

The UK Court of Appeal followed this interpretation in *Ali*,<sup>15</sup> where none of the conditions of residency could be fulfilled because the claimant was a third-country national, relying on the fact their dependent Dutch children had a right to reside under the Treaty provisions on citizenship. Keene LJ highlighted that EU jurisprudence had continuously affirmed the limitations and conditions on the right to residency for EU citizens,<sup>16</sup> as per *Baumbast*<sup>17</sup> and *Chen*.<sup>18</sup> The Court refused to recognise residency on the basis of the Treaty, with no assessment of the proportionality of this decision, as the possibility of residence being established outside of the parameters of the Directives would ‘undermine’ the Directive and render ‘its restrictive requirement’ redundant.<sup>19</sup> This seems a restrictive, albeit understandable, interpretation: conditions should be applied proportionately, and those who fulfil no conditions of the Directive have no right to reside.

The issue of proportionality will be more ambiguous when it is unclear whether the residency conditions are met or not. This is a particular problem for citizens residing under what is now Art.7(1)(b) CRD, with the unclear ‘sufficient resources’ requirement. Citizens requiring welfare may not fulfil the conditions of residence, or perhaps simply fall short of doing so. The interpretation taken will have a direct impact on whether or not the principle of proportionality is applied, and thus on whether the citizen is given a chance at securing residency and equal treatment.

In *Trojani*,<sup>20</sup> the CJEU had an opportunity to clarify the issue of ‘sufficient resources’ and proportionality. It held that it would be proportionate to deny a right of residence to a citizen whose insufficient resources were evidenced by their claim for minimum subsistence benefits.<sup>21</sup> However, the Court considerably muddied the waters by concluding that a citizen’s lawful residency according to national law will entitle them to equal treatment to welfare;<sup>22</sup> and also that Member States can not *automatically* exclude individuals after a claim for benefits.<sup>23</sup> For national courts and decision makers, the mixed messaging is unhelpful. It appears that a claim for benefits may undermine residency, but not always. *Trojani* implores Member States to pause before making a decision regarding the sufficiency of resources and the right to reside, but does not reveal the function of this pause. The ambiguous messaging allows Member States to elect not to engage with the issue of proportionality at all.

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14. *ibid* [30].

15. *Ali v Secretary of State for the Home Department* [2006] EWCA Civ 484, [2006] 5 WLUK 40.

16. *ibid* [22].

17. *Baumbast* (n.11).

18. C- 200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* ECLI: EU: C:2004:639.

19. *Ali* (n.15) [22].

20. *Trojani* (n.12).

21. *ibid* [36].

22. *ibid* [42]-[44].

23. *ibid* [45].

A lingering uncertainty is whether it is expulsion, or the loss of the right to reside that cannot be automatic after an attempt to access welfare. The fact the Court has accepted that a loss of the right to reside is proportionate when a citizen claims minimum subsistence, suggests that it is exclusion that should not be automatic. However, the Court has also re-asserted that the *conditions* of residency should be applied proportionately and referenced its previous judgment in *Grzelczyk*,<sup>24</sup> which established that Member States should offer some financial solidarity when the need of the citizen is temporary. It was also noted in *Grzelczyk* that Member States may revoke or refuse to renew the residence permit of citizens with insufficient resources, but that these measures should not be the automatic consequence of recourse to public funds.<sup>25</sup> It may be more persuasive that it is the act of revoking the right to reside that should not come as an automatic consequence of recourse to welfare benefits, and not expulsion. The lack of clarity from the CJEU on this matter made it easier for national authorities to take a systemic, restrictive approach to proportionality rather than attempt to engage with it in a more meaningful way.

*Abdirahman*<sup>26</sup> illustrates this point. The appellant was a Swedish national who was refused income support, housing benefit and council tax benefit on the basis that she had no right to reside in the UK. The UK Court of Appeal affirmed that citizens who are not self-sufficient have no right to residency or social welfare, and that '*those limitations are proportionate to the legitimate objective in protecting [...] public finances*',<sup>27</sup> suggesting that the conditions of residency are inherently proportionate, rather than being required to be applied proportionately. Lloyd LJ relied heavily on *Trojani*, citing CJEU recognition that Mr Trojani clearly had a lack of resources, as he was attempting to claim minimum subsistence.<sup>28</sup> The mixed messages from the CJEU were not expressly recognised or reconciled, as the paragraph where the CJEU found that attempts to claim benefits do not automatically equate to no right to reside<sup>29</sup> was not referenced.

In *Kaczmarek*,<sup>30</sup> the appellant was refused income support on the basis that she did not have a right to reside. It was generally accepted that the appellant did not have 'sufficient resources', but was argued that in her situation it would be a disproportionate interference with her citizenship rights under Art. 18 (now 21 TFEU) to deny her a right to reside. The claimant had been resident in the UK for three years, and had spent the majority of this time studying or economically active. Because it had been accepted, at the EU and national level, that a welfare claim may indicate the lack of sufficient resources, the grounds for argument were based on direct enforcement of a Treaty right to reside, rather than the proportionality of enforcing Directive conditions. The UK Court of Appeal found that proportionality may undermine the clear limitations of the Directive, and posited that cases revolving around proportionality (like *Baumbast*) were exceptional.

According to Maurice Kay LJ, proportionality was only resorted to in *Baumbast* because of a lacuna in the Directive, which did not foresee circumstances where an economically active individual would have no right to reside in a host Member State whilst working in a third country.<sup>31</sup>

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24. C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, ECLI: C:2001:458.

25. *ibid* [41]-[43].

26. *Abdirahman v Secretary of State for Work and Pensions* [2007] EWCA Civ 657, [2008] 1 W.L.R. 254.

27. *ibid* [33].

28. *ibid* [36].

29. *Trojani* (n.12) [45].

30. *Kaczmarek v Secretary of State for Work & Pensions* [2008] EWCA Civ 1310, [2008] 11 W.L.R. 715.

31. *ibid* [19]-[22].

This is a restrictive interpretation of *Baumbast*, establishing a high threshold for when proportionality may aid claims for the right to reside.<sup>32</sup> There is nothing in the CJEU judgment to suggest that *only* cases involving a lacuna in EU law will result in disproportionate enforcement of the residency conditions, although it is acceptable that those cases are more likely to fail the proportionality test. *Baumbast* established that the limitations and conditions of residency are *always* to be applied according to the principle of proportionality.<sup>33</sup> This would be undermined, or at least excessive, if only lacuna cases would constitute a disproportionate enforcement of the conditions. Unfortunately, it remained unclear exactly what the CJEU required of Member States applying the principle of proportionality.

*Kaczmarek* seems to be a judgment ahead of its time, in line with recent EU jurisprudence: if the circumstances of the citizen fall squarely into the confines of the Directive, then enforcements of the restrictions in the Directive are proportionate. If citizens fall outside of the tenets of the Directive, there is no need to consider the proportionality of refusing the right to reside. In its cautious and ambiguous wording around proportionality, the CJEU created a landscape where the principle would play a minimal role, in only a handful of cases that would fall just short of the margins of the Directive. This may have been unintentional, as *Kaczmarek* directly conflicted with CJEU judgments such as *Grzelczyk*<sup>34</sup> or *Bidar*,<sup>35</sup> where the Court found that irrespective of somewhat clear residency conditions, Member States owe a ‘*certain degree of financial solidarity*’<sup>36</sup> to integrated EU citizens. Recent CJEU cases are more focused on the protection of Member State interests and legal certainty, a development that the Court of Appeal cases appear to unwittingly anticipate, by interpreting proportionality in line with similar objectives.

First, is the protection of economic interests. In both *Abdirahman*<sup>37</sup> and *Kaczmarek*<sup>38</sup> the Court of Appeal mentioned the need to protect the national welfare system from ‘benefit tourism’. So far, there is no legal acceptance, or empirical evidence, that benefit tourism exists as a result of EU law (Thym, 2015; Verschueren, 2014; ICF GHK and Milieu, 2013). The CJEU itself did not coin the phrase, but the AG in *Trojani* stated, ‘*so long as social security systems have not been harmonised in terms of the level of benefits, there remains a risk of social tourism.*’<sup>39</sup> Naturally, the greater the scope for enforcement of residency conditions to be ‘disproportionate’, the lower the protection is against such ‘benefit tourism’.

Second, is the concern to ensure legal certainty and administrative efficiency in benefits eligibility. In *Abdirahman*,<sup>40</sup> the Court found it would be disproportionate to require a consideration of every claimant’s circumstances before they could be justifiably excluded from welfare. Later, in *Kaczmarek*,<sup>41</sup> the Court avoided the CJEU assertion in *Trojani* that those who have been in a Member State for a ‘length of time’ may acquire the right to reside there. The Court affirmed that

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32. *ibid* [14].

33. *Baumbast* (n.11) [91].

34. C-184/99 *Rudy Grzelczyk v Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve* [2001] ECLI: EU:2001:458.

35. C-209/03 *The Queen (on the application of Dany Bidar) v London Borough of Ealing* [2005] ECLI: EU:2005:169.

36. *Grzelczyk* (n.34) [44]; *ibid* [56].

37. *Abdirahman*, (n.26) [50].

38. *Kaczmarek* (n.30) [2].

39. *Trojani* (n.12), AG opinion [18].

40. *Abdirahman*, (n.26) [47]-[48].

41. *Kaczmarek* (n.30) [16].

normative regulation under the provisions of a Directive should be the status quo, rather than establishing benefit eligibility by length of residency, on a case-by-case basis.<sup>42</sup>

These are good objectives for the law to aspire to regarding residency and equal treatment. However, it is not so persuasive that they require the side-lining of proportionality in the majority of cases, which seems counter-productive to the objectives of the court. The UK case law discussed attempts to create an automatic, one-size-fits-all approach to deciding eligibility to residency, which leaves proportionality as a last resort for special cases. This does not provide legal certainty, as it recognises the existence of unspecified exceptions to systemic rules. With the plethora of situations citizens may fall under when living in another Member State, it is not difficult to argue that many cases could potentially fall under the unspecified exceptions; thus either undermining the systemic rule, or creating significant uncertainty about the exceptions to it.

Reliance on normative regulation requires principled, detailed rules that establish legitimate claims. The CRD often does not provide this, and inherently relies on the discretion of national decision makers. The qualifiers of residency, such as the requirements relating to ‘unreasonable burdens’ and ‘sufficient resources’, imbue a flexibility in the law that is necessary to recognise different living costs in each Member State. The flexibility of the residency conditions, and the principle of proportionality, are precisely why the CJEU can assert that *sometimes* there should be social solidarity and *sometimes* recourse to social assistance may undermine the right to reside. Arguably, the residency Directives would be better for national authorities if they were prescriptive and automatic. That they are not is a choice of the EU legislature, and one that should be accepted. The onus was on the CJEU to create guidelines for a principled approach to the right to reside and proportionate decision-making. The Court’s judgment in *Brey* theorised a principled approach to Art.7(1)(b), and illustrated textual support for a case-by-case approach to residency.

### 3. A more principled approach to Proportionality: *Brey*

In *Brey*,<sup>43</sup> the CJEU asserted that national decision makers must assess ‘*the specific burden*’ that an award of benefits would put on the social assistance system, ‘*by reference to the personal circumstances characterising the individual situation of the person concerned.*’<sup>44</sup> Member States should not reject a claim for benefits without considering the individual’s amount and regularity of income, the fact of any residence certificate, and the period over which the benefit is likely to be granted. This accompanies the CRD’s own articulation of factors to consider, in Recital 16 of the Preamble: the temporality of financial difficulty, the duration of residence, the amount of benefit that would be granted, and the personal circumstances of the individual.

The most exacting point of the judgment was the Court’s agreement with the Commission that Member States should consider the demographics of benefit claimants, and make decisions on welfare access based on how regularly the particular benefit has been claimed by EU citizens in the same position as the claimant. The test makes it impossible for citizens to know their rights within the host Member State (Verschueren, 2014: 177) as well as placing a significant administrative burden on national decision makers.

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42. *ibid.*

43. *Brey* (n.1).

44. *ibid* [64].

The UK approach to residency and proportionality was clearly open to challenge after *Brey*, as the courts had assumed that the Directive provides sufficient norms, and that it does not require case-by-case assessments of proportionality. *Brey* posited precisely the opposite. Whilst the UK courts endeavoured to create a transparent, legally certain approach to residency, any transparency and certainty achieved could be considered artificial, when looking at the Directive as a whole, the way the CJEU did in *Brey*. Article 7(1)(b) CRD in particular is difficult to apply literally, due to its imprecise language. *Brey* demonstrated an attempt to conceptualise ‘unreasonable burdens’ in a more comprehensive manner, providing a positive obligation for Member States to make proportionate decisions on a case-by-case basis rather than assuming that a refusal of the right to reside is proportionate for those who are financially eligible for social assistance. Previous case law underpinned the judgment. With regard to financial assistance, it had already been noted in *Grzelczyk* that citizens may not be an ‘unreasonable’ burden if their needs are only temporary, hinting that the temporality of need should always be assessed.<sup>45</sup> *Baumbast* established the need for residency conditions to be applied proportionately.<sup>46</sup> In *Bidar*, the Court asserted that there should not be conditions on access to equal treatment to social assistance that make it impossible for citizens who are genuinely integrated in the host Member State to fulfil those conditions.<sup>47</sup> *Brey* drew this earlier case law into a consistent, principled, framework.

It is unfortunate that there are no UK cases from the period directly after *Brey*, which would show how the national courts would have interpreted the judgment. Undoubtedly, the approach to assessing residency and welfare rights would have altered. UK decision makers would have to adopt a case-by-case assessment of the proportionality of denying residence based on the ‘unreasonable burden’ of the citizen. To do so would likely have undermined the argument that proportionality is only a concern where the Directive does not cover the citizen’s specific situation. Some of the UK courts’ approach to proportionality would remain, such as the assertion that there is no general right to reside for EU citizens under Art. 21 TFEU. In cases regarding the sufficiency of resources, residency would be established on the basis of a proportionate application of Art.7(1)(b), not the Treaty rights. It could also still be deemed disproportionate for courts to deny residency when the Directive does not cover the circumstances of the individual.

Any potential changes in approach would not have been a detriment to the overarching goals of the UK courts when assessing residency, such as the protection of economic interests and legal certainty. Individual proportionality assessments and legal certainty are not mutually exclusive. In light of the textual basis for individual assessments, it becomes difficult to argue that legal certainty and administrative efficiency must be achieved through reducing the role of proportionality. A system where a finding of insufficient resources is reliant upon conducting a review of personal circumstances still offers a certain procedure for decision makers to follow. It remains open for Member States to construct clear guidance on what would be considered too long a claim, too great a claim, or too brief a residency. Such a system would be much more consistent with the CRD itself and the case law of the CJEU over the years, than one that side-lines the role of individual proportionality assessment for a sheltered reading of the residency conditions in the CRD. It also does not naturally follow that proportionality assessments would ‘undermine’ the protection Member States get from the CRD, as it is open to national decision makers to find that

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45. *Baumbast* (n.11).

46. *Grzelczyk* (n.24).

47. *Bidar* (n.35).

an individual would be an ‘unreasonable burden’ on the social assistance system, and thus refuse the right to reside.<sup>48</sup>

Member States should only be subjected to the elements of *Brey* that are textually supported. AG Wahl’s opinion, and the judgment of the Court, highlighted provisions of the CRD that assist Member States in deciding whether a citizen would unreasonably burden the social assistance system. Art. 8(4) requires consideration of their personal situation,<sup>49</sup> which is supported by Article 14(3) and Recital 16 of the Preamble.<sup>50</sup> As AG Wahl<sup>51</sup> noted, Recital 10 requires there to be a *disproportionate* burden before the right of residence can be lost. Whether a burden is disproportionate will depend upon consideration of the factors laid out in Recital 16. The pause for reflection can be textually supported, as can some of the factors the Court required the Member State to take into consideration. The necessity of determining the overall level of citizen claimants for particular benefits is not so supported. In *Dano*,<sup>52</sup> the Court had the opportunity to clarify the framework asserted in *Brey*, focusing on the considerations necessitated by Recital 16, and Article 8. Unfortunately, instead of doing so, the Court opted to afford greater deference to Member States’ interests, stating the need for transparency, clarity and consistency. As this article will show, such clarity and consistency were not forthcoming.

#### 4. Proportionality and sufficient resources post-Brey: difficulties of interpretation for national courts

Multiple issues with the following line of case law, starting with *Dano*, have been explored elsewhere (Düsterhaus, 2015; Iliopoulou-Penot, 2016; Kramer, 2016; Nic Shuibhne, 2016; O’Brien, 2016), and are outside the scope of this article. The CJEU seems to have adopted a systematic approach to the principle of proportionality, whereby Member States are not required to consider the individual circumstances of claimants before refusing the right to reside. This has the potential to increase the transparency and administrative efficiency of the law. Two issues prohibit such a desired outcome for national courts. First, the Directive’s ‘sufficient resources’ and ‘unreasonable burden’ provisions are difficult to apply literally. Second, in the absence of any explicit CJEU guidance, the role of *Brey*-style individual assessments becomes unclear.

##### 4.1 *Dano*:

In *Dano*, the CJEU blindly accepted the referring German court’s decision that Ms Dano had insufficient resources, without considering whether this decision had been made proportionately. A fundamental change in language and methodology occurred, shifting away from proportionality, to focus on the sufficiency of citizens’ resources.<sup>53</sup> There was a telling absence of the qualifications

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48. *Brey* (n.1) [79].

49. *Brey* (n.11) [67]; AG Opinion [75].

50. *ibid* AG Opinion [75].

51. *ibid* AG Opinion [76].

52. C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* [2014] ECLI: EU:2014:2358.

53. *Dano* (n.52) [77]-[79].

that were presented alongside similar assertions in the *Trojani*,<sup>54</sup> *Grzelczyk*<sup>55</sup> and *Brey*<sup>56</sup> judgments; the Court no longer asserted that Member States cannot *automatically* infer that a citizen does not have ‘sufficient resources’, from their claim for social assistance.

By reinforcing the link between sufficient resources and welfare benefits claims,<sup>57</sup> the CJEU legitimised the idea that claims for social assistance will determine a lack of sufficient resources. The CRD does not textually support such an interpretation. AG Wahl, in *Brey*,<sup>58</sup> refused to accept an interpretation of ‘sufficient resources’ being equivalent to ‘no reliance upon the social assistance’, as other provisions of the CRD require individual assessments to determine any disproportionate ‘burden’. The Court in *Dano* did not reflect on those provisions, nor consider whether the German law adequately conformed to them. More importantly, in the absence of any explanation for why the elements of *Brey* were unnecessary to consider in *Dano*, it became unclear whether the CJEU was taking a fundamental shift in its approach to what Art.7(1)(b) requires, or whether the authorities in *Dano* had already met the obligations of proportionality that the Court had previously set out.

The sections of the German social code that deal with the rights to residency and social assistance shed little light on how sufficient resources are considered. Paragraph 23(3) SGB XII notes that ‘foreign nationals who have entered national territory in order to obtain social assistance . . . have no right to social assistance.’<sup>59</sup> This does not reflect the position of EU law, and the long-standing principle that the motive behind mobility is irrelevant to considerations of the right to reside.<sup>60</sup> Paragraph 7 of Book II of the German Social Code (SGB II)<sup>61</sup> is more reflective of EU law, prescribing the beneficiaries of minimum subsistence whilst excluding EU citizens who are not workers or self-employed and who do not enjoy right to free movement under German law.

Paragraph 2(2)(5) of the *Freizüg/EU*,<sup>62</sup> not mentioned in *Dano*, regulates the right to reside for economically inactive citizens. The provisions require sufficient sickness insurance cover and sufficient means of subsistence.<sup>63</sup> It is not elucidated how ‘sufficient resources’ are determined, but an inference may be made from a claim for SGBII benefits. One of the conditions for the grant of the benefit is that an individual must be classed as ‘in need’, meaning they ‘cannot, or cannot sufficiently, cover their subsistence costs on the basis of the income or assets to be taken into consideration.’<sup>64</sup> If it is the case that those who attempt to claim SGBII do not have sufficient resources, and therefore have no right to reside, this may be taken into account when deciding if the citizen has entered Germany ‘solely’ to gain benefits.

The wording of the provisions echo the sentiment that ‘sufficient resources’ requires a citizen not to claim welfare benefits; although a more acceptable reading would be that it requires citizens

54. *Trojani* (n.12) [45].

55. C-184/99 *Rudy Grzelczyk v Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve* [2001] ECLI: EU:2001:458 [42]-[43].

56. *Brey* (n.1) [63]-[64].

57. *ibid* [77].

58. *Brey* (n.1), AG Opinion [74]-[77].

59. Sozialgesetzbuch, Zwölftes Buch (SGB XII) Sozialhilfe für Ausländerinnen und Ausländer (social assistance for foreigners), § 23.

60. C-53/81 *Levin v Staatssecretaris van Justitie* [1982] ECLI: EU:1982:10 [45].

61. Sozialgesetzbuch, Zweites Buch (‘SGBII’) Grundsicherung für Arbeitsuchende (basic jobseeker’s allowance).

62. *Freizügigkeitsgesetz/EU* vom 30. Juli 2004 (BGBl. I S. 1950, 1986); amended by Artikel 6 (BGBl. I S. 2780) § 2.

63. *ibid*, § 4.

64. SGB II, (n.61) § 9(1).

not to claim those specific benefits. This appears to be a disingenuous interpretation for the CJEU to legitimise; it purports that only those who can fulfil the conditions of residency can gain equal treatment to welfare benefits, but this is made impossible if recourse to welfare benefits automatically undermines the citizen's fulfilment of the conditions of residency. By blindly accepting the finding that Ms Dano had insufficient resources, the Court failed to question whether German law on residency considers the possible temporary nature of the need, or the specific circumstances of the individual, or any other criteria the Directive suggests should be considered. It may be that German law *does* consider those factors, and conforms to the principle of proportionality. The benefits at issue were substantial, and as such could have a large impact on the social assistance system if awarded to all EU citizens on a long-term basis. It could be easily established, therefore, that it was proportionate to enforce the conditions of residency against Ms Dano, and exclude her from equal treatment under the *Brey* criteria.

Concern stems from the failure to elucidate on these matters. The judgment did not suggest that the specific reliance on an expensive, possibly long-term subsistence benefit undermined Ms Dano's right to reside under German law. Such an interpretation would have restated the importance of considering the factors asserted in *Brey* for proportionate decision-making; and would have been a good opportunity to clarify that it is an option for national authorities to consider welfare statistics in decision-making, but not an obligation. Had the CJEU focused on the length and expense of the German benefits at hand, it could have demonstrated the considerations national decision makers are obligated to make by the CRD, and provided reassurance that case-by-case assessments based on general criteria can protect welfare systems. It is impossible to ascertain whether Member States are complying with these obligations if the CJEU limits its scrutiny of how conditions in the CRD are enforced. Moreover, it becomes difficult to decipher *what* those obligations are, in the absence of clear CJEU guidance on proportionality.

For this article, the core problem of *Dano* is the scaling back of advice and guidance offered to national decision makers. The methodology of the decision seems to diverge from *Baumbast*, *Trojani*, *Grzelczyk* and *Brey*, thus raising questions about the legitimate application of residency conditions. For instance, is there still a requirement for Member States to pause before refusing the right to reside for citizens financially eligible for social assistance? If so, does this need to entail a case-by-case assessment as per *Brey*, or can Member States simply look at the potential for the individual to claim substantive benefits? The judgment potentially raises questions about the relevance of *Brey*, and whether the older judgment is still good law at all. It may be that the specific nuances of the case prompted the Court to accept the German decision (Verschuere, 2015), but it may also be that claims for social assistance can now automatically undermine the right to reside (Nic Shuibhne, 2016). A paradigm shift may certainly be the interpretation adopted by national courts in search of administrative efficiency and legal certainty.

#### 4.2 *Alimanovic*:

In *Alimanovic*,<sup>65</sup> the CJEU held that Articles 7(3)(c) and 24(2) CRD are inherently proportionate when they operate to exclude an individual from social benefits because they have lost worker status.<sup>66</sup> The Court reiterated the sentiment from *Dano* that only those legally resident would be

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65. C-67/14 *Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others* (2015) ECLI: EU:2015:597.

66. *ibid* [60]-[61].

entitled to equal treatment under the CRD.<sup>67</sup> Art.7(3)(c) CRD allows individuals to retain worker status after becoming involuntarily unemployed<sup>68</sup> for ‘no less than six months’. The Court did not address whether it may be disproportionate in some circumstances to find that an ex-worker loses their worker status after the six-month time limit. Instead, it accepted that the only type of residency that could be established by Ms Alimanovic at the end of the six months would be on the basis of Art. 14(4)(b) CRD, as a jobseeker. As Art.24(2) CRD excludes citizens resident on the basis of Art.14(4)(b) from equal treatment to social assistance, Ms Alimanovic was not entitled to SGBII benefits.

AG Wathelet asserted the need for an individual assessment of the unreasonable burden a citizen would create before they can be denied social assistance.<sup>69</sup> The Court disagreed, finding that a *Brey*-style assessment would not be required ‘in circumstances such as those at issue’ in *Alimanovic*.<sup>70</sup> According to the Court, the CRD takes into account sufficient personal circumstances, like how long a citizen has worked in the Member State, and creates a ‘gradual’ system of rights according to residency.<sup>71</sup> For national authorities, this significantly lowers the number of factors to consider before a decision can be deemed ‘proportionate’. Instead of considering the length of residency, amount claimed, or potential longevity of claim, the authorities will simply look at how long an individual has been involuntarily unemployed for before proportionately denying access to social assistance. Interestingly, the CJEU aligned the objectives of free movement law with those expressed by the UK courts years earlier. The Court found that by not making the use of Art.24(2) conditional on an inspection of personal circumstances, it allows individuals to know ‘without any ambiguity’ what their rights are. Moreover, the judgment sought to ‘*guarantee a significant level of legal certainty and transparency*’<sup>72</sup> in free movement law.

The author does not dispute that transparency in the law is desirable. Nevertheless, it is disputed that *Dano* or *Alimanovic* provide this. *Alimanovic* seems to answer the question remaining after *Dano*, of whether individual assessments are required for proportionate decision-making, apparently in the negative. This would provide a modicum of certainty for national decision makers, but for the CJEU seeming to ring-fence the situations in which *Brey* does not apply, leaving uncertainty remaining around *when* (not *whether*) individualised proportionality assessments are required. The wording of the judgment clearly acknowledges textual support for individual proportionality assessments in certain instances: ‘*the Court has held that Directive 2004/38 requires a Member State to take account of the individual situation of the person concerned*’ before finding they are an unreasonable burden, but not in situations like *Alimanovic*.<sup>73</sup>

Uncertainty remains about when the circumstances are those ‘such as’ *Alimanovic*. The Court may have created space for a largely systemic approach to proportionality in general, or may have accepted that when a Member State applies the very clear wording of Art.7(3)(c) and Art.24(2), it is proportionate for the outcome to be a lack of equal treatment to social assistance. The latter would not be unreasonable, it is much easier to apply the express derogation of Art.24(2) literally whilst

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67. *ibid* [49].

68. After less than 12 months of employment.

69. *Alimanovic* (n.65) AG Opinion [103]-[104].

70. *Alimanovic* (n.65) [59].

71. *ibid* [60].

72. *ibid* [61].

73. *Alimanovic* (n.65) [59].

retaining certainty regarding equal treatment to social assistance for jobseekers (and ex-workers).<sup>74</sup> That the Court referenced and distinguished from *Brey* when discussing this could highlight that cases under Art.7(1)(b) still require consideration of the factors put forward in *Brey* and the CRD.

In terms of legal certainty, the seemingly automatic approach to proportionality in *Dano* is much more concerning, as it permits a literal interpretation of Art.7(1)(b) and an oversimplification of ‘sufficient resources’. This approach would mean the CJEU is side-lining proportionality, or individual assessments in *most* cases, whilst recognising that there are unspecified exceptions to this. To posit this, whilst championing certainty and transparency, seems counter-productive. It would be much more transparent to have a consistent approach to assessing the proportionality of denying claims to social assistance, with a very clear exception in cases related to Art.24(2). Either way, the CJEU does not make clear whether the general rule regarding individual circumstances is that purported in *Brey*, or *Alimanovic*.

The cumulative impact of *Dano* and *Alimanovic* for UK courts, is significant justification for the pre-*Brey* side-lining of proportionality, thus avoiding case-by-case analysis of proportionality. In the absence of a specific statement that *Brey* is no longer good law, national courts face the difficult task of reconciling the conflicting judgments and settling on a methodology of proportionality that satisfies them. The UK Supreme Court judgment in *Mirga*<sup>75</sup> illustrates the difficulty of doing this in a principled manner, and demonstrates that it would be impossible for citizens to understand their rights *without any ambiguity* in the post-*Dano* era.

### 4.3 *Mirga*: a national perspective on certainty and transparency post-*Dano*:

*Mirga* concerned two appellants arguing, amongst other things, that to deny citizens the right to reside, the Secretary of State would first have to show that their claims would place a disproportionate burden on the welfare system, in order to demonstrate the proportionality of the decision.<sup>76</sup> The position of the Court was clear from the outset of the judgment, stating ‘if [Ms *Mirga*] had had been a “self-sufficient person” she would presumably not have needed income support anyway’.<sup>77</sup> The consistent linking of self-sufficiency with eligibility for financial help artificially alters Art.7(1)(b) from requiring citizens not to burden the social assistance system, to requiring them never to need it. *Brey* appeared to put forward the idea that the sufficiency of resources, for residency, would depend upon the burden that any social assistance claim would present. As such, requiring income support would not automatically undermine any residency under Art.7(1)(b).

The Court considered the *Brey* judgment, reiterating that claims for social welfare should not automatically bar the claimant from them, on the grounds of insufficient resources.<sup>78</sup> The Supreme Court also highlighted some of the factors that the CJEU indicates should be assessed before benefits refusal.<sup>79</sup> There was no mention of the textual basis of these assessments in the CRD. However, *Mirga* illustrates the impact of *Dano* and *Alimanovic* on the relevance of *Brey*, as the

74. CRD, Article 24(4).

75. *Mirga v Secretary of State for Work and Pensions* [2016] UKSC 1, [2016] 1 W.L.R. 481.

76. *ibid* [38]-[39].

77. *ibid* [36].

78. *ibid* [64].

79. *ibid* [65]; i.e. residency permits, income, and the period for which benefits would be needed should be assessed before excluding an individual from equal treatment.

Court found that ‘*in the light of the [ . . . ] decisions in Dano and Alimanovic*’,<sup>80</sup> the claimants could not benefit from the *Brey* judgment.

The Supreme Court rejected the idea that an individual assessment of proportionality, or the ‘burden’ created by the citizen, is always necessary under EU law. It relied upon the CJEU finding Article 7 CRD to be an ‘inherently proportionate’ system for assessing residency and welfare eligibility;<sup>81</sup> adding that it would be ‘unrealistic’<sup>82</sup> to require courts to look at the individual circumstances of each case. Lord Neuberger agreed with the CJEU assertion that a broad application of Article 7, read *in the light of other provisions of the CRD*,<sup>83</sup> ensures certainty and transparency in the award of social assistance.<sup>84</sup> In the *AMS*<sup>85</sup> judgment, discussed below, the Tribunal noted that the CJEU was actually referring to the German provisions on residency; and did *not* state that Article 7(1)(b) is inherently clear.<sup>86</sup> As commendable as the UK Court’s endeavour for clarity is, it should be recalled that the Court in *Brey* relied on reading Article 7(1)(b) in light of the rest of the CRD, including Article 8(4) and Recital 16, and came to a very different conclusion about the application of that provision. *Dano*, as shown in the section above, potentially relied upon the Court reading the provision in a vacuum, and neglecting the textual support for individual assessments under Art.7(1)(b).

The key paragraph of *Mirga* (for the purposes of this article) demonstrates how the role of individual assessments has been confused by the CJEU’s back-tracking from the case-by-case system it promoted in *Brey*:

‘where a national of another member state [ . . . ] 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.’<sup>87</sup>

The judgment posits proportionality assessments as a ‘Hail Mary’ for citizens who cannot establish residency as a self-sufficient economically inactive citizen. For the author, this is not the role of individual assessments. Their role is to determine whether the sufficiency of resources is enough to establish residency, according to the particular burden they may place on the social assistance system. The burden is determined according to general factors for consideration. *Brey* seemed to establish that relatively clearly, until *Dano* and *Alimanovic* challenged the need for individual assessments as the general rule. The fact that *Brey* could not assist the appellants in *Mirga*, ‘in light of’ the *Dano/Alimanovic* jurisprudence, acknowledges that *Brey* would have had general application if it were not for the latter case law.

The findings of the Supreme Court resonate with recent CJEU jurisprudence, and rest upon the desirability of avoiding administrative burdens and uncertainty in the application of residency

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80. *ibid* [66].

81. *ibid* [67].

82. *ibid* [68].

83. *ibid* (emphasis added).

84. *ibid* [67]-[68].

85. *AMS v Secretary of State for Work and Pensions* [2017] UKUT 48.

86. *ibid* [42]-[43].

87. *Mirga* (n.75) [69].

conditions and welfare access. Whilst this is an appropriate end game for the CJEU and national courts to have, the execution of ensuring ‘certainty’ has been relatively poor, due to the dichotomy between *Brey* and *Dano* and the lack of guidance from the CJEU on how they ought to be reconciled at the national level.

**4.3.1 The Administrative Burden of Proportionality Assessed.** The post-*Dano* landscape presents the same issues discussed in the pre-*Brey* case law: proportionality is considered by the CJEU, and applied, but very little guidance is given on how national authorities can apply the principle themselves. This leaves authorities to draw their own conclusions on the role and function of proportionality, which in turn leads to less clarity for the law in this area. Lord Neuberger agreed with the CJEU’s judgment in *Dano* and *Alimanovic*, finding that it would place an undue burden on the Member States to conduct a proportionality assessment in every case concerning the right to reside.<sup>88</sup> Whilst this may be a potential justification of the CJEU’s U-turn from *Brey*, the author respectfully disagrees, and posits that the administrative burden of proportionality assessments will depend on exactly what is required in such assessments. The idea supported by the CRD, that decision makers should consider whether the need of individuals is temporary, the amount and length of the benefits claim made, the length of residence in the host Member State, should not be too cumbersome a task (O’Brien, 2008:664-665). In assessing benefits claims, there will already be data for decision makers to assess, so factoring in the length of possible claims or the amount awarded or requested should not add any significant layer of administration, but should allow decision makers to show why their decisions are proportionate, thus avoiding challenges like the one in *Mirga*. It is unfortunate that such a position was never adopted in the post-*Brey* case law from the CJEU.

Even if one were convinced that proportionality is administratively cumbersome; it remains that any side-lining of proportionality is potentially counter-productive to the goal of clarity and consistency. Systemic conditions on residency replaces one type of legal uncertainty for another as the courts grapple with the task of finding an accurate place for *Brey* in the post-*Dano* legal landscape. Previous UK case law, with its preference for unspecified exceptions to general residency rules, makes it all the more difficult to find clarity and consistency at the national level.

**4.3.2 Deepening Inconsistencies in Residency Case Law.** *Mirga* demonstrates that even when Member States lean in to the CJEU-approved regime of more systemic restrictions, uncertainty remains around the relevance of *Brey*. In the absence of CJEU guidance, it is up to national decision makers to define the place for the judgment, and individual assessments. Lord Neuberger emulated the CJEU’s reasoning from *Dano*, and asserted that it would ‘undermine the whole thrust and purpose’ of the CRD if citizens could ‘invoke’ proportionality to gain a right to reside in the host Member State, and therefore claim social assistance, ‘save in extreme circumstances’.<sup>89</sup> The caveat of ‘extreme circumstances’ recognises that *Brey* has not been overruled, but attempts to confine the use of its principles to the smallest number of cases possible to create a consistent approach to applying residency conditions. Without significant guidance on how the older jurisprudence is reconciled with new developments, citizens will face doubt in how their residency and welfare rights should be examined at the national level, and as such, welfare decisions may be open to

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88. *ibid* [68].

89. *ibid* [69].

being questioned. This will be more prevalent in the event that Member States take different approaches to applying *Brey* after *Dano* and *Alimanovic*.

The ‘extreme circumstances’, where proportionality can aid an applicant in establishing the right to reside, were not comprehensively assessed in *Mirga*, so it is difficult to tell exactly how *Brey* is meant to apply. There was a brief mention of the *Baumbast* scenario, where an individual has their own resources. The CJEU jurisprudence makes it clear that it is not only instances where the applicant has sufficient resources where residency conditions may need to be softened, as evidenced by cases like *Grzelczyk*<sup>90</sup> where the individual did not have sufficient resources but could claim equal treatment to social assistance. The idea of ‘exceptional’ or ‘extreme’ circumstances being necessary creates greater incoherence and uncertainty in the law, when the apparent reasoning for avoiding proportionality assessments is to ensure clarity and efficiency. In one statement, the Supreme Court found it too taxing for decision makers to consider specified factors of citizens’ circumstances in order to arrive at a proportionate decision on their right to reside; but in the next, required them to consider the possibility of whether the individual’s circumstances are exceptional, with no legislative or jurisprudential guidance on what this means. Such is the outcome of the CJEU’s methodological U-turn on proportionality. National courts are required to stay open to the possibility of *Brey* being relevant, without any principled way of applying it in light of *Dano*.

The idea of proportionality ‘undermining’ the Directive sits at odds with the Directive itself and CJEU jurisprudence; something that challenges the narrative in *Dano* and national cases reliant on it (such as *Mirga*). It relies on the purpose of the CRD being to protect the welfare systems of Member States, which may be one purpose that the CJEU has read into the Directive,<sup>91</sup> but the primary aim of the CRD is to ‘simplify and strengthen the right of free movement and residence of all Union citizens’.<sup>92</sup> Furthermore, the idea that citizens should be invoking proportionality, and that proportionality should not be an inherent part of assessment of residency conditions, conflicts with *Baumbast*, *Trojani* and *Brey*. This poses a challenge to the creation of legal certainty in the application of residency conditions, and demonstrates that the CJEU has created less clarity by not engaging with proportionality more thoroughly in *Dano* or *Alimanovic*. The idea that proportionality is sometimes relevant (which the UK Supreme Court seems to take from *Dano/Alimanovic*) is a less clear approach than an assertion that the principle is always relevant (which seemed to be the approach in *Brey*). The above analysis shows how the creation of the proportionality gap actually reduces legal certainty, as there has to be recognition that some citizens will be an ‘exception’ to the rules as they are applied in *Dano* and *Alimanovic*, and that *Brey* does still have a place in EU free movement law, however uncertain that place may be.

#### 4.4 *Commission v UK*:

In *Commission v UK*<sup>93</sup> the Commission directly challenged the lawfulness of the UK’s approach to assessing residency rights without individual assessments. It held that the UK’s right to reside test did not include or allow for individual assessments, as required after *Brey*.<sup>94</sup> The rebuttal from the

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90. *Grzelczyk* (n.24).

91. *Dano* (n.52) [71], [74].

92. CRD, Preamble, Recital 3.

93. C-308/14 *Commission v UK* [2016] ECLI: EU: C:2016:436.

94. *ibid* [47].

UK authorities relied on *Dano*, and stated that the Court had made it clear that *only* citizens who can comply with the requirements of Art.7(1)(b) have equal treatment to social assistance. Of course, what *Dano* did not clarify is how the German authorities had assessed the fulfilment of the requirements, and whether an individual assessment had been/should have been undertaken. The UK highlighted that the national approach takes into account data from the Department of Work and Pensions, which checks whether the citizen has ever claimed social assistance, thus helping authorities to determine if they have the right to reside.<sup>95</sup> This does not seem to fulfil the requirements of the Directive, or align with *Brey* (or perhaps even *Dano*). Nor does the assertion that where it is ‘not clear’ whether a person has the right to reside, their personal circumstances will be considered. The ‘personal circumstances’ considered are: whether the citizen is searching for work with a genuine chance of engagement.

For the author, the UK approach to proportionality and residency is unsatisfying and confusing. However, this approach would not be possible if clearer messaging on individual assessments had been present in *Dano* and *Alimanovic*. Instead of reviewing personal circumstances that may enable a citizen to reside under Art.7(1)(b) on the basis that their claim for benefits would not create an ‘unreasonable burden’, the UK authorities abandon the establishment of the right to reside under Art.7(1)(b) and review ‘personal circumstances’ in an attempt to establish one under Art.14(4)(b). This will only be possible for citizens who are, or can be, jobseekers. By applying the conditions of residency in the robust, systemic manner that is justifiable after *Dano* and *Alimanovic*, the UK authorities artificially blur the distinctions between categories of economically inactive citizens. In this instance, the national application of the Court’s most recent case law does not seem any closer to a clear, transparent system than one that requires case-by-case analysis.

*Commission v UK* presented the CJEU with an opportunity to clarify whether or not individual assessments are necessary for proportionate decision-making under Art.7(1)(b). The Court seemed unwilling to elucidate in detail whether the UK system is proportionate in light of *Brey*.<sup>96</sup> Instead, it found that the Commission had not provided sufficient evidence that the UK approach was not proportionate. It is unfortunate that the Court did not either confirm or overrule *Brey* directly. The result of the CJEU not doing so is a lack of clarity, and also a less principled approach to proportionality. This is illustrated in *Mirga* to some extent, but also in cases before the UK Tribunal Service.

Two specific decisions of the Upper Tribunal demonstrate how reconciliation of the CJEU case law leads to complex and incoherent additional legal tests for citizens to overcome, thus detracting from the post-*Dano* goal of enhanced legal certainty and transparency. These decisions also demonstrate that proportionality is not a definitive gateway to benefits access, but something that can legitimately facilitate their protection whilst providing for expansion where justifiable. This further throws into question the necessity of side-lining proportionality in order to protect Member States and gain greater transparency and certainty in the law.

#### 4.5 *LO v SSWP*:

The Upper Immigration Tribunal judgment in *LO v SSWP*<sup>97</sup> confirms that the UK interpretation of recent CJEU case law foresees a limited role for *Brey*, taking *Dano* and *Alimanovic* as the more

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95. *ibid* [53].

96. *ibid* [83]-[84] the Court deals very briefly with the matter.

97. *LO v SSWP* (IS) [2017] UKUT 440 (AAC), [2017] 11 WLUK 234.

general rules on welfare access.<sup>98</sup> The decision illustrates the confusion that is caused when national authorities try to determine the role for proportionality in the wake of the latter cases. The Tribunal gave some insight into when proportionality matters, and to what Lord Neuberger may have meant by ‘exceptional circumstances’ in *Mirga*. The claimant was a Spanish national single mother, who had separated from her British partner, the father of her young children. She could not claim income support because she was not genuinely ‘resident’, having (undisputedly) insufficient resources. However, she was legally prohibited from returning to Spain to claim financial assistance, as under UK law this would separate the children from their father.

**4.5.1 *Brey* confinement.** Counsel argued that cases of residency and benefits access require an individual examination; an interpretation of *Brey* with which this article agrees. The judge disagreed, and found that ‘*in the light of the subsequent decisions of the CJEU, it is clear that this does not operate on a generalised level*’, and that *Brey* only aids claimants who have been previously self-sufficient.<sup>99</sup> This interpretation was based on the findings from *AMS*,<sup>100</sup> discussed below. The Tribunal also found that proportionality will aid individuals that only just fall short of meeting the requirements, and definitively have adequate resources. The reasoning behind this is that it clearly poses no threat to public finances, whereas residency claims that do (i.e. claims for social assistance), are treated much differently and will rarely benefit from proportionality considerations. Proportionality could also aid those whose circumstances were considered a lacuna<sup>101</sup> in the Directive, as per *Kaczmarek*.<sup>102</sup>

**4.5.2 *The Lacuna Argument Revisited.*** This article has already noted that the lacuna argument is in itself questionable; but it at least goes some way to finding a role for *Brey* and individual assessments in the scheme of existing EU and UK jurisprudence. The problem with this approach to reconciling EU and national case law on proportionality, is that it insists on the proof of a negative: that the Directive *does not* cover a situation. It is also an open-textured, unprincipled approach to determining a proper place for individual assessments. It relies on citizens and courts knowing exactly what situations the Directive covers and does not cover. This is not always easy, as the Directive is not entirely comprehensive and prescriptive, and is reliant upon national interpretation and application. As a result, to make the lacuna argument workable, national authorities are more likely to interpret the wording of the Directive’s conditions very broadly, thus avoiding the recognition of many lacunas.

*LO* is a direct example of this. The claimant was an economically inactive citizen, who had been resident for less than five years but more than three months. She was not a jobseeker. Moreover, she was not a family member, as she had never been married to or in a registered partnership with her British ex-partner, as Art.2 of the CRD would require for residency as a ‘family member’. The closest she would get to establishing residency under the Directive would be via Art.3(2)(b), as someone in a ‘durable relationship’; in any case a Member State could justify a denial of a right to reside for such citizens, and the claimant was no longer in such a relationship. The situation of a

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98. *ibid* [49]-[51].

99. *ibid* [48].

100. *AMS* (n.85).

101. *LO v SSWP* (n.97) [49]-[51].

102. *Kaczmarek* (n.30) [19].

person who cannot leave the country due to child custody circumstances, but who is no longer in their long-term relationship, is not covered in the Directive.

The ‘lacuna’ reconciliation of proportionality in this circumstance required the Tribunal to explicitly recognise that the Directive has not considered the circumstances of the claimant, or to interpret the Directive broadly in order for it to encompass her (very difficult) situation. Neither decision would have an entirely clear outcome. To find a lacuna would send the Court on an assessment of personal circumstances, and after *Commission v UK*, it is not clear whether this would entail a *Brey*-style assessment of the potential benefits claim, or an assessment of whether the claimant could establish residency as a jobseeker. To avoid the lacuna and draw analogies from the existing provisions, the Court would artificially widen the intended scope of the Directive: assuming that the claimant should be treated as a divorced person.

The latter view was taken by the Tribunal. The claimant was treated as a divorced third-country national living in a host Member State, who would need ‘sufficient resources’ to be resident.<sup>103</sup> This was because the provisions on third-country nationals covered the breakdown of relationships for unmarried partners, and for access to children after the breakdown of a relationship.<sup>104</sup> Because the Directive does not intend to grant extensive rights to citizens on the basis that they were previously a dependent of a host Member State national,<sup>105</sup> the situation of the claimant was not a ‘lacuna’ in the Directive, and the stringent provisions of it could be enforced against her without concern of this being disproportionate.<sup>106</sup>

It would not be difficult to shift the blame onto UK national authorities and question why the citizen could not be considered as falling into a ‘lacuna’ in the Directive, as it cannot be accepted that the provisions on third-country nationals should apply to EU citizens when the Directive is silent on a particularly sensitive issue. To find that the claimant would not be an ‘unreasonable burden’ would have absolved the need for the claimant to return to Spain for financial resources. However, the UK Tribunal was attempting to implement what *Dano* and *Alimanovic* had hinted at: avoiding the use of proportionality in cases on welfare access. The unwillingness to find a ‘lacuna’ and conduct an individual proportionality assessment was justified by reference to ‘balancing’ this against the important budgetary concerns of Member States to which the *Dano* line of case law attaches significant importance.<sup>107</sup> The judge explicitly recognised that there is a ‘restrictive climate’ on residency, at both the European and national levels,<sup>108</sup> and adapted to this climate.<sup>109</sup>

The Tribunal did not see the claimant in *LO* as requiring a *Brey*-style individual assessment to determine residency on the basis that her claim for social assistance would not be an unreasonable burden. Instead, it was deemed proportionate to require the single mother to take steps to establish her residency elsewhere under the Directive by finding or looking for work, which would have entitled her to jobseekers assistance, provided she could show she had a genuine chance of

103. CRD, Art.13(2).

104. *LO v SSWP* (n.97) [59].

105. *ibid* [64].

106. *ibid* [66].

107. *LO v SSWP* (n.97) [53].

108. *ibid* [62].

109. See, in a similar vein, *AM v SSWP and City and County of Swansea Council* [2019] UKUT 361 (AAC), [2019] 11 WLUK 820 [56]; the Upper Tribunal declined to hold that refusing a right to reside to a mother would be inconsistent with the aim of the Directive, as its aim is to protect Member State finances.

engagement.<sup>110</sup> This is despite the fact that UK nationals with young children are not expected to work,<sup>111</sup> due to the cost of childcare, and because it is undoubtedly better for children to be cared for by their parents.<sup>112</sup> The discriminatory nature of this is also considered a foreseen and acceptable result of the enforcement of the Directive.<sup>113</sup>

Of significant importance for this article, is whether the approach taken to proportionality offers greater clarity than individual proportionality assessments. In order to avoid taking a case-by-case approach to assessing welfare claims, Courts are required to take a case-by-case approach to whether such an assessment is needed. This does not seem to add significant clarity for decision makers, or EU citizens in difficult situations. Procedurally, a principled, case-by-case approach to the unreasonable burden in *Brey* seems more easily followed than Member States having to add a procedural layer into these cases to determine if *Brey* is significant or not.

To further add to the uncertainty, the outcome reached in *LO* is inconsistent with the broader principles of Union law. As discussed by the AG in *Trojani*:<sup>114</sup> it is not disproportionate to find those without sufficient resources to not have a right to reside, because ‘*the basic principle of Community law is that persons who depend on social assistance will be taken care of in their own Member State.*’<sup>115</sup> The claimant in this case was effectively stuck in the UK, unable to return to Spain and gain assistance because of UK law. It appears disproportionate to expect the claimant to do what no other mother in the UK is expected to do to retain the right to reside and gain access to vital financial support.

Most concerning is the broad, and somewhat artificial, reading of the Directive to cover a situation that it does not appear to naturally encompass. The situation in *LO* was precisely one where a proportionality assessment would be beneficial, to take into account the unusual circumstances and prevent residency conditions from giving a disproportionate outcome. This would have been attainable if *Brey* were not side-lined, or at least if the Tribunal had taken a more flexible approach to determining the meaning of ‘lacuna’ for requiring individual assessments. Unfortunately, because the *Dano* and *Alimanovic* jurisprudence has created a restrictive approach to residency, it was easier to disregard *Brey* and adopt a narrow approach to entertaining any possible lacunas.

Whilst reconciling CJEU jurisprudence, UK law has become more convoluted. Whether a citizen has their circumstances considered will depend on whether they have been previously self-sufficient (a term with little legal definition), or whether they fall into a ‘lacuna’ in the Directive, or perhaps when they fall into the ‘exceptional circumstances’ mentioned in *Mirga*. It is not clear what would constitute a lacuna, but the impact of *Dano* and *Alimanovic* appears to be the CRD stretching beyond its natural limits, and providing arguably disproportionate responses in order to avoid the finding of a lacuna. An earlier Tribunal decision, *AMS*, also demonstrates the struggle to reconcile *Brey* with any certainty, but also the questionable necessity of the recent developments regarding legal certainty and Member State protection.<sup>116</sup>

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110. *LO v SSWP* (n.97) [64], [69].

111. *ibid* [69].

112. *R(SG) v SSWP* [2015] UKSC 16, [2015] 1 W.L.R. 1449 Lady Hale [202].

113. *LO v SSWP* (n.97) [69].

114. *Trojani* (n.12).

115. *ibid*, AG opinion [70].

116. *AMS* (n.85).

#### 4.6 AMS v SSWP:

The appellant in *AMS* was a Dutch pensioner and a widow of a British citizen. She had British children, one of whom lived in the UK, where she moved to in 2006. She lived off her modest savings until they had depleted and then she made a claim for pension credit in 2011. Had she held comprehensive sickness insurance for her period of residence, she would have qualified for permanent residence in the UK under Art. 16 CRD. Unfortunately, this was not the case. The Tribunal questioned whether *Brey* was relevant in the circumstances, and if so, what the impact the specific circumstances of the claimant would be on the outcome of her welfare claim. *AMS* illustrates the post-*Dano* uncertainty about the use of proportionality. The decision also highlights that fuller proportionality assessments do not pose a risk to the economic interests of Member States, leading to the conclusion that individualised proportionality assessments do not need to be cast aside to protect those interests.

*4.6.1 Uncertainty post-Mirga.* *Mirga* left open the possibility that an additional threshold of ‘exceptional circumstances’ had to be met by claimants wishing to rely on *Brey*. The Tribunal judge in *AMS* explicitly disagreed that this is the case.<sup>117</sup> Nonetheless, the reconciliation of *Mirga* and *Brey* was objectively difficult. Judge Ward found that the Supreme Court did not apply *Brey* proportionality in *Mirga*, because the claimants attempted to use proportionality to ‘undermine the Directive’, which should only be permissible in exceptional circumstances. It was held, in *AMS*, that cases where individuals have never fulfilled any of the conditions of Art.7(1)(b) could ‘undermine’ the provisions, if proportionality allows them access to welfare,<sup>118</sup> but where they have previously conformed to the residency requirements then proportionality may aid their case in the event that they lose the right to reside.

The distinction between those who have previously been self-sufficient and those who never have, could be one way of distinguishing between *Dano* and *Brey* applications of residency conditions for self-sufficient persons under Art.7(1)(b). Ms *Dano* had never worked in the host Member State and had no resources of her own, whereas Mr *Brey* was a pensioner who had some financial resources in the form of a pension from his home state. However, this reconciliation is somewhat confusing, because of the undefined ‘sufficient resources’ requirement. It posits a two-stage test: that decision makers must first determine if an individual has ever had sufficient resources, then they may consider the personal circumstances of the individual in order to assess whether it would be disproportionate to refuse a benefits claim. *Brey* states that authorities cannot draw decisive conclusions on the sufficiency of resources, without conducting an overall assessment of the burden that the claim would have on the social assistance system.<sup>119</sup> As already noted in this article, the *Dano* judgment did not make clear whether this had been done. The case held that the specific *financial* circumstances of the claimant should be considered, to consider if they have sufficient resources. Yet little more was given as to how this assessment could determine the potential burden a citizen would cause.

It is therefore difficult to consider how decision makers can ultimately determine that a citizen has *never* had sufficient resources, without conducting a *Brey*-style assessment, or something similar. The claimant in *Mirga* had lived in the host Member State for at least two years before

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117. *ibid* [40].

118. *ibid* [44].

119. *Brey* (n.1) [64].

making any claim for benefits. It is difficult to assume that she had *never* had sufficient resources *not to burden the social assistance system*. It is important to note that ‘sufficient resources’ does not require a person to have means of subsistence, only that they must not burden the social assistance system. Even in *Dano*, the Court reiterated the link between the need to have sufficient resources and to not become a burden on the social assistance system, for a citizen to be treated equally with nationals.<sup>120</sup> An examination of the burden can only, according to *Brey*, be done in light of the individual’s personal circumstances. The fact that no specific assessment of the personal circumstances or specific burden was taken in *Alimanovic* does not seem to detract from this, as it was the specific derogation in Art.24(2) that prohibited access to social assistance, and not lack of residency. That Art.7(1)(b) links residency conditions so closely to the need to not become a burden suggests that Member States cannot determine whether a citizen has sufficient resources (and thus residency) without determining the type of burden they would create on the social assistance system. The restriction of proportionality assessments to only a fraction of cases under Article 7(1)(b) is seemingly unjustifiable. Even if it were intended for Member States to reconcile the case law this way, to do so does not create the certainty and transparency that *Dano* and *Alimanovic* aimed for, as it remains difficult to see how Member States will determine if a citizen has previously had sufficient resources. *Dano* in particular has left considerable room for uncertainty on this front. The rubric of Article 7(1)(b) does not lend well to literal application, in the continued absence of any legal definition of ‘sufficient resources’ and the silence of the CJEU in *Dano* on what had legitimised the finding of insufficient resources by German authorities.

In *AMS*, Ward J stated that the Supreme Court in *Mirga* was simply refusing to allow a stand-alone right to reside, based on proportionality assessments, when a citizen has been categorically found to have insufficient resources.<sup>121</sup> This also reflects, quite well, the position of the CJEU in *Dano*: that only those who can establish residency are entitled to equal treatment,<sup>122</sup> and to permit otherwise would undermine the residency conditions<sup>123</sup> and potentially create an automatic right to equal treatment to welfare (and thus self-sufficient residency).<sup>124</sup> It is nonetheless also a questionable and confusing approach to reconciling *Dano* with cases like *Brey*. If the insufficiency of resources had been adequately assessed, according to proportionality, there would not be a question of residence on the grounds of proportionality put forward by the counsel for the applicants. Even if there were, the opposing counsel would be able to point to the proportionality assessment which had already taken place in order to determine the insufficiency of resources, thus showing how the decision to refuse the right to residency would not be disproportionate. This was not the case; an investigation into the ‘unreasonable burden’ of Ms *Mirga*’s benefits claim had not been undertaken.<sup>125</sup>

In trying to reconcile *Dano* and *Brey* the national court finds itself with an extra layer of procedure to consider: is there a possibility that *Brey* may apply to the situation? For this, there is no clear answer, as the recent CJEU jurisprudence does not define a role for *Brey*, but ultimately it is still good law and must apply somewhere. For the author, at least if the procedural and

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120. *Dano* (n.2) [77].

121. *AMS* (n.85) [37].

122. *Dano* (n.2) [69].

123. *ibid* [76].

124. *ibid* [78]-[79].

125. *Mirga* (n.75) [38].

administrative hurdle in each case under Art.7(1)(b) is whether or not the individual is an unreasonable burden, there is some jurisprudential and legislative guidance on how to answer that issue.

The judge in *AMS* noted that the ‘exceptional circumstances’ issue was not fully discussed in *Mirga*, so there may indeed be a gloss applied to the relevance of *Brey*.<sup>126</sup> The reduced role of proportionality and a significant increase in legal uncertainty is evident either way. To have proportionality examined, citizens face an extra test of undetermined ‘exceptional circumstances’, or proving that they have previously been self-sufficient, or fall into a lacuna in the Directive, none of which have working legal definitions. *Dano* and *Alimanovic* have legitimised the reduced use of proportionality in welfare access cases, but have failed to provide guidance on how that reduction should be made. The level of ambiguity remaining results in confusing and unsupported legal tests for Union citizens to overcome, detracting from the aim of greater clarity. This article shows that this is as unnecessary as it is undesirable, as individual proportionality assessments can be applied according to general criteria and do not pose any risk to Member State interests around the welfare system.

**4.6.2 Proportionality Assessments in Action.** The applicant in *AMS* had her circumstances assessed by the Upper Administrative Appeals Tribunal because she had been previously self-sufficient.<sup>127</sup> For the Tribunal, her situation was precisely the type where *Brey* would apply, as the CJEU in *Dano* had confined the role of individual proportionality assessments to those who had previously been able to establish residency under Art.7(1)(b) and subsequently lost the ability to do so. The judge touched upon the uncertainty in this particular reconciliation: national authorities had accepted the claimant’s prior self-sufficiency, avoiding any ‘difficult questions about what sufficiency of resources actually entails.’<sup>128</sup> The CJEU in *Dano*, and the UK Supreme Court in *Mirga*, made clear that national authorities can arrive at the position that an individual has never had sufficient resources, but do not make it clear how this is done. Although the previously self-sufficient route to reconciling *Brey* and *Dano* seems relatively straightforward, it is not. The matter of how a Member State may calculate sufficient resources remains shrouded in mystery, save for the little that the Directive specifies on the matter. Until this is rectified by the CJEU, it seems impossible to reconcile *Brey* and later case law with any degree of certainty for cases under Art.7(1)(b). Considering that ‘sufficient resources’ is inherently linked to not becoming an ‘unreasonable burden’, the most obvious and pragmatic approach would be to determine the threshold of ‘unreasonable burden’ at the national level, according to factors considered in the CRD and *Brey*, then determine the ‘sufficiency’ of resources according to the burden. The threshold could be set according to the amount claimed, length of claim, and length of residency. This would be a more transparent system for decision makers and citizens, and would provide some principled approach to findings of sufficient resources.

**4.6.3 Individual proportionality assessments as a gateway to equal treatment?** *AMS* illustrates how the welfare state is protected by *Brey*-style assessments. The claimant only required a £200 top-up benefit to live a modest life. Although Ward J conducted a rigorous *Brey*-style assessment of her circumstances, she was denied benefits on the basis that she would have been an unreasonable burden on the social assistance system. The pension credit system would have passported her to

126. *AMS* (n.85) [40].

127. *AMS v SSWP (Final)* [2018] AACR 27.

128. *ibid* [60].

housing benefit access and council tax reduction. As a result, she would have been entitled to £1100pcm, despite needing far less, and the significant sum suggested that the claimant would be an ‘unreasonable burden’.

*Brey* required the Tribunal to assess the claimant’s amount and regularity of ‘income’, any facts leading to a residence permit, and the likely period for which the benefit would be claimed. The judge did note that the claimant would only need a limited top-up allowance, in light of her resources and the help she regularly received.<sup>129</sup> The nature of national legislation meant that it was not possible to give the claimant a top-up benefit. Although she may never have applied for housing benefit, the fact she would be entitled to it if given pension credit could not be overlooked.<sup>130</sup> The Tribunal assumed that the claim would last for at least four years, perhaps even longer, given that the situation of the pensioner claimant was unlikely to change.<sup>131</sup> The potential claim was calculated as amounting to £13,200 per annum for a period of at least four years.<sup>132</sup> This was considered to be a clear ‘unreasonable’ burden, compared to a situation involving a temporary need or a top-up. The position of the citizen in *AMS* can be distinguished from situations where the Court required a ‘*certain degree of financial solidarity*,’ such as to satisfy the temporary financial needs of the student in *Grzelczyk*.<sup>133</sup>

The unfortunate outcome in *AMS* demonstrates how much protection Member States glean from individual proportionality assessments. Although *Brey* requires definitive factors to be assessed before a claimant is deemed an ‘unreasonable burden’, a large degree of flexibility remains as to what weight these individual factors carry (O’Brien, 2008:664-665). Member States may focus mainly on the potential cost of the claim, and thus reject large claims on the grounds of presenting an unreasonable burden. The amount and longevity of the claim in *AMS* weighed heavily against permitting the claimant to receive vital financial benefits.<sup>134</sup> The Tribunal may have been somewhat influenced by *Dano* and *Alimanovic* in their assessment of the potential burden, as the judge noted that the two cases provide strong evidence that the role of the Directive is to protect Member State resources.<sup>135</sup>

It is not apparent that proportionality assessments ‘undermine’ the protection offered by the CRD. In the absence of evidence for this, the strongest justification for substantially abandoning *Brey* would be enhancing transparency and consistency in the application of free movement law. This article has already shown why this is not a natural outcome of *Dano* or *Alimanovic*. *AMS* adds to this line of criticism, as it highlights further questions left unanswered by the CJEU in its recent case law. National courts have to grapple with *when* individual assessments are necessary, and must apply those assessments with very little guidance.

**4.6.4 Legal uncertainty in the application of *Brey*.** There are two matters in *AMS* that illustrate lingering uncertainty around *Brey*-style cases, even after *Dano* and *Alimanovic*. Once the national authorities affirm that *Brey* does apply, they are faced with deciding the factors on which to place weight. *Dano* affirms that the financial impact of any claim is to be assessed. It remains unclear how

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129. *AMS (final)* (n.127) [16], [19].

130. *ibid* [17]-[20].

131. *ibid* [21].

132. *ibid* [22].

133. *Grzelczyk* (n.24) [44].

134. *AMS (final)* (n.127) [20].

135. *ibid*.

integration between the individual and the Member State, or the statistical breakdown of EU citizens claiming the same benefit, should impact the outcome of cases. Ward J recognised the significant links between the claimant in *AMS* and the UK, but did not consider them relevant to the assessment of the possible ‘unreasonable burden’. Notably, the requirement to consider the ‘duration of residency’, as the CRD requires, is not interpreted as a requirement to consider the integration of the claimant, but as referring to the *future* residency of the individual, to aid an assessment of the future financial burden. This may be an inaccurate interpretation of the requirement to look at ‘duration’ of residence. It would not make sense to require Member State authorities to consider the level of ‘burden’ by assessing the length of a possible claim (under *Brey*) and also the length of time an individual may potentially reside in the Member State (under the Directive). The former consideration would make the authorities aware of the future cost of the claimant, and thus take into account any temporality of award. It is unlikely that the ‘duration of residency’ consideration is intended to give the Member State an idea of the cost the citizen will be to the social assistance system.

The only other reason to interpret ‘duration of residency’ as meaning the potential future residency of a claimant, would be to take into account the level of integration planned by the individual. The Tribunal judge explicitly declined to consider integration as a factor for assessing the ‘burden’ in *AMS*. Future residency would not give the court an accurate assessment of integration, in any event. The citizen’s past in the Member State is much more telling. The CJEU has found, on numerous occasions, that residing in a Member State for a length of time will indicate a level of integration to justify the provision of welfare benefits.<sup>136</sup> This may suggest that integration should be considered, and that the requirement to consider the ‘duration of residency’ is asking precisely for that, but more clarity is needed.

Integration seems to be an imperative (but perhaps not definitive) factor to consider in welfare access cases. Assessing integration as a factor does seem to present a better view of whether a burden is ‘unreasonable’. The cost of the individual does not account for the entire nature of the redistributive issue with free movement, caused by entrenched national and territorial boundaries of the welfare state (Dougan, 2009); whereby a collective group with similar heritage agree to look after the most vulnerable in society, because of their shared cultural and physical space.<sup>137</sup> Significantly integrated citizens should perhaps not be considered a ‘burden’, even if costly.<sup>138</sup> The CRD recognises this, offering graduated rights so that the longer an individual is in a Member State, the greater their right to be there is, and to claim equal treatment. It would be desirable for the CJEU to clarify the role that integration plays in determining the level of ‘burden’ created by a citizen, for the purposes of Art.7(1)(b). At present, it seems easier for Member State courts to avoid any consideration of integration, than attempt to balance it against financial interests that *Dano* and *Alimanovic* promulgate as the central focus.

By refusing to look at the integrative links of the claimant, the judge in *AMS* apparently avoided making the class of citizens she belonged to ‘less specific’ and ‘more numerous’, for the

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136. C-138/02 *Brian Francis Collins v Secretary of State for Work and Pensions* [2004] ECR I-12733 [70]; *Bidar*, (no.35) [59]; C-423/11 and C-585/11 *Prinz and Seeberger* EU: C:2013:524 [38].

137. The author accepts that this is just one view of the welfare state. The communitarian vision of the welfare state is taken in this context, to reflect that earlier EU attempts to harness solidarity in citizenship jurisprudence appeared as attempts to replicate national solidarity.

138. See the AG Opinion in *Brey* (n.1) [88], it is suggested that open-ended claims are non-justifiable where there is no link to the host Member State.

assessment of the possible collective burden suggested by the CJEU in *Brey*. It is not evident from *Brey* that the potential to look at the number of citizens in receipt of the same benefit should take into consideration only citizens with the same integrative links. It may be easier to consider the two factors as issues to balance against each other, alongside the cost and length of potential claim. Whilst declining to consider integration, Ward J considered the number of 80+ year-old EU citizens requiring pension credits in the UK. The Tribunal had evidence that there were around 1,590 similar claims in 2016;<sup>139</sup> and that pension credit claimants typically claimed for around five years. It was accepted that these were relatively low figures, but the number of potential claims resulting from opening equal treatment to one claimant would constitute an ‘unreasonable burden’. The decision is understandable; given the significant costs at play, and that the CJEU has accepted that Member States must look at the collective, rather than the individual, burden.<sup>140</sup> How much weight should be given to such calculations, or the integration of the citizen, remains unclear until the CJEU provides guidance on applying *Brey*. It is not the intention of the author to criticise the logical approach of Ward J, who sought to identify and ascertain assessment criteria required by *Brey*; but instead highlighted the difficulty that ensues in doing so,<sup>141</sup> in light of the scant definitive guidance from the CJEU. *AMS* highlights the truth of this, and that a greater focus on integration could have delivered a different outcome, given the claimant’s substantial links to the UK.

## Conclusion

This article demonstrates that there has been a consistent lack of clear guidance and communication to Member States, in terms of what is required to ensure decisions on welfare access and residency are proportionate. Initial attempts by the CJEU to strike a delicate balance between Member State protection and proportionate decision-making posited no clear obligations on Member States. In *Brey*, the CJEU offered some clarification on what Member States are obliged to do in order to make proportionate decisions, textually supported by the CRD. However, in the post-*Dano* era a search for legal certainty and transparency has been difficult to execute. The UK courts’ reconciliation of *Brey* and *Dano*, raises considerable doubt as to when a citizen’s circumstances must be taken into account, and how their circumstances will impact their claims for welfare. For this article, the impact that the CJEU case law has on transparency and clarity in national decision-making is important. The lack of guidance on reconciling conflicting judgments entrenches the uncertainty of the proportionality gap, by leaving it up to Member States to determine what role individual assessments and proportionality should play, who are perhaps more likely to avoid the principle than robustly engage with it. The UK decisions discussed illustrate various methods of reconciling *Brey* with *Dano* and *Alimanovic*, all of which are likely to leave citizens and decisions facing a double stream of uncertainty. It now must be ascertained a) whether a citizen’s specific circumstances are exceptional, if they are a lacuna case, or if they have previously had ‘sufficient resources’; and b) if one of these applies, how their circumstances should affect a decision on welfare access.

For the author, *Brey* offered a procedurally clearer approach to cases under Art.7(1)(b). The certainty of weighing up the cost and length of a claim with the citizen’s economic history and

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139. *AMS (final)* (n.127) [25].

140. *Alimanovic* (n.65) [62].

141. Noted by Ward J in *AMS* (n.85) [67].

integration in a Member State in *every* case where the citizen would be residing under Art.7(1)(b), provides a more stable procedure than one where national courts create extra-legal tests to decipher whether such factors should be considered. The case-by-case approach, and range of factors for consideration, at least have some textual and jurisprudential support. Moreover, Member States can set down general principles to guide an assessment of the factors and utilise these assessments to protect their financial interests. Individual assessments would also avoid the need for national decision makers to wrestle with the meaning of ‘sufficient resources’, as they would simply need to look at the potential burden the claimant in each case would cause. If the goals of residency conditions are truly to create clarity, transparency in the law whilst protecting Member State social assistance systems, *Brey* appeared to provide the best way to do so under Art.7(1)(b).

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