Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 21 February 2013 [1]

Joined Cases C-523/11 and C-585/11

Laurence Prinz
v
Region Hannover
(Request for a preliminary ruling from the Verwaltungsgericht Hannover (Germany))
Philipp Seeberger
v
Studentenwerk Heidelberg

(Request for a preliminary ruling from the Verwaltungsgericht Karlsruhe (Germany))

(Freedom of movement for EU citizens — Funding for higher education abroad — Residence requirement — 'Three-year rule' — Proportionality)

1. Germany is one of the Member States where European Union ('EU') citizens may apply for funding of higher education and training at institutions located elsewhere in the European Union. Miss Prinz and Mr Seeberger, both German nationals, applied for such funding. Their applications were refused because neither could demonstrate three years of uninterrupted residence in Germany immediately before commencing their studies abroad ('the three-year rule'). The three-year rule is imposed, the German Government says, in order to address the risk of an unreasonable financial burden which might have effects on the overall level of assistance available ('the economic objective'), to identify those who are integrated into German society and to ensure that funding is awarded to those students who are most likely to return to Germany following their studies and contribute there to society ('the social objective'). Students who cannot show three years of such uninterrupted residence are refused funding for the full duration of their studies abroad. They can however receive funding for the first year of such studies or for the full duration of studies in Germany.

Legal background

EU law

Treaty on the Functioning of the European Union

2. Article 20 TFEU states:

'1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

1 — Original language: English.

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

(a) the right to move and reside freely within the territory of the Member States;

…

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.'

3. According to Article 21(1) TFEU, every EU citizen 'shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'.

4. Pursuant to Article 165(1) TFEU, the Member States are responsible 'for the content of teaching and the organisation of education systems'. Article 165(1) states that '[t]he Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action'. According to the second indent of Article 165(2), Union action is also to be aimed at 'encouraging mobility of students'.

Directive 2004/38/EC

5. Article 24 of Directive 2004/38[2] provides:

'1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.

2. By way of derogation from paragraph 1, the host Member State shall not be obliged … prior to acquisition of the right of permanent residence, [3] to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.'

National law

6. The Bundesausbildungsförderungsgesetz (Bundesgesetz über individuelle Förderung der Ausbildung - Bundesausbildungsförderungsgesetz: 'the BAföG' or 'the student assistance law') is the German law that sets out conditions for obtaining funding of studies and training. It has been amended several times,[4] including in order to give effect to the Court's judgment in *Morgan and Bucher*.[5] There, the Court found that what are now Articles 20 and 21 TFEU preclude a condition such as that included at

2 — Directive of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 27, OJ 2005 L 197, p. 34, and OJ 2007 L 204, p. 28).

3 — As a general rule, the right of permanent residence is acquired after five years of continuous legal residence: see Article 16 of Directive 2004/38.

4 — Based on the German Government's observations, it appears that the version put before the Court is that which was published on 7 December 2010.

5 — Joined Cases C-11/06 and C-12/06 [2007] ECR I-9161.

point 3 of Paragraph 5(2) of the (old) student assistance law making the award of a grant for studies at an educational establishment abroad dependent on whether those studies are a continuation of the education or training pursued for at least one year in the Member State of origin (the 'first-stage condition').

7. Subparagraph 1 of the revised Paragraph 5 defines 'permanent residence' as the place which is the centre of interests, not only temporarily, of the person concerned, irrespective of any intention to become permanently established. It further provides that a person who resides at a place only for education or training purposes has not established his permanent residence there.

8. Point 3 of Paragraph 5(2) states that students having their permanent residence in Germany shall be awarded a grant for attending an educational or training establishment in an EU Member State or in Switzerland to start or continue education or training there.

9. According to Paragraph 6, entitled 'Assistance for Germans abroad', German nationals who have their permanent residence outside Germany may be awarded an education or training grant to study where they reside or in a neighbouring State if that is justified by the particular circumstances of an individual case.

10. Paragraph 8(1) indicates that German nationals and other EU citizens who enjoy a right of permanent residence may apply for funding.

11. Paragraph 16 sets out the duration for which funding of studies or training can be obtained. Paragraph 16(3) contains the three-year rule and reads as follows:

'… an education or training grant shall be awarded … in the cases referred to in Paragraph 5(2)(3), for more than a year only if, at the commencement of a stay abroad beginning after 31 December 2007, the student has been permanently resident in Germany for at least the previous three years.'

12. The explanatory memorandum of the Federal Government to the draft legislation introducing the three-year rule stated that that rule was intended to ensure that grants for the full duration of education and training courses abroad were not awarded to students who had hardly resided in Germany. It is a principle of German education policy that receipt of education and training grants is normally contingent upon the education or training being completed in Germany or at least upon there being a special connection to Germany. The explanatory memorandum notes that other Member States also impose a residence requirement as an additional requirement for a longer-term grant for studies abroad. That requirement gives concrete expression to the justifiable interest of the State awarding social benefits to restrict financial benefits funded from the public purse to those who can demonstrate a minimum degree of close relationship to that State.

Facts, procedure and questions referred

Prinz

13. Laurence Prinz was born in Cologne in 1991 and is a German national. She lived for about 10 years with her family in Tunisia where her father worked for a German firm. Since January 2007, she has lived with her family in Germany.

14. From February 2007, Miss Prinz attended school in Germany and completed her secondary education there in June 2009. On 1 September 2009, she started business management studies at the Erasmus University in the Netherlands.

15. Before commencing her studies in the Netherlands, Miss Prinz applied on 18 August 2009 to the relevant German authority for funding. By decision of 30 April 2010, she was granted funding for the academic year 2009/10.

16. Miss Prinz made a further application for funding for the following academic year. Her application was rejected by decision of 4 May 2010 because she had permanently resided in Germany only as from January 2007 and therefore did not satisfy the three-year rule.

17. Miss Prinz appealed against that decision to the Verwaltungsgericht Hannover (Administrative Court, Hanover). First, she argued that she had been resident in Germany for a total of three years and four months, namely from September 1993 to April 1994[6] and from January 2007 to August 2009. Second, she claimed that a residence requirement such as the three-year rule is contrary to the right of freedom of movement laid down in Article 21 TFEU.

18. The Third Chamber of the Verwaltungsgericht stayed the proceedings and referred the following question to the Court for a preliminary ruling:

'Does it constitute a restriction of the right to freedom of movement and residence conferred on citizens of the [EU] by Articles 20 and 21 TFEU, which is not justified under [EU] law, if, pursuant to the [student assistance law], a German national, who has her permanent residence in Germany and attends an educational establishment in a Member State of the European Union, is awarded an education grant for attending that educational establishment abroad for only one year because when she commenced her stay abroad she had not already had her permanent residence in Germany for at least three years?'

19. Written observations have been submitted by the Austrian, Danish, Finnish, German, Greek, Netherlands and Swedish Governments and by the Commission. At the hearing on 29 November 2012, oral submissions were made by the same parties except for the Netherlands Government.

Seeberger

20. Philipp Seeberger is a German national. He was born in Germany in 1983 and lived there with his parents, who are also German nationals, until 1994. From 1989 to 1994, he attended primary and secondary schools in Germany.

21. Between 1994 and December 2005, Mr Seeberger lived with his parents in Spain, where his father worked as a self-employed business consultant. The national court states that, in moving there for that reason, Mr Seeberger's father exercised his rights under what are now Articles 45 and 49 TFEU. Mr Seeberger completed his secondary schooling in Spain, leaving in 2000 after passing the lower secondary examination. In April 2005, he qualified as an estate agent after professional training undertaken during 2004 and 2005, still in Spain. In January 2006, Mr Seeberger's parents returned to Germany. Although he claims that, as of that time, he also had his permanent residence in Germany, Mr Seeberger was not registered in Munich until 26 October 2009. A statement by a former employer appears to show that he completed an internship as a web designer in Cologne between 2 April and 27 June 2007.

22. In April 2009, Mr Seeberger passed an external examination admitting him to study at the University of the Balearics in Palma de Mallorca. In September 2009, he began a course in economics there. He applied in Germany for funding for those studies.

6 — It is not clear from the reference for a preliminary ruling how soon after her birth Miss Prinz moved with her family to Tunisia, or why she briefly returned from Tunisia to Germany in September 1993 before apparently leaving again in April 1994.

23. The relevant German authority rejected his application on the grounds that there was insufficient evidence that he had actually established permanent residence in Germany for the three years immediately prior to the start of his course.

24. Mr Seeberger challenged that decision, arguing that the three-year rule was contrary to his right of freedom of movement as an EU citizen. Following the rejection of that challenge, Mr Seeberger initiated proceedings before the Verwaltungsgericht Karlsruhe (Administrative Court, Karlsruhe). There, he argued that his freedom of movement was restricted because the three-year rule required him to abandon his permanent residence in another Member State and to move his permanent residence back to Germany well in advance in order to be eligible for funding of his studies abroad.

25. The Fifth Chamber of the Verwaltungsgericht Karlsruhe has stayed the proceedings and referred the following question to the Court for a preliminary ruling:

'Does [EU] law preclude national legislation which denies an education or training grant for studies in another Member State solely on the ground that the student, who has exercised the right to freedom of movement, has not, at the commencement of the studies, had his permanent residence in his Member State of origin for at least three years?'

26. Written observations have been submitted by Mr Seeberger, the Austrian, Danish, Finnish, German, Netherlands and Swedish Governments and by the Commission. At the hearing on 29 November 2012, oral submissions were made by the same parties who filed written observations except for the Netherlands Government; the Greek Government also attended and made oral submissions.

Assessment

Preliminary remarks

27. In both cases, the Court is asked to consider whether Articles 20 and 21 TFEU preclude a Member State from making funding of studies abroad dependent on a residence requirement such as the three-year rule.

28. Unlike the referring court in *Prinz*, that in *Seeberger* has formulated its question in terms that are silent as to whether the student is a national of the Member State awarding the grant. However, the rest of the reference in that case makes it clear that guidance is sought in relation to the position of a German national.

29. Prior to exercising their freedom of movement to study elsewhere in the EU, Miss Prinz and Mr Seeberger both moved away from Germany for different reasons. Miss Prinz moved outside the EU when her father took up employment in Tunisia. Mr Seeberger moved to Spain when his father exercised his right of freedom of establishment to engage in a self-employed activity there.

30. Unlike Miss Prinz, Mr Seeberger thus appears previously to have exercised his right of freedom of movement under EU law. That fact does not affect the analysis of the questions referred to the Court because both, as EU citizens, may rely against their Member State of origin on rights conferred by that status,[7] such as the freedom to move in order to study elsewhere in the EU. The Commission none the less questions whether the position of Mr Seeberger should also be examined under the law on freedom of establishment. I shall address this point as an issue pertaining to the relevant law.[8]

7 — *Morgan and Bucher*, cited in footnote 5 above, paragraphs 22 and 23 and case-law cited.

8 — See points 36 to 39 below.

31. The Court has already considered on a number of occasions whether the Member States can make funding of studies dependent on a residence condition of the same general nature as that at issue. These cases have appeared before the Court in various guises. They have involved migrant workers and their dependent family members,[9] but also students who were not basing their claim to funding on their link to an EU citizen engaged in gainful economic activity.[10] They have concerned requests for funding from the Member State of origin,[11] the Member State of employment,[12] or the host Member State where the student hoped to study.[13] Some cases predate the entry into force of Directive 2004/38 while others refer directly or indirectly to Article 24(2) of that directive. In many of these cases, the measure at issue was claimed to be justified because, inter alia, it avoided an unreasonable burden on the public budget of the Member State awarding the funding and/or made it possible to identify those who were sufficiently connected to that Member State and those who, following their studies, were likely to return to the Member State awarding the funding.

32. Whilst the Court accepts that the Member States enjoy wide discretion in defining whether and how to finance studies and to whom to award that funding, it has, in my view, been less clear in explaining precisely what elements are to be taken into account in examining whether a particular restriction can be justified. Is it sufficient for a Member State to put forward the economic objective or must it also establish the existence of a risk of an unreasonable financial burden? May a Member State justify a restriction like the three-year rule based on the objective of granting funding to students showing a certain degree of integration, independently of concerns about the financial cost of the scheme? Is it appropriate to assess the proportionality of a restriction like the three-year rule in relation to the economic objective by verifying whether that rule is not more restrictive than necessary to establish the required degree of integration?

33. These, and possibly other, uncertainties may explain why some Member States continue to use a residence requirement as the sole measure to achieve what are clearly complex objectives, why six Member States have intervened in the present cases in support of Germany and why the Court is repeatedly asked to decide whether some variation on a residence requirement is in conformity with EU law.

Relevant law

34. The referring courts have asked the Court solely to interpret the Treaty provisions on EU citizenship.

35. They were clearly right not to ask the Court to examine Article 24 of Directive 2004/38. That provision governs when a host Member State is required to give EU citizens who reside in its territory on the basis of the directive equal treatment with its own nationals, including in relation to maintenance aid for studies. However, there is no indication that Miss Prinz and Mr Seeberger have applied for funding in, respectively, the Netherlands and Spain. Rather, they have applied for funding to their Member State of origin.

36. What of the Commission's suggestion that Mr Seeberger's position should be examined by reference to the law relating to freedom of establishment?

37. The three-year rule was not in place when Mr Seeberger and his family exercised their right to move to Spain. It cannot therefore have affected that initial move.

9 — See, for example, Case C-542/09 *Commission* v *Netherlands* [2012] ECR.

10 — See, for example, Case C-209/03 *Bidar* [2005] ECR I-2119.

11 — See, for example, *Morgan and Bucher*, cited in footnote 5 above.

12 — See, for example, *Commission* v *Netherlands*, cited in footnote 9 above.

13 — See, for example, *Bidar*, cited in footnote 10 above.

38. Now that the rule is in place, however, it does potentially have a 'chilling effect' on any EU citizen contemplating exercising free movement rights within the EU as a worker, a self-employed person or simply as a citizen. It also disadvantages those who have exercised those rights and do not return to Germany sufficiently far in advance to satisfy the three-year rule.

39. The referring court was asked to consider the validity of the decision refusing funding for Mr Seeberger. It has made no findings as to whether Mr Seeberger is still dependent on (either of) his parents or, if not, when he stopped being dependent. The Court therefore has insufficient elements to understand whether the referring court should approach the case before it on the basis that Mr Seeberger exercised free movement rights in connection with (i) his father's exercise of his freedom of establishment and (ii) his father's subsequent decision to return to his Member State of origin.

40. I add that nothing in the orders for reference suggests that Miss Prinz and Mr Seeberger are relying on their status as economically active EU citizens or on relevant family ties to, for example, a migrant worker in Germany. I shall therefore, like the referring courts, approach the matter exclusively on the basis of Articles 20 and 21 TFEU.

Definition of residence

41. Where one physically resides is a question of fact. However, the place where a person actually lives or is registered as living may not necessarily be the place at which a Member State defines, as a matter of law, that person to have his permanent residence or domicile.

42. The three-year rule is defined by reference to uninterrupted permanent residence in Germany. In accordance with Paragraph 5(1) of the student assistance law, permanent residence is defined as 'the place which is the centre of interests, not only temporarily, of the person concerned, irrespective of the intention to become permanently established'.

43. Yet, at least in the case of Mr Seeberger, it would appear that the decision refusing him funding was based on a different notion of residence. Mr Seeberger claims to have resided in Germany from January 2006 but he was only registered as resident in Munich as of 26 October 2009.

44. At the hearing, the German Government confirmed that the relevant authorities sometimes use the date of registration as an indicative fact to determine whether the three-year rule is satisfied. If funding is refused because the period between the date of registration and starting studies abroad is less than three years, an applicant may challenge that decision and produce evidence that he resided in Germany prior to registering there before the German courts. The German Government emphasised that all facts and circumstances must be considered in assessing whether the applicant has his residence in Germany within the meaning of Paragraph 5(1) of the student assistance law.

Restriction on EU citizens' right of freedom of movement

45. EU law does not oblige the Member States to award funding for studies pursued either within their territory or elsewhere. However, whilst the Member States remain competent in this area, they must none the less comply with EU law in exercising their competences. [14]

14 — *Morgan and Bucher*, cited in footnote 5 above, paragraph 24 and case-law cited.

46. The referring courts in *Prinz* and *Seeberger* consider that the three-year rule is likely to restrict free movement rights for EU citizens under Articles 20 and 21 TFEU. For reasons similar to those applied by the Court in *Morgan and Bucher*,[15] they consider that the three-year rule is liable to discourage an EU citizen from moving to another Member State to start study or training there or, if such study or training abroad has already commenced, to put pressure on the student to discontinue the studies and return to Germany.

47. I agree that the three-year rule is a restriction.

48. A measure that makes entitlement to a social advantage dependent on residence in the Member State granting it is likely to restrict free movement. It disadvantages any EU citizen who has already exercised his freedom of movement rights (namely, any citizen who resides or has resided elsewhere in the EU) before applying for the benefit. By its very nature, a residence requirement of the kind at issue is likely to discourage an EU citizen from exercising his right to move to another Member State[16] and pursue secondary education there prior to applying for funding for tertiary education ('the chilling effect').

49. In the present cases, Mr Seeberger finds himself at a disadvantage when he wishes to pursue studies outside Germany solely because, prior to commencing those studies, he and his parents had exercised their freedom of movement and he is not considered to have returned to Germany sufficiently far in advance of the start of his studies. Miss Prinz is also under financial pressure to study in Germany rather than follow her preferred course in the Netherlands because she cannot obtain funding to study in the Netherlands beyond the first year of her course.

50. I therefore agree that the three-year rule constitutes a restriction on the free movement rights of EU citizens conferred by Articles 20 and 21 TFEU.

51. Such a restriction can be justified only if it is based on objective considerations of public interest, is appropriate to achieve that legitimate objective and is proportionate to it, that is to say, it is not more restrictive than necessary to achieve the objective.

52. The German Government identifies two objectives on the basis of which the three-year rule can be justified. I shall consider each in turn.

Justification based on the economic objective

Legitimacy of the objective

53. The German Government relies on the Court's rulings in *Bidar* and *Morgan and Bucher* to justify the three-year rule. That approach is consistent with the explanatory memorandum to the draft legislation introducing the rule.[17]

54. In *Bidar*, the Court stated that, in relation to economically inactive EU citizens, 'it is permissible for a Member State to ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State'.[18] As a result, it was legitimate to grant funding 'only to students who have demonstrated a certain degree of integration into the

15 — See *Morgan and Bucher*, cited in footnote 5 above, paragraphs 25 and 26.

16 — See for example, in the context of a disability pension, Case C-499/06 *Nerkowska* [2008] ECR I-3993, paragraph 31 and case-law cited.

17 — See point 12 above.

18 — *Bidar*, cited in footnote 10 above, paragraph 56.

society of that State'.[19] In *Morgan and Bucher*, the Court applied the same reasoning as regards the award by a Member State of grants to its own nationals wishing to study in another Member State,[20] before concluding that the first-stage studies condition there at issue was too general and exclusive to satisfy the proportionality test.[21]

55. The Court has thus recognised that the objective of avoiding an unreasonable burden which could have consequences for the overall level of assistance may in principle justify a restriction on freedom of movement such as the three-year rule.

56. But is it sufficient for a Member State merely to assert, without more, that such an economic objective exists?

57. In my view, it is not.

58. In *Morgan and Bucher*, the Court found that in principle considerations such as those advanced in *Bidar* may apply to grants for students wishing to study abroad 'if a risk of such an unreasonable burden *exists*'.[22] The Commission points out in the present cases that Germany has not shown the existence of the risk that it seeks to avoid or limit.

59. It is clearly for each Member State to decide what part of its public budget it is willing to set aside to fund studies at home and abroad and to assess what overall financial burden it considers to be reasonable.[23] Some Member States may decide to make only a modest amount of funding available. Others may be willing to devote a significantly larger part of their public budget to that purpose. Whilst it is not for the Court to review a Member State's decision as to what is 'reasonable', it may give guidance to national courts regarding their examination of whether, *given that decision*, covering the maintenance (and possibly other) costs of students from other Member States will create a risk of an unreasonable burden.

60. Attaching any type of condition to entitlement to a social advantage is likely to limit the number of persons who can apply successfully and hence the overall budgetary cost of making that advantage available. That fact cannot of itself suffice to justify a restriction on free movement rights under Articles 20 and 21 TFEU. Rather, I consider that a Member State must assess the actual or potential risks arising from making particular versions of funding available. Based on that assessment, it may then determine what would be an unreasonable financial burden and define measures aimed at avoiding or limiting the risk that such a burden will be created.

61. In the present cases, the German Government relies on data generated by the federal statistical office ('Statistisches Bundesamt') showing that in 2008 approximately one million German nationals lived in other Member States, including half a million in neighbouring Member States. The German Government submits that, if the residence requirement were to be eliminated, that group, together with certain non-nationals, would qualify for funding for the entire duration of studies outside Germany.

62. Whilst I see no basis for doubting the accuracy of those figures, they obviously say nothing about the existence of an actual or potential risk of an unreasonable financial burden. It is doubtful whether all Germans residing elsewhere in the EU, from babes in arms to old-age pensioners, intend to pursue further studies (and in particular outside Germany). Nor is it evident that those who do intend to be students will all apply to the German authorities for funding.

19 — *Bidar*, cited in footnote 10 above, paragraph 57.

20 — *Morgan and Bucher*, cited in footnote 5 above, paragraphs 43 and 44.

21 — *Morgan and Bucher*, cited in footnote 5 above, paragraph 46.

22 — *Morgan and Bucher*, cited in footnote 5 above, paragraph 44 (emphasis added).

23 — See also, for example, my Opinion in *Commission* v *Netherlands*, cited in footnote 9 above, point 103.

63. The German Government confirmed at the hearing that it did not have further, more detailed material to put before the Court.

64. In my view, a more robust assessment of the likely risk of 'an unreasonable financial burden that could have consequences for the overall level of assistance that may be granted'[24] is required in order to establish that a restriction such as the three-year rule is justified on the basis of the economic objective. Such an assessment would need also to consider the appropriateness of the restriction as a means of avoiding or limiting the risk that such a burden will be created.

65. To the extent that the legitimate objective recognised in *Bidar* and *Morgan and Bucher* is that of avoiding an unreasonable financial burden which might affect the overall level of assistance granted, the appropriateness and proportionality of the restriction must be assessed in relation to that objective.

66. However, whilst Germany in the present cases certainly invokes the economic objective, it also argues that the restriction is proportionate in relation to the need to give funding only to those students showing a certain degree of integration in its society.

67. That position suggests that the Member State understands the Court's case-law as showing that a restriction like the three-year rule can be justified on the basis of the need to require a certain degree of integration ('the integration objective') independently of concerns about the financial cost of the scheme (the economic objective).

68. It is true that the Court has accepted that the economic objective can be *achieved* by awarding funding only to students demonstrating a certain degree of integration in the Member State awarding the grant – whether it be the host Member State or the Member State of origin. If funding is sought from the host Member State, financial solidarity has only to be shown to students who are nationals of another Member State after an initial period of residence.[25]

69. In my Opinion in *Commission* v *Netherlands*, I set out what I understand the Court to have decided in *Bidar*. As I read that judgment, the Court did not recognise a separate integration objective. Rather, requiring evidence of a degree of integration was treated as the *means* to limit those entitled to support and hence to avert an unreasonable financial burden.[26] A residence requirement serves such a purpose. The Court in *Commission* v *Netherlands* did not decide this point. It held that the economic objective was not capable of justifying unequal treatment of migrant workers but, as part of the same analysis, recognised Member States' right to require nationals of other Member States to show a certain degree of integration in their societies in order to receive social advantages.[27]

70. As EU law currently stands, it is unreasonable to require a Member State to assume financial responsibility for a student who has no connection to it. The opposite proposition would imply that the Member States have agreed on full financial solidarity for funding students and that there is full 'mobility' of that social advantage, which is clearly not the case. Member States are thus justified in refusing funding to students who have *no meaningful connection* in order to avoid an unreasonable burden which could have consequences for the overall level of assistance. Put differently, they can limit the range of beneficiaries in order to achieve the economic objective; and it is acceptable for that purpose to use a criterion that establishes evidence of a degree of integration.

24 — *Bidar*, cited in footnote 10 above, paragraph 56.

25 — See recital 10 in the preamble to Directive 2004/38; see also Case C-75/11 *Commission* v *Austria* [2012] ECR, paragraph 60.

26 — See my Opinion in *Commission* v *Netherlands*, cited in footnote 9 above, point 84.

27 — *Commission* v *Netherlands*, cited in footnote 9 above, paragraphs 63 and 69.

71. In my Opinion in *Commission* v *Netherlands*, I left open the possibility of reading the Court's case-law differently: that is, as indicating that a Member State can require a degree of integration *independently* of concerns about the financial cost of making funding for studies available.[28] Under such an approach, the integration objective (appropriately defined) would suffice of itself to justify the restriction on free movement rights. Whether a residence requirement such as the three-year rule was deemed to be proportionate would then depend on whether that rule was more restrictive than necessary to identify which applicants showed the required degree of connection.[29]

72. I believe that it would assist the referring courts in the present cases if the Court were to clarify its position on the relationship between the economic objective and the integration objective. Is the integration objective a separate legitimate objective capable of justifying a restriction on the right of freedom of movement,[30] including when that restriction is applied to a Member State's own nationals? Or do both objectives represent interests that are linked and that should therefore be considered as part of a single objective? Or is the degree of integration criterion merely a means to achieve the economic objective?

73. In the remaining part of my analysis I shall consider the appropriateness and proportionality of a measure such as the three-year rule in relation to each objective in turn.

Appropriateness of the restriction

– Economic objective

74. Clearly any measure that limits the group of beneficiaries will reduce the cost of the scheme as compared to the cost of a scheme that gave funding to all EU citizens without differentiation. The three-year rule does indeed so limit the group of potential beneficiaries.

75. However, the national court must still decide whether the three-year rule is reasonably connected to the objective of avoiding an unreasonable burden which could have consequences for the overall level of assistance. That will depend on whether the risk is reduced to a reasonable burden by the application of the three-year rule.

– Integration objective

76. Where a person resides normally shows where he or she is integrated into society. A requirement based on residence is therefore prima facie an appropriate means of achieving the integration objective.

28 — See my Opinion in *Commission* v *Netherlands*, cited in footnote 9 above, point 120.

29 — See points 80 to 82 below.

30 — Whilst *Stewart* did not involve the same type of social advantage as that at issue in the present cases, the Court there considered that it is legitimate to wish (i) to ensure that there is a genuine link between a claimant to a benefit and the competent Member State and (ii) to guarantee the financial balance of a national social security system. It then appeared to examine the appropriateness and proportionality of the measure at issue in relation to the first objective before concluding that, in relation to the second objective, 'the foregoing considerations also apply with regard to [the second objective]' and that 'the necessity of establishing a genuine and sufficient connection … enables that State to satisfy itself that the economic cost of paying the benefit at issue … does not become unreasonable': Case C-503/09 *Stewart* [2011] ECR I-6497, paragraphs 89 and 103.

Proportionality of the restriction

77. The ambiguity as to whether a restriction such as the residence requirement contained in the three-year rule can be justified on the basis of the economic objective or the integration objective appears to have resulted in false logic when it comes to assessing the proportionality of such a restriction. The Member States appear to invoke the economic objective in order to justify a restriction but then submit that the measure is proportionate by reference to the integration objective.

78. Thus, in the present cases the German Government in essence claims that the three-year rule identifies those applicants who are sufficiently connected to German society to be awarded funding paid out of the public budget. It submits that it is important to verify the existence of that connection for its own nationals because the type of solidarity underlying paying out of the public budget to fund studies is a solidarity that exists between inhabitants of a Member State and not necessarily between its nationals.[31] As a separate argument, the German Government maintains that the three-year rule operates in a manner that is transparent, offers legal certainty and is administratively efficient.

79. I will consider the proportionality of the three-year rule in relation both to the economic objective and to the integration objective.

– Economic objective

80. A measure like the three-year rule is proportionate if it imposes no greater restriction than is needed to bring the financial burden within the limits of the reasonable. In making that assessment, it is necessary to consider the availability of alternative but less restrictive measures. Reasons of administrative efficiency, legal certainty and transparency will enter into the equation when comparing the actual (or preferred) measure with alternative measures.

81. The national court cannot undertake that assessment without knowing (i) what is considered to be an unreasonable financial burden and (ii) what the quantitative impact of the three-year rule on that burden is estimated to be.

82. Suppose, for example, a Member State decides that it is prepared to devote EUR 800 million to student finance for tertiary education. It reviews the new arrangements that it proposes to put in place and realises that, unless it imposes some additional criterion, there is a risk that it will have to pay out over EUR 1 billion. It classes that risk as unacceptable. After examining the past residence history of a representative sample of existing students benefiting from funding (a sufficiently large sample to be statistically reliable), it reaches the conclusion that, were it to impose the requirement that the applicant must have resided four years within its territory, that would exclude sufficient prospective candidates to limit the risk of running seriously over budget. The single additional criterion is chosen in order to attain the economic objective. Provided that the risk-cost analysis is properly carried out, I do not find the arrangements intrinsically objectionable, even though they may well result in a restriction on free movement rights of EU citizens. And, when compared with alternative measures, such a criterion might be proportionate. I emphasis, though, that such an analysis would be purely economic. The residence requirement would *not* be prayed in aid as a proxy measure for ‘a certain degree of integration’.

31 — Whilst these arguments might suggest that Germany makes entitlement to funding of studies abroad conditional on a connection to its tax system, the German Government confirmed at the hearing that that is not the case. It expressly stated that it did not aim to award funding only to those EU citizens who had previously contributed to the public budget out of which grants are paid. When asked at the hearing to define the solidarity to which it referred in its written observations, the German Government answered that beneficiaries should be those with some attachment to German society.

– Integration objective

83. The German Government argues that limiting the group of beneficiaries, whatever their nationality, to those satisfying the three-year rule is a proportionate measure to ensure that only students who can show a sufficient degree of connection to German society obtain funding paid out of the public budget. In support of its position, it relies in particular on *Bidar* and *Förster*.

84. As I pointed out in my Opinion in *Commission* v *Netherlands*, the Court in *Bidar* did not need to examine proportionality. [32] And in *Förster* it relied on the text of Directive 2004/38 to conclude that the restriction resulting from the residence requirement at issue in that case was justified. In so doing, the Court focused on the fact that that directive lays down specific requirements with respect to the degree of integration of non-nationals in the host Member State. [33]

85. Directive 2004/38 does not apply here. [34] For that reason, this is not an appropriate moment to revisit *Förster* or to take a closer look at the relationship between Article 24(2) of that directive and the principle of proportionality. By the same token, I do not find the analysis in *Förster* of a five year residence requirement for showing integration in order to claim student finance from a *host* Member State of great assistance in resolving the present cases.

86. In the absence of harmonisation, I consider that Member States should be allowed a certain freedom to define the degree of integration they require from applicants for funding of studies or training; and to choose an appropriate primary measure to establish evidence of that integration.

87. An EU citizen's connection to the society of a particular Member State is a complex question, both from the perspective of the citizen and of the State. Such a connection may exist by birth (and therefore be involuntary) or be acquired. It is likely to evolve over time, with varying intensity. Its appreciation may be subjective or objective. It appears reasonable to assume that, in any context, it implies membership of a defined community.

88. However, whilst the Member States should be allowed a certain freedom to define that community, it is insufficient for them to argue that the required degree of connection is invariably demonstrated by residence for a certain number of years. That argument is circular because it suggests that, in the context of the present cases, the three-year rule would thus be proportionate because it is not more restrictive than necessary to establish who can show three years of uninterrupted residence immediately prior to the start of studies abroad.

89. If a Member State chooses to require evidence of integration through a measure that restricts the right of freedom of movement, it must accept that the exercise of its discretion in this area be subject to, inter alia, the principles of proportionality and non-discrimination. Thus, in *Bidar*, the Court expressly recognised that the requirement that an applicant for a student loan be settled in the United Kingdom for the purposes of national law and satisfy a three year residence requirement resulted in indirect discrimination against non-nationals: it was therefore justified only if it was based on objective considerations independent of the nationality of the persons concerned and was proportionate to the legitimate aim of the national provisions. [35]

90. The Court appears already to have rejected the notion that, in relation to the integration objective, a single criterion can be proportionate.

32 — *Commission* v *Netherlands*, cited in footnote 9 above, point 113 of the Opinion.

33 — See Case C-158/07 *Förster* [2008] ECR I-8507, paragraphs 54 and 55.

34 — See point 35 above.

35 — See *Bidar*, cited in footnote 10 above, paragraphs 51 to 54 and case-law cited.

91. For example, in *Morgan and Bucher*, the Court concluded that the first-stage condition [36] was not proportionate because 'the degree of integration into its society which a Member State could legitimately require must, in any event, be regarded as satisfied by the fact that the applicants … were raised in Germany and completed their schooling there'. Whilst the first-stage studies condition was imposed to test the degree of integration, the Court (and the national court) accepted that the necessary degree of integration was shown 'in any event' in the case of the applicants (who were German nationals) based on *other factors* such as where they were raised and where they completed their schooling. [37]

92. More recently, in *Commission* v *Austria*, the Court has confirmed in general terms that 'the proof required to demonstrate the genuine link must not be too exclusive in nature or unduly favour an element which is not necessarily representative of the real and effective degree of connection between the claimant … and the Member State … to the exclusion of all other representative elements'. [38] The genuine link required 'should be established according to the constitutive elements of the benefit in question, including its nature and purpose or purposes'. [39]

93. These considerations lead me to conclude that the three-year rule at issue here is likewise more restrictive than necessary.

94. At the hearing, the Commission put forward the example of two German nationals: the first, having lived 17 years outside Germany, returns to Germany three years prior to starting his studies abroad; the second, having lived 17 years in Germany, leaves Germany three years prior to the start of his studies elsewhere in the European Union. Under the three-year rule, the first can obtain funding but the second cannot. Yet who is more integrated in German society?

95. That example demonstrates that the three-year rule is too rigid. It risks excluding from funding students who, despite not having resided for an uninterrupted period of three years in Germany immediately prior to studying abroad, are nevertheless sufficiently connected to German society due to their German nationality, residence, schooling or employment there, language skills, family and other social or economic ties, or other elements capable of showing that connection.

96. Under the student assistance law, it is entirely irrelevant if a German student who wishes to study in France has, for example, lived and studied in Germany previously or has his family living nearby and/or his parents working in Germany. By contrast, if that student were, for example, Bulgarian and had moved to Germany only three years before starting university studies in Poland or his Member State of origin, he would be entitled to funding paid out of the German public budget and no other facts would need to be considered in deciding whether he belonged to the targeted group of 'integrated' beneficiaries.

97. The issue at stake is, of course, not whether Bulgarian or German students are entitled to receive funding from the German Government. What matters is the relationship between the three-year rule, the objective it aims to achieve and the basis on which the decision is made (in this example) that the Bulgarian student gets funding whereas the German student does not.

36 — See point 6 above.

37 — *Morgan and Bucher*, cited in footnote 5 above, paragraphs 45 and 46.

38 — Cited in footnote 25 above, paragraph 62.

39 — Cited in footnote 25 above, paragraph 63.

98. Under the three-year rule, it is irrelevant whether the claimant has German nationality. However, nationality is, as the Court put it in *Rottman*, a 'special relationship of solidarity and good faith' which together with 'the reciprocity of rights and duties … form[s] the bedrock of the bond of nationality'. [40] I find it difficult to conceive that that is a connection that can be entirely disregarded when assessing the proportionality of the measures that a Member State adopts to achieve the integration objective.

99. I therefore consider that a measure such as the three-year rule is too rigid and does not enable national authorities to establish the real and effective degree of integration.

100. Are there alternative, less restrictive, measures that are available?

101. I consider that there might be.

102. The national court may consider that the rule could be designed in a less restrictive manner without losing its ability to identify those students having a sufficient degree of integration in Germany. Possible alternative rules might be less restrictive but still effective. A different approach might incorporate more flexibility. I emphasise that I am not recommending any particular rule – that is the province of the Member State. I merely observe that it would be possible to construct less rigid, and therefore more proportionate, arrangements.

103. In comparing alternative measures, it is obviously important to assess whether the application of a measure 'rest[s] on clear criteria known in advance and [provides] for the possibility of means of redress of a judicial nature'. [41]

104. Here, I agree with the German Government that the three-year rule is transparent and administratively efficient and offers legal certainty. The relevant information can easily be collected and the decision is mechanical, yes or no. The cost of administering the scheme is likely to be relatively low, especially in relation to the overall budget allocation for student funding. These are all relevant matters to take into account when comparing the three-year rule with other possible measures.

105. However, the most transparent and efficient measure is not necessarily a proportionate measure. Whether it is depends on other elements such as the design and structure of the scheme, the overall coherence of the scheme and the objective being considered.

106. A measure like the three-year rule is likely to be more transparent and efficient than one requiring individual circumstances to be examined in each case. The latter would arguably be less restrictive and more inclusive. A third type of measure might provide that residence can be used as the primary or usual way of demonstrating the required degree of integration, without precluding the applicant or the authority from putting forward facts showing the existence (or the absence) of a real and effective connection. Such a measure would appear to be more transparent and efficient than the second type I have described and less restrictive than a measure like the three-year rule.

40 — Case C-135/08 *Rottman* [2010] ECR I-1449, paragraph 51.

41 — Case C-138/02 *Collins* [2004] ECR I-2703, paragraph 72. In that case, the residence requirement was a condition applied to restrict access to a social advantage of the type that, according to the Court's previous case-law, could be linked to the geographic employment market in question (see paragraph 67).

107. The benefits of a measure like the three-year rule must also be appreciated against the background of the overall regulatory scheme of which it forms part. In that connection, the national court may wish to bear in mind that in other respects – such as the assessment of whether a student has his residence in Germany[42] or whether 'particular circumstances' exist justifying the grant of funding under Paragraph 6 of the student assistance law[43] – it appears possible to reconcile a careful assessment of individual circumstances with the need to ensure legal certainty, transparency and administrative efficiency.

Justification based on the social objective

108. It was not entirely clear from the German Government's written observations whether it was advancing another basis for justification of the three-year rule, namely that it wished to award funding only to those students who would, following their studies abroad, become effective members of the German workforce or otherwise be absorbed into its economy and society.

109. However, several of the other Member States presenting observations submitted that whether making funding available to study abroad is a success depends partly on whether students return to the Member State that provided the funds when they complete their studies. Member States often award such funding because of the expected positive effects on their labour market, based on the perceived probability that a student so funded is likely to return and contribute to that Member State's society.

110. At the hearing, the German Government confirmed that it took the view that the three-year rule was also justified on the basis of the social objective.

Legitimacy of the objective

111. This objective corresponds partly with the social objective invoked in *Commission* v *Netherlands* to justify the three out of six years rule at issue in that case.[44] There, the Court accepted that encouraging student mobility was an objective in the public interest capable of justifying a restriction.[45] It also accepted the twin premises that (i) the scheme was aimed at encouraging students residing in the Netherlands to consider studying abroad rather than at home, and (ii) the Netherlands expected that students who benefited from the scheme would return to the Netherlands after completion of their studies in order to reside and work there.[46]

112. I consider that the same objective is capable of justifying the three-year rule here at issue.

42 — See point 44 above.

43 — See point 9 above. At the hearing, there was disagreement on the scope of application of that rule. The German Government described it as a 'hardship rule' applicable in exceptional circumstances where the student is unable to move to Germany in order to study there (for example, because the student is disabled or under-age). Counsel for Mr Seeberger suggested that it was used to accommodate the children of German diplomats living abroad. The Court will have an opportunity to consider Paragraph 6 of the BAföG in Case C-220/12 *Thiele Meneses*, which is currently pending.

44 — That rule required an applicant for 'portable' student finance, in addition to being eligible for funding to study in the Netherlands, also to have resided lawfully in the Netherlands during at least three out of the previous six years.

45 — *Commission* v *Netherlands*, cited in footnote 9 above, paragraph 72; see also points 135 to 140 of my Opinion in that case.

46 — *Commission* v *Netherlands*, cited in footnote 9 above, paragraph 77.

Appropriateness of the restriction

113. In *Commission* v *Netherlands*, the Court accepted that the three out of six years rule was appropriate to achieve the social objective because students otherwise normally study in the Member State where they reside and studies abroad enrich students as well as the society and labour market of the Member States. [47]

114. In my Opinion in that case, I took a different view, based on a consideration that is not discussed in the Court's judgment. I was not convinced that there was an obvious link between the place where students reside prior to their studies abroad and the place where they will reside and work after their studies. [48]

115. I have not changed my view; and the three-year rule itself helps to illustrate why.

116. First, that rule excludes from funding for studies abroad all students who cannot show three years of uninterrupted residence in Germany. It is argued that such a rule is likely to identify those who will return to Germany. But does not the same logic lead equally well to the conclusion that, after three years or more studying and residing abroad, a student once he graduates will stay to work and live in the Member State where he studied?

117. Second, where a graduate, having completed studies abroad, will take up work may plausibly be determined in part by such practical matters as where jobs are available, what language(s) he speaks and the general state of the employment market in the EU. Of course he may return to his previous Member State of residence; but he may equally well remain where he studied or move on elsewhere. Should it really be assumed that attachment to the Member State where he lived without interruption for the three years immediately before starting his studies will automatically override every other consideration?

118. For these reasons, I consider the connection between the three-year rule and the social objective to be far from self-evident.

119. For the sake of completeness, I shall none the less briefly consider the proportionality of the three-year rule in relation to the social objective.

Proportionality of the restriction

120. Here, the German Government's written and oral observations were considerably less developed than in relation to the economic objective and the integration objective.

121. Whilst the German Government stressed the attractiveness of the three-year rule in terms of legal certainty, transparency and administrative efficiency in the context of the economic objective, it did not expressly state whether it also relied upon those arguments in relation to the social objective. On the assumption that it intended to do so, I consider, for reasons already set out, [49] that those elements are insufficient to demonstrate that the three-year rule is not more restrictive than necessary in relation to the social objective.

47 — *Commission* v *Netherlands*, cited in footnote 9 above, paragraphs 76 to 79.

48 — See point 147 of my Opinion in *Commission* v *Netherlands*, cited in footnote 9 above.

49 — See points 103 to 106 above.

122. In similar circumstances in *Commission* v *Netherlands*, the Court considered that it was incumbent upon the Member State to explain why it preferred a residence requirement, to the exclusion of other representative elements. The Court held that requirement to be 'too exclusive' because it 'prioritises an element which is not necessarily the sole element representative of the actual degree of attachment between the party concerned and [the Member State granting the funding]'. [50]

123. I reach the same conclusion with regard to the three-year rule. I am not convinced that past residence in one Member State can be used as the sole criterion to predict future residence following an intervening residence in another Member State. [51] Rather, as the Commission put it in its Green Paper, 'Europeans who are mobile as young learners are more likely to be mobile as workers later in life'. [52]

Conclusion

124. I therefore suggest that the Court should answer the questions referred as follows:

Articles 20 and 21 TFEU must be interpreted as meaning that a Member State is precluded from making an education grant for attending an educational establishment abroad for the full duration of those studies dependent on the fulfilment of a condition requiring any EU citizen, including its own nationals, to have resided in its territory during an uninterrupted period of three years immediately prior to the start of those studies abroad.

50 — *Commission* v *Netherlands*, cited in footnote 9 above, paragraph 86.

51 — See also point 117 above.

52 — Commission Green Paper Promoting the learning mobility of young people COM(2009) 329 final, page 2.