Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 20 May 2014[1]

Case C-333/13

Elisabeta Dano,
Florin Dano
v
Jobcenter Leipzig

(Request for a preliminary ruling from the Sozialgericht Leipzig (Germany))

(Regulation (EC) No 883/2004 — Directive 2004/38/EC — Citizenship of the Union — Equal treatment — Union citizens who are economically inactive and are resident in the territory of another Member State — Legislation of a Member State providing for the exclusion of such persons from special non-contributory cash benefits if their right of residence is based solely on Article 20 TFEU)

1. This request for a preliminary ruling essentially raises the question whether a Member State can exclude nationals of other Member States who are in need from access to non-contributory subsistence benefits as referred to in Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems,[2] as amended by Regulation (EC) No 988/2009 of the European Parliament and of the Council of 16 September 2009[3] ('Regulation No 883/2004'), in order to prevent such benefits from becoming an unreasonable burden on that Member State, even though they would be granted to its own nationals in the same situation.

2. The questions referred by the national court will once again give the Court cause to turn its attention to the relationship between Regulation No 883/2004 and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC[4] and to the concepts, first, of 'special non-contributory cash benefits' covered by Regulation No 883/2004 and, second, 'social assistance' within the meaning of Directive 2004/38.

3. Consequently, although the questions referred do not expressly concern classification of the benefits at issue in the main proceedings in the light of these two legislative acts, the Court cannot, in my view, dispense with this task if it is to provide the referring court with a useful answer.

1 — Original language: French.
2 — OJ 2010 L 166, p. 1.
3 — OJ 2009 L 284, p. 43.
4 — OJ 2004 L 158, p. 77, and corrigenda at OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34.

I – **Legal framework**

A – *EU law*

1. Charter of Fundamental Rights of the European Union

4. According to Article 1 of the Charter of Fundamental Rights of the European Union (the 'Charter'), entitled 'Human dignity', '[h]uman dignity is inviolable. It must be respected and protected'.

5. Article 20 of the Charter, entitled 'Equality before the law', provides that '[e]veryone is equal before the law'.

2. Regulation No 883/2004

6. Recitals 16 and 37 in the preamble to Regulation No 883/2004 read as follows:

'(16) Within the Community there is in principle no justification for making social security rights dependent on the place of residence of the person concerned; nevertheless, in specific cases, in particular as regards special benefits linked to the economic and social context of the person involved, the place of residence could be taken into account.

…

(37) As the Court of Justice has repeatedly stated, provisions which derogate from the principle of the exportability of social security benefits must be interpreted strictly. This means that they can apply only to benefits which satisfy the specified conditions. It follows that Chapter 9 of Title III of this Regulation can apply only to benefits which are both special and non-contributory and listed in Annex X to this Regulation.'

7. Article 2(1) of Regulation No 883/2004 provides in relation to the latter's personal scope:

'This Regulation shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors.'

8. The material scope of Regulation No 883/2004 is, in turn, described in Article 3:

'1. This Regulation shall apply to all legislation concerning the following branches of social security:

…

(h) unemployment benefits;

…

2. Unless otherwise provided for in Annex XI, this Regulation shall apply to general and special social security schemes, whether contributory or non-contributory, and to schemes relating to the obligations of an employer or shipowner.

3. This Regulation shall also apply to the special non-contributory cash benefits covered by Article 70.

…

5. This Regulation shall not apply to:

(a) social and medical assistance or

(b) benefits in relation to which a Member State assumes the liability for damages to persons and provides for compensation, such as those for victims of war and military action or their consequences; victims of crime, assassination or terrorist acts; victims of damage occasioned by agents of the Member State in the course of their duties; or victims who have suffered a disadvantage for political or religious reasons or for reasons of descent.'

9. Article 4 of the regulation, entitled 'Equality of treatment', states:

'Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.'

10. Chapter 9 of Title III of Regulation No 883/2004 is devoted to 'Special non-contributory cash benefits'. It consists only of Article 70, which is entitled 'General provision', and provides:

'1. This Article shall apply to special non-contributory cash benefits which are provided under legislation which, because of its personal scope, objectives and/or conditions for entitlement, has characteristics both of the social security legislation referred to in Article 3(1) and of social assistance.

2. For the purposes of this Chapter, 'special non-contributory cash benefits' means those which:

(a) are intended to provide either:

(i) supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in Article 3(1), and which guarantee the persons concerned a minimum subsistence income having regard to the economic and social situation in the Member State concerned;

or

(ii) solely specific protection for the disabled, closely linked to the said person's social environment in the Member State concerned,

and

(b) where the financing exclusively derives from compulsory taxation intended to cover general public expenditure and the conditions for providing and for calculating the benefits are not dependent on any contribution in respect of the beneficiary. However, benefits provided to supplement a contributory benefit shall not be considered to be contributory benefits for this reason alone,

and

(c) are listed in Annex X.

3. Article 7 and the other chapters of this Title shall not apply to the benefits referred to in paragraph 2 of this Article.

4. The benefits referred to in paragraph 2 shall be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation. Such benefits shall be provided by and at the expense of the institution of the place of residence.'

11. Annex X to Regulation No 883/2004, on 'Special non-contributory cash benefits', contains, under the heading 'Germany', the following:

'…

(b) Benefits to cover subsistence costs under the basic provision for jobseekers unless, with respect to these benefits, the eligibility requirements for a temporary supplement following receipt of unemployment benefit ([Paragraph] 24(1) of Book II of the Social Code) are fulfilled.'

3. Directive 2004/38

12. Recitals 10, 16 and 21 in the preamble to Directive 2004/38 state:

'(10) Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore, the right of residence for Union citizens and their family members for periods in excess of three months should be subject to conditions.

…

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

…

(21) However, it should be left to the host Member State to decide whether it will grant social assistance during the first three months of residence, or for a longer period in the case of jobseekers, to Union citizens other than those who are workers or self-employed persons or who retain that status or their family members, or maintenance assistance for studies, including vocational training, prior to acquisition of the right of permanent residence, to these same persons.'

13. Article 6 of Directive 2004/38, entitled 'Right of residence for up to three months', provides in paragraph 1:

'Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.'

14. Article 7(1) of Directive 2004/38 states:

‘All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; …

…’

15. Article 8 of Directive 2004/38, entitled ‘Administrative formalities for Union citizens’, provides in paragraph 4:

‘Member States may not lay down a fixed amount which they regard as “sufficient resources”, but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State.’

16. Article 14 of Directive 2004/38 is devoted to ‘Retention of the right of residence’. According to that provision:

‘1. Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.

…

3. An expulsion measure shall not be the automatic consequence of a Union citizen’s or his or her family member’s recourse to the social assistance system of the host Member State.

4. By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if:

(a) the Union citizens are workers or self-employed persons, or

(b) the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.’

17. Finally, Article 24, entitled ‘Equal treatment’, states:

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

2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.'

B – *German law*

1. The Social Code

18. Paragraph 19a(1) of Book I of the Social Code (Sozialgesetzbuch Erstes Buch; 'SGB I') describes the two types of benefit granted by way of basic provision for jobseekers as follows:

'(1) Under the entitlement to basic provision for jobseekers, the following may be claimed:

1. benefits for integration into the labour market,

2. benefits to cover subsistence costs.

…'

19. In Book II of the Social Code (Sozialgesetzbuch Zweites Buch; 'SGB II'), Paragraph 1, entitled 'Function and objective of basic provision for jobseekers', provides in subparagraphs 1 and 3:

'(1) Basic provision for jobseekers is intended to enable its beneficiaries to lead a life in keeping with human dignity.

…

(3) Basic provision for jobseekers encompasses benefits:

1. intended to bring to an end or reduce need, in particular by integration into the labour market, and

2. intended to cover subsistence costs.'

20. Paragraph 7 of SGB II, entitled 'Beneficiaries', states:

'(1) Benefits under this Book shall be received by persons who:

1. have attained the age of 15 and have not yet reached the age limit referred to in Paragraph 7a,

2. are fit for work,

3. are in need of assistance and

4. whose ordinary place of residence is in the Federal Republic of Germany (beneficiaries fit for work). The following are excluded:

1. foreign nationals who are not workers or self-employed persons in the Federal Republic of Germany and do not enjoy the right of freedom of movement under Paragraph 2(3) of the Law on freedom of movement of Union citizens [Freizügigkeitsgesetz/EU; 'the FreizügG/EU'], and their family members, for the first three months of their residence,

2. foreign nationals whose right of residence arises solely out of the search for employment and their family members,

…

Point 1 of the second sentence shall not apply to foreign nationals residing in the Federal Republic of Germany who have been granted a residence permit under Chapter 2, Section 5, of the Law on residence. Provisions of law governing residence shall be unaffected.

…'

21. Paragraph 8 of SGB II, devoted to the concept of 'Fitness for work', provides:

'(1) All persons who are not incapable for the foreseeable future, because of an illness or handicap, of working for at least three hours per day under normal labour market conditions are fit for work.

…'

22. Paragraph 9 of SGB II provides:

'(1) All persons who cannot, or cannot sufficiently, cover their subsistence costs on the basis of the income or assets to be taken into consideration and who do not receive the necessary assistance from other persons, in particular from family members or providers of other social security benefits, are in need of assistance. …

…'

23. Additional provisions are contained in Paragraph 20 of SGB II on basic subsistence needs, in Paragraph 21 of SGB II on additional needs and in Paragraph 22 of SGB II on accommodation and heating needs. Finally, Paragraphs 28 to 30 of SBG II deal with education and participation benefits.

24. In Book XII of the Social Code (Sozialgesetzbuch Zwölftes Buch; 'SGB XII'), Paragraph 1, which relates to social assistance, provides:

'The function of social assistance is to enable the beneficiaries to lead a life in keeping with human dignity. …'

25. Paragraph 21 of SGB XII provides:

'Subsistence benefits shall not be paid to persons who are in principle entitled to benefits under Book II because they are fit for work or because of their family ties. …'

26. Paragraph 23 of SGB XII, entitled ‘Social assistance for foreign nationals’, reads as follows:

‘(1) Subsistence assistance, assistance for sick persons, assistance for pregnant women, maternity assistance and care assistance under this Book must be given to foreign nationals who are actually resident in national territory. The provisions of the fourth Chapter shall not be affected. Otherwise, social assistance may be granted in so far as it is justified in a particular case. The restrictions of the first sentence shall not apply to foreign nationals holding a permanent residence permit [‘Niederlassungserlaubnis’] or a residence permit of limited duration [‘befristeter Aufenthaltstitel’] who anticipate taking up permanent residence in federal territory. Legal provisions under which social assistance other than the benefits referred to in the first sentence must or should be granted shall not be affected.

…

(3) Foreign nationals who have entered national territory in order to obtain social assistance or whose right of residence arises solely out of the search for employment, and their family members, have no right to social assistance. If they have entered national territory for the purpose of treatment or alleviation of illness, assistance for sick persons may be granted only to remedy a critical, life-threatening condition or for urgent and essential treatment of a serious or contagious disease.

(4) Foreign nationals in receipt of social assistance must be informed of the return and resettlement programmes applicable to them; in appropriate cases recourse to such programmes is to be promoted.

…’

2. The FreizügG/EU

27. The scope of the FreizügG/EU is laid down in Paragraph 1 of that Law:

‘This Law shall govern the entry and residence of nationals of other Member States of the European Union (Union citizens) and their family members.’

28. Paragraph 2 of the FreizügG/EU provides, on the right of entry and residence:

‘(1) Union citizens who are entitled to freedom of movement and their family members shall have the right to enter and reside in federal territory, subject to the provisions of this Law.

(2) The following are entitled to freedom of movement under Community law:

1. Union citizens who wish to reside in federal territory as workers or for the purpose of seeking employment or pursuing vocational training,

…

5. Union citizens who are not working, subject to the conditions laid down in Paragraph 4;

6. family members, subject to the conditions laid down in Paragraphs 3 and 4.

…’

29. Paragraph 4 of the FreizügG/EU provides, in respect of persons who are entitled to freedom of movement and are not working:

'Union citizens who are not working and the family members accompanying or joining them shall enjoy the right provided for in Paragraph 2(1) if they have sufficient sickness insurance cover and sufficient means of subsistence. If the Union citizen is resident in federal territory as a student, this right shall extend only to his spouse, partner and children who are maintained.'

II – **Facts of the dispute in the main proceedings**

30. Ms Dano, who was born in 1989, and her son Florin, who was born on 2 July 2009 in Saarbrücken (Germany), are both Romanian nationals. According to the findings of the referring court, Ms Dano last entered Germany on 10 November 2010.

31. On 19 July 2011, the city of Leipzig issued Ms Dano with a residence card of unlimited duration for EU nationals, establishing 27 June 2011 as the date of entry into German territory. On 28 January 2013, it also issued her with a duplicate card.

32. Since their arrival in Leipzig, Ms Dano and her son have been living in the apartment of Ms Dano's sister, who provides for them materially.

33. Ms Dano receives child benefit ('Kindergeld') for her son Florin, which is paid by the Leipzig family benefits office on behalf of the Federal Employment Agency and amounts to EUR 184 per month. The Leipzig social assistance service for children and young people also pays an advance on maintenance payments of EUR 133 per month for that child.

34. Ms Dano attended school for three years in Romania and does not have any leaving certificate. She understands German and expresses herself simply in German. On the other hand, she cannot write in German and her ability to read texts in the German language is only limited. She has not been trained in a profession and, to date, has not worked in Germany or Romania. [5]

35. Ms Dano and her son submitted an initial claim for benefits under SGB II. Jobcenter Leipzig rejected it by decision of 28 September 2011 on the basis of point 2 of the second sentence of Paragraph 7(1) of SGB II. The applicants in the main proceedings did not contest that decision, which became final.

36. They submitted a further claim on 25 January 2012. Following the rejection of that second claim by Jobcenter Leipzig, they challenged that decision of 23 February 2012. Their objection was based on Articles 18 TFEU and 45 TFEU and on the judgment in *Vatsouras and Koupatantze*. [6] However, the objection was rejected by decision of 1 June 2012.

37. On 1 July 2012, the applicants in the main proceedings brought an action before the Sozialgericht Leipzig (Social Court, Leipzig, Germany) against that last decision. In this context, they are again claiming basic provision benefits for jobseekers, that is to say, subsistence benefit, social allowance and a contribution to accommodation and heating costs ('basic provision benefits'), under SGB II, for the period from 25 January 2012.

5 — The referring court also states that Ms Dano has been convicted for crimes against property and assets, receiving as maximum sentence a suspended two-year term of imprisonment. However, such factual statements do not, in my view, have any bearing on the answers to be given to the questions referred.

6 — C-22/08 and C-23/08, EU:C:2009:344.

III – **Request for a preliminary ruling and procedure before the Court**

38. The Sozialgericht Leipzig considers that, under point 2 of the second sentence of Paragraph 7(1) of SGB II and Paragraph 23(3) of SGB XII, the applicants in the main proceedings are not entitled to basic provision benefits. However, that court is uncertain whether provisions of EU law, in particular Article 4 of Regulation No 883/2004, the general principle of non-discrimination resulting from Article 18 TFEU and the general right of residence resulting from Article 20 TFEU preclude the abovementioned provisions of German law.

39. Therefore, by decision of 3 June 2013, which was received at the Court on 19 June 2013, the Sozialgericht Leipzig decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling under Article 267 TFEU:

‘(1) Do persons who do not wish to claim payment of any benefits of social security law or family benefits under Article 3(1) of Regulation No 883/2004 but rather special non-contributory benefits under Article 3(3) and Article 70 of the regulation fall within the scope *ratione personae* of Article 4 of the regulation?

(2) If Question 1 is answered in the affirmative: are the Member States precluded by Article 4 of Regulation No 883/2004, in order to prevent an unreasonable recourse to non-contributory social security benefits under Article 70 of the regulation which guarantee a level of subsistence, from excluding in full or in part Union citizens in need from accessing those benefits, which are provided to their own nationals who are in the same situation?

(3) If Question 1 or Question 2 is answered in the negative: are the Member States precluded by (a) Article 18 TFEU and/or (b) [point (a) of the first subparagraph of Article 20(2)] TFEU in conjunction with the [second subparagraph] of Article 20(2) TFEU and Article 24(2) of Directive 2004/38/EC, in order to prevent an unreasonable recourse to non-contributory social security benefits under Article 70 of Regulation No 883/2004 which guarantee a level of subsistence, from excluding in full or in part Union citizens in need from accessing those benefits, which are provided to their own nationals who are in the same situation?

(4) If, according to the answers to the abovementioned questions, the partial exclusion of benefits which guarantee a level of subsistence complies with EU law: may the provision of non-contributory benefits which guarantee a level of subsistence for Union citizens, outside acute emergencies, be limited to the provision of the necessary funds for return to the home State or do Articles 1, 20 and 51 of the [Charter] require more extensive payments which enable permanent residence?’

40. Written observations were submitted by the German and Austrian Governments (only in connection with the second question), Ireland, the United Kingdom Government and the European Commission.

41. They all also presented oral argument at the hearing on 18 March 2014. The representatives of the applicants in the main proceedings and of the Danish and French Governments, who had not submitted written observations, were also able to put forward their arguments at the hearing.

IV – **Analysis**

A – *Nature of basic provision benefits in the light of Regulation No 883/2004 and Directive 2004/38*

42. As I stated in my introductory remarks, the questions referred do not expressly concern classification of the basic provision benefits at issue in the main proceedings in the light of Regulation No 883/2004 and Directive 2004/38. None the less, the referring court asks the Court about the validity of the German arrangements in the light, in particular, of the principle of equal treatment referred to in Article 4 of that regulation and the sufficient resources criterion laid down in Article 24(2) of that directive. As the scope of these two provisions depends on the nature of the measures at issue, the Court cannot, in my view, dispense with this task if it is to provide the referring court with a useful answer.

43. I shall therefore be concerned, first of all, with determining the nature of the basic provision benefits which are claimed by the applicants in the main proceedings and the grounds for the refusal of which have given rise to the request for a preliminary ruling.

1. Special non-contributory cash benefits in the light of Regulation No 883/2004

a) Theoretical concept

44. The concept of special non-contributory cash benefits was inserted into EU law by Council Regulation (EEC) No 1247/92 of 30 April 1992 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community[7] in order to take account of the case-law of the Court of Justice stating that certain benefits provided under national laws may fall simultaneously within the categories of both social security and social assistance.[8]

45. That concept, arising from the case-law of the Court, is therefore not new and it is now consistently defined. A special non-contributory cash benefit is defined by its purpose. It must, first, replace or supplement a social security benefit, while being distinguishable from that benefit, second, be, by its nature, social assistance justified on economic and social grounds, and, third, be fixed by legislation setting objective criteria.[9] It must also, fourth, be non-contributory in nature, in that the benefit at issue must not be financed, either directly or indirectly, from social contributions but must be financed from public resources,[10] and, fifth, be mentioned in Annex X to Regulation No 883/2004, pursuant to Article 70(2)(c) thereof.

46. This definition must be viewed in conjunction with the principle defined by the Court of Justice when the legislation applicable was Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/1997 of 2 December 1996 (OJ 1997 L 28, p. 1), namely that ‘the provisions in Article 10a of

7 — OJ 1992 L 136, p. 1.

8 — See, to this effect, the third recital in the preamble to Regulation No 1247/92.

9 — See, inter alia, judgments in *Skalka* (C-160/02, EU:C:2004:269, paragraph 25 and the case-law cited) and *Commission* v *Parliament and Council* (C-299/05, EU:C:2007:608, paragraph 55 and the case-law cited).

10 — See, to this effect, judgment in *Skalka* (EU:C:2004:269, paragraph 28) and, for an example of application, judgment in *Jauch* (C-215/99, EU:C:2001:139, paragraph 33).

Regulation No 1408/71 derogating from the principle of the exportability of social security benefits must be interpreted strictly. [Which means, therefore, that t]hat provision can apply only to benefits which satisfy the conditions defined in Article 4(2a) of Regulation No 1408/71, that is, benefits which are both special and non-contributory and which are listed in Annex IIa to that regulation'. [11]

47. There is nothing in the corresponding provisions of Regulation No 883/2004, namely, Articles 3(3) and 70 and Annex X thereto, to suggest that this finding should be qualified. [12]

48. In short, as perfectly summarised by Advocate General Wahl in footnote 8 of his Opinion in *Brey*, 'such a [special non-contributory cash] benefit must be of a *supportive* nature in relation to one of the risks mentioned in Article 3(1) [of Regulation No 883/2004]. It must provide the recipient with basic income, the amount of which is set in the light of the economic and social situation in the Member State concerned. It must also be financed through general taxation rather than through contributions made by the recipient. Finally, it must be listed in Annex X to the Regulation …'. [13]

b) The basic provision benefits under SGB II

49. The basic provision benefits provided for in SGB II encompass subsistence benefits for Ms Dano and social allowances and a contribution to accommodation and heating costs for her son.

50. It is accepted by all the parties that they are special non-contributory cash benefits within the meaning of Regulation No 883/2004.

51. Indeed, if we look again at the five conditions listed in point 45 of this Opinion, they are mentioned in Annex X to Regulation No 883/2004 (fifth condition). Their non-contributory nature is established (fourth condition) [14] and it is clear from Paragraphs 7 (determination of the beneficiary), 8 (definition of fitness for work), 9 (definition of being in need) and 1(1) and (3) (function and objectives of the basic provision) of SGB II that they may be regarded as constituting, by their nature, social assistance justified on economic and social grounds (second condition) and that they are fixed by legislation setting objective criteria within the meaning of the abovementioned case-law of the Court (third condition). [15]

52. On the other hand, fulfilment of the first condition, that is to say, the supportive nature of the benefits in relation to one of the risks listed exhaustively in Article 3(1) of Regulation No 883/2004, is less easy to determine.

53. In the Commission's view, basic provision benefits are related to unemployment benefits within the meaning of Article 3(1)(h) of Regulation No 883/2004. It considers that they are benefits intended to replace a salary which is not received by a person who is unemployed, whilst being fit for work, in order to provide for that person's maintenance.

11 — Judgments in *Jauch* (EU:C:2001:139, paragraph 21) and *Skalka* (EU:C:2004:269, paragraph 19).

12 — See, to this effect, judgment in *Brey* (C-140/12, EU:C:2013:565, paragraph 36).

13 — C-140/12, EU:C:2013:337, footnote 8. Emphasis added.

14 — According to the German Government's written observations, these benefits are granted irrespective of whether the person concerned has previously worked or paid contributions.

15 — See point 45 of this Opinion.

54. The German Government considers, on the other hand, that the basic provision laid down in SGB II cannot be classified under one of the branches of social security mentioned in Article 3(1) of Regulation No 883/2004. In that government's view, the basic provision arrangements are not linked to the risk of unemployment but grant benefits to persons who, whilst being fit for work, are in a state of need. However, this does not prevent them from being classified as special non-contributory cash benefits. [16]

55. I conclude from the explanations provided by the German Government that the system established by SGB II is the result of the amalgamation of two previous systems (unemployment assistance, on the one hand, and social assistance, on the other) and that it is intended for persons who are fit for work and their family members.

56. I also note that the German Government states that another social assistance system continues to exist beside SGB II, namely social assistance in the narrow sense, defined in SBG XII.

57. It follows from these considerations that the mixed nature of the system established by SGB II (which resulted from the merging of two previous systems, one of which was devoted exclusively to unemployment assistance), the maintenance of a social assistance regime separate from SGB II and the incorporation of the basic provision into Annex X to Regulation No 883/2004 prompt me to view that system as also providing special non-contributory cash benefits.

2. Social assistance benefit in the light of Directive 2004/38

a) Theoretical concept: independence from Regulation No 883/2004

58. The fact that a benefit is not, under Regulation No 883/2004, a social assistance benefit does not mean that it cannot be covered by the social assistance system within the meaning of Directive 2004/38.

59. The possibility that a special non-contributory cash benefit within the meaning of Regulation No 883/2004 might also be covered by the concept of 'social assistance' within the meaning of Directive 2004/38 lay, moreover, at the heart of *Brey*. [17]

60. Advocate General Wahl, when examining the objectives of the two instruments (the first of which essentially relates to social security and the second, as a whole, to freedoms of movement, non-discrimination and Union citizenship), reached the conclusion that the concept of 'social assistance' could not be the same in the two legislative texts. [18]

61. The Court followed this approach, holding that 'the concept of "social assistance system" as used in Article 7(1)(b) of Directive 2004/38 cannot … be confined to those social assistance benefits which, pursuant to Article 3(5)(a) of Regulation No 883/2004, do not fall within the scope of that regulation'. [19]

16 — Somewhat paradoxically, the German Government concludes that, although basic provision benefits can be granted to unemployed persons and thus, prima facie, take on the characteristics of the social security legislation referred to in Article 3(1) of Regulation No 883/2004, they are, in reality, special non-contributory cash benefits within the meaning of Article 3(3) of that regulation.

17 — Judgment in *Brey* (EU:C:2013:565).

18 — Opinion of Advocate General Wahl in *Brey* (EU:C:2013:337), point 56.

19 — Judgment in *Brey* (EU:C:2013:565, paragraph 58).

62. On the contrary, in its view, the concept of 'social assistance system' within the meaning of Article 7(1)(b) of Directive 2004/38 must be defined according to the objective of that provision and not on the basis of formal criteria.[20] Accordingly, it must be interpreted 'as covering all assistance introduced by the public authorities, whether at national, regional or local level, that can be claimed by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family and who, by reason of that fact, may become a burden on the public finances of the host Member State during his period of residence which could have consequences for the overall level of assistance which may be granted by that State'.[21]

63. However, it follows from the judgment in *Vatsouras and Koupatantze*[22] that benefits of a financial nature which, irrespective of their status under national law, are intended to facilitate access to the labour market cannot be regarded as constituting 'social assistance' within the meaning of Article 24(2) of Directive 2004/38.

64. This clarification seems to me important inasmuch as Advocate General Ruiz-Jarabo Colomer had, in his Opinion, expressed precisely the opposite view that 'there may be "social assistance" measures, as contemplated in Article 24(2) of Directive 2004/38, which promote integration into the labour market'.[23]

b) The basic provision benefits under SGB II

65. In paragraph 43 of the judgment in *Vatsouras and Koupatantze*,[24] the Court noted the possibility that the condition laid down in Paragraph 7(1) of SGB II, that a person must be capable of working in order to receive basic provision benefits under SGB II, could indicate that the benefits at issue are intended to facilitate access to employment.

66. If this were the case, the basic provision benefits under SGB II could not, in view of what is stated in point 63 of this Opinion, be regarded as social assistance benefits within the meaning of Directive 2004/38.

67. However, I am not certain that the criterion of fitness to work must be regarded as determining, by itself, the classification of the benefits in the light of that directive.

68. According to the methodological criterion adopted by the Court in the judgment in *Brey*, the concept of 'social assistance system' within the meaning of Article 7(1)(b) of Directive 2004/38 must be defined according to the *objective* of that provision and *not on the basis of formal criteria*.[25]

69. In this regard, whilst Paragraph 19a of SGB I provides that both benefits to cover subsistence costs and benefits for integration into the labour market may be claimed under the entitlement to basic provision for jobseekers, Paragraph 1 of SGB II, entitled 'Function and objective of basic provision for jobseekers', states in subparagraph 1 that 'basic provision for jobseekers is intended to enable its beneficiaries to lead a life in keeping with human dignity'.

70. Paragraph 1(3) of SGB II also states that the basic provision for jobseekers encompasses benefits intended to bring to an end or reduce need, in particular by integration into the labour market, and to cover subsistence costs.

20 — Ibid. (paragraph 60 and the case-law cited).

21 — Ibid. (paragraph 61 and the case-law cited).

22 — EU:C:2009:344, paragraph 45.

23 — Opinion in *Vatsouras and Koupatantze* (C-22/08 and C-23/08, EU:C:2009:150, point 57).

24 — EU:C:2009:344.

25 — EU:C:2013:565, paragraph 60.

71. Moreover, according to Paragraph 19 of SGB II, the benefits at issue cover 'basic needs, additional needs and accommodation and heating needs'. The vocational integration assistance benefits that the basic provision for jobseekers involves are, on the other hand, essentially described in Book III of the Social Code (Sozialgesetzbuch Drittes Buch). According to the referring court, those provisions are not the subject-matter of the present dispute, as the claims of the applicants in the main proceedings do not concern vocational integration assistance benefits.

72. The basic provision benefits at issue in the main proceedings therefore correspond, in my view, to the definition of 'social assistance system', within the meaning of Directive 2004/38, adopted by the Court in the judgment in *Brey*, that is to say, assistance introduced by a public authority that can be claimed by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family and who, by reason of that fact, may become a burden on the public finances of the host Member State during his period of residence which could have consequences for the overall level of assistance which may be granted by that State .[26]

3. Interim conclusion on the nature of the basic provision benefits

73. Having conducted this initial analysis, I conclude that the basic provision benefits constitute, on the one hand, special non-contributory cash benefits within the meaning of Regulation No 883/2004 and, on the other hand, social assistance within the meaning of Directive 2004/38.

74. If, on the contrary, the Court were to regard the basic provision benefits as 'social assistance' within the meaning of Regulation No 883/2004, thereby rejecting their classification as special non-contributory cash benefits, there would then be no need to answer the first question referred as that question concerns only the applicability of Article 4 of the regulation to special non-contributory cash benefits. Moreover, an answer would be all the more unnecessary as Article 3(5) of the regulation expressly excludes social assistance benefits from its scope.

B – *The first question*

75. By its first question, the referring court asks whether Article 4 of Regulation No 883/2004 applies to special non-contributory cash benefits within the meaning of Articles 3(3) and 70 of the regulation.

76. Article 3 of the regulation defines the latter's material scope. It expressly states, in paragraph 3, that the regulation 'shall also apply to the special non-contributory cash benefits covered by Article 70'.

77. Article 70 of Regulation No 883/2004 consists of four paragraphs. The first defines the scope of the article by giving a definition of special non-contributory cash benefits. The second fleshes out the definition by stating the constituent elements required. The fourth establishes the principle that such benefits are to be provided in the Member State in which the persons concerned reside, in accordance with its legislation. Finally, the third states that 'Article 7 and the other chapters of this Title shall not apply to the benefits referred to in paragraph 2 of this Article'.

78. It is therefore absolutely clear from Articles 3(3) and 70(3) of Regulation No 883/2004 that Article 4 of that regulation applies to special non-contributory cash benefits.

26 — See, to this effect, judgment in *Brey* (EU:C:2013:565, paragraph 61).

79. Indeed, Article 3(3) of Regulation No 883/2004 provides expressly and without exception that that regulation is to apply to the special non-contributory cash benefits referred to in Article 70. Whilst Article 70, by way of exception, renders certain provisions of the regulation inapplicable to those benefits, Article 4 is not one of them.

80. This interpretation also reflects the legislature's intention as expressed in the seventh recital in the preamble to Regulation No 1247/92, which, as I have explained above, amended Regulation No 1408/71 in order to incorporate into it the provisions on special non-contributory cash benefits.

81. According to that recital, benefits simultaneously categorised as social security and social assistance benefits, that is to say, special non-contributory cash benefits, 'should be granted … solely in accordance with the legislation of the country of residence of the person concerned or of the members of his or her family … and *without discrimination on grounds of nationality*'.[27]

82. It would therefore be contrary not only to the wording of Regulation No 883/2004 but also to the legislature's intention to exclude special non-contributory cash benefits from the principle of equal treatment laid down in Article 4 of the regulation.

83. Since, in the words of Article 4 of that regulation, there is nothing in it indicating that it 'provides otherwise', I consider that, in principle, 'persons to whom [the r]egulation applies shall enjoy the same [special non-contributory cash] benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof'.

84. I therefore propose that the Court's answer to the first question asked by the referring court should be that persons claiming a special non-contributory cash benefit within the meaning of Articles 3(3) and 70 of Regulation No 883/2004 fall within the scope *ratione personae* of Article 4 of that regulation.

85. However, I should say here and now that this conclusion does not necessarily mean that the discrimination pleaded in the main proceedings is contrary to the principle of equality as laid down in Article 4 of Regulation No 883/2004.

86. This consideration lies at the heart of the second and third questions referred by the national court. I shall therefore examine them together.

C – *The second and third questions*

1. The subject-matter of the second and third questions and the rules applicable

87. By its second and third questions, the referring court asks, in essence, whether EU law precludes national legislation under which economically inactive nationals of another Member State are excluded in full or in part from accessing certain special non-contributory cash benefits within the meaning of Regulation No 883/2004, although such benefits should be granted to nationals of the Member State concerned who are in the same situation.

88. In addition to the principle of equal treatment laid down in Article 4 of Regulation No 883/2004, the referring court also relies on Article 18 TFEU, point (a) of the first subparagraph, and the second subparagraph, of Article 20(2) TFEU and Article 24(2) of Directive 2004/38.

27 — Emphasis added.

89. Article 18 TFEU prohibits all discrimination on grounds of nationality '[w]ithin the scope of application of the Treaties, and without prejudice to any special provisions contained therein'. The second subparagraph of Article 20(2) TFEU expressly states that the rights conferred by Article 20 on Union citizens are to be exercised 'in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder'. I should add that Article 21(1) TFEU also makes the right of Union citizens to move and reside freely within the territory of the Member States subject to compliance with the 'limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'.

90. Regulation No 883/2004 and Directive 2004/38 constitute such conditions or limitations adopted in implementation of the Treaties or in order to ensure their implementation. [28]

91. I therefore consider them to be the only instruments of relevance in answering the second and third questions, with the exception that, in my view, Article 24(2) of that directive is not relevant in the case brought before the referring court.

92. It would appear from the case-file that Ms Dano did not enter Germany in order to seek employment and that she is not trying to find a job there. Article 24(2) of Directive 2004/38 allows Member States not to confer entitlement to social assistance to persons 'other than workers, self-employed persons, persons who retain such status and members of their families' during the first three months of residence or during the period of seeking employment extending beyond that initial period. [29] As Ms Dano has been in Germany for more than three months, is not seeking employment and did not enter the country in order to find employment, she does not fall within the scope *ratione personae* of that provision. On the other hand, her situation is covered by Article 7(1)(b) of Directive 2004/38, relating to the requirement to have sufficient resources not to become a burden on the social assistance system of the host Member State.

2. The scope of the second and third questions in the light of the case-law of the Court of Justice

a) The possibility of restricting the operation of the principle of equal treatment

93. Any unequal treatment between Union citizens who have made use of their freedom of movement and residence and nationals of the host Member State is an inevitable consequence of Directive 2004/38.

94. As Advocate General Wahl has already observed in point 38 of the Opinion in *Brey*, '[w]hile the overarching aim of the Directive is to simplify and strengthen the right of all Union citizens to freedom of movement and of residence, the particular aim of Article 7(1)(b) [of the Directive] is to ensure that persons exercising their right of residence do not become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. *This indicates that that provision seeks to prevent economically inactive Union citizens from using the welfare system of the host Member State to finance their livelihood*'. [30]

28 — See to this effect, in connection with Article 21 TFEU and Article 7(1)(b) of Directive 2004/38, judgment in *Brey* (EU:C:2013:565, paragraphs 46 and 47).

29 — Article 24(2) of Directive 2004/38 refers to Article 14(4)(b) of that directive, which states that an expulsion measure cannot be adopted against Union citizens or their family members (subject to the restrictions on the right of residence on grounds of public policy, public security or public health that are laid down in Chapter VI of the directive) if they entered the territory of the host Member State in order to seek employment as long as they can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.

30 — EU:C:2013:337. Emphasis added.

95. The Court agrees with the analysis of Advocate General Wahl. In fact, it held in paragraph 57 of its judgment [31] that, 'while Regulation No 883/2004 is intended to ensure that Union citizens who have made use of the right to freedom of movement for workers retain the right to certain social security benefits granted by their Member State of origin, Directive 2004/38 allows the host Member State to impose legitimate restrictions in connection with the grant of such benefits to Union citizens who do not or no longer have worker status, so that those citizens do not become an unreasonable burden on the social assistance system of that Member State'.

96. In this context, potential unequal treatment in the granting of social assistance benefits between nationals of the host Member State and other Union citizens necessarily results from the link established by the EU legislature in Article 7 of Directive 2004/38 between the requirement to have sufficient resources as a condition for residence and the concern not to create a burden on the social assistance systems of the Member States.

97. The question at the heart of this case is therefore, in my view, that of the legality, in the light of Directive 2004/38 and the principle of proportionality, of a general exclusion from entitlement to social assistance of nationals of other Member States who have entered the territory of the host Member State in order, in the words of Article 23(3) of SGB XII, 'to obtain social assistance or whose right of residence arises solely out of the search for employment'.

b) A proposed summary of the existing case-law of the Court of Justice

98. Faced with a similar problem in *Brey* (the national legislation at issue in that case made the entitlement to a social assistance benefit conditional on lawful residence in the territory of that Member State), Advocate General Wahl was categorical, stating that, '[u]nder the Directive, it would seem justified for a Member State to protect its social assistance system in respect of inactive Union citizens who have not yet obtained permanent residence. However, … rules which make the right to reside conditional upon not having recourse to the social assistance system of the host Member State and which do not provide for an individual assessment of a Union citizen's economic capability are incompatible with Articles 8(4) and 14(3) of the Directive'. [32]

99. It is clear that the Court followed this interpretation of Directive 2004/38 when it decided, in paragraph 77 of the judgment in *Brey*, [33] that 'a mechanism, whereby nationals of other Member States who are not economically active are automatically barred by the host Member State from receiving a particular social security benefit … does not enable the competent authorities of the host Member State, where the resources of the person concerned fall short of the reference amount for the grant of that benefit, to carry out — in accordance with the requirements under, inter alia, Articles 7(1)(b) and 8(4) of that directive and the principle of proportionality — an overall assessment of the specific burden which granting that benefit would place on the social assistance system as a whole by reference to the personal circumstances characterising the individual situation of the person concerned'.

100. The conclusion arrived at in the judgment in *Brey* is consistent with the earlier case-law of the Court on the matter of social assistance benefits.

31 — Judgment in *Brey* (EU:C:2013:565).

32 — EU:C:2013:337, point 81.

33 — EU:C:2013:565.

101. In *Grzelczyk*,[34] the Court decided inter alia that Articles 6 EC and 8 EC (now Articles 18 TFEU and 20 TFEU) preclude entitlement to a non-contributory social benefit from being made conditional, in the case of nationals of Member States other than the host State where they are legally resident, on their falling within the scope of the regulation on freedom of movement for workers, when no such condition applies to nationals of the host Member State.

102. The most extreme outcome of that case-law is undoubtedly to be found in *Trojani*,[35] where the Court, after stating that a Union citizen who does not enjoy a right of residence in the host Member State under Articles 45 TFEU, 49 TFEU or 56 TFEU may, simply as a Union citizen, enjoy a right of residence there by direct application of Article 20(1) TFEU, added that 'once it is ascertained that a person in a situation such as that of the claimant in the main proceedings is in possession of a residence permit, he may rely on Article [18 TFEU] in order to be granted a social assistance benefit'.

c) Application of the case-law to this case, and to the *ratio legis* and wording of Directive 2004/38

103. I am called upon to apply the case-law of the Court to this case, and to the *ratio legis* and wording of Directive 2004/38.[36]

104. Directive 2004/38 expressly makes the right of residence for a period of longer than three months of Union citizens who are not workers or self-employed persons subject to the double condition that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State.[37]

105. In so far as the validity of that directive is not called into question in the light of Articles 18 TFEU, 20 TFEU and 21 TFEU, it therefore seems to me legitimate that a Member State can refuse to grant social assistance benefits to citizens who exercise their right to freedom of movement solely in order to obtain the social assistance of another Member State although they do not have sufficient resources to claim a right of residence of longer than three months.

106. To deny Member States this right would have the consequence that a national of a Member State who, upon arriving in the territory of another Member State, does not have sufficient resources to provide for himself would have them, *automatically* and *de facto*, through the grant of a special non-contributory cash benefit which is intended to cover the beneficiary's subsistence costs by enabling him to lead a life in keeping with human dignity.

107. The cumulative application of the two acts of secondary legislation, namely Regulation No 883/2004 and Directive 2004/38, would, if they were interpreted as preventing the general exclusion of nationals of Member States other than the host Member State from receipt of a social assistance benefit of this kind, result in the nullification of the legislature's intention in enacting that directive.

34 — C-184/99, EU:C:2001:458, paragraph 46.

35 — C-456/02, EU:C:2004:488, paragraph 46. Although the judgment was delivered after the adoption of Directive 2004/38, both the facts at issue in that case and the request for a preliminary ruling considerably predate its adoption.

36 — This matter has also been debated in the legal literature. In connection with the case-law of the Court relating to Articles 18 TFEU and 21 TFEU and to Directive 2004/38, O. Golynker wrote, inter alia, that '[t]he peculiar consequence of this line of reasoning is that once the construct of lawful residence becomes disjointed from the requirement to meet the conditions to which the right of residence is subject, the conditional nature of the right to residence under Art. [21 TFEU] becomes neutralised by the right to equal treatment under Art. [18 TFEU]. As a result, the coherence of the concept of the right to free movement and residence in Community law is called into question. The Court's generous interpretation of the right to equal treatment for Union citizens lawfully resident in the territory of another Member State seems to be in conflict with the conditional nature of the right to free movement and residence under Art. [21 TFEU]' (Golynker, O., 'Jobseekers' rights in the European Union: challenges of changing the paradigm of social solidarity', *European Law Review*, 2005, 30 (1), pp. 111 to 122, especially p. 120).

37 — Article 7(1)(b) of Directive 2004/38.

108. According to recital 10 in the preamble to Directive 2004/38, persons exercising their right of residence are to be prevented from becoming an unreasonable burden on the social assistance system of the host Member State, which means that '[t]herefore, the right of residence for Union citizens and their family members for periods in excess of three months should be subject to conditions'. Recital 21 adds that 'it should [therefore] be left to the host Member State to decide whether it will grant social assistance during the first three months of residence, or for a longer period in the case of jobseekers, to Union citizens other than those who are workers or self-employed persons or who retain that status or their family members'.

109. I should add that, although Article 14(1) of Directive 2004/38 authorises the right of residence of Union citizens and their family members during the first three months,[38] 'as long as they do not become an unreasonable burden on the social assistance system of the host Member State', Article 7(1)(b) thereof requires Union citizens who have exercised their right to freedom of movement and wish to remain in the territory of the host Member State for more than three months to have sufficient resources not to become a burden on the social assistance system of the host Member State, without requiring that the burden should be 'unreasonable'.

110. Moreover, recital 16 in the preamble to Directive 2004/38, which explains the idea behind the condition of sufficient resources necessary for the maintenance of the right of residence, links the expression 'unreasonable burden' to all 'beneficiaries of the right of residence'. The latter are therefore viewed collectively.

111. In this regard, I share the opinion of Advocate General Wahl where he finds that '[a] mere request for social assistance cannot amount *in itself* to a disproportionate burden on the social assistance system of a Member State and cause the loss of the right to reside'.[39] It is, in fact, scarcely conceivable that the assistance granted to *a single* applicant can amount to an intolerable burden on a Member State, however small the latter is. The legislature therefore necessarily had in mind the possible overall consequence of all individual applications when it allowed the Member States to require *all* applicants for residence to prove that they have sufficient resources and comprehensive sickness insurance cover in order to be able to reside for more than three months in the territory of a Member State other than that of which they are nationals.

112. I therefore have some difficulty in reconciling these considerations with the idea, developed in the same point in the Opinion delivered in *Brey*, that 'rules which make the right to reside conditional upon not having recourse to the social assistance system of the host Member State and which do not provide for an individual assessment of a Union citizen's economic capability are incompatible with … the Directive'.

113. In my view, such reasoning could lead to an impasse. Directive 2004/38 makes the right of residence subject to the two objective conditions of having sufficient resources and comprehensive sickness insurance cover. There are two possibilities: either the Union citizen has sufficient resources, in which case he can reside in the territory of the Member State of his choice and will not need, by the very fact of having sufficient resources, to have recourse to social assistance benefits the purpose of which is to meet basic needs, or he does not have sufficient resources, in which case he theoretically fulfils the conditions to receive this type of social assistance benefit, but cannot then reside in a Member State other than that of which he is a national in the light of Article 7(1)(b) of Directive 2004/38. To prevent the Member States from excluding this kind of situation from the scope of social assistance results in the condition of sufficient resources being artificially fulfilled in the case of Union citizens moving to another Member State merely in order to obtain social assistance from a Member State other than that of which they are nationals.

38 — Article 14(1) of Directive 2004/38 refers, in fact, to Article 6 thereof, which regulates the right of residence for a period of up to three months.

39 — EU:C:2013:337, point 81, emphasis added by Advocate General Wahl.

114. An interpretation of Regulation No 883/2004 and Directive 2004/38 in line with the case-law of the Court [40] is also, in my view, liable to result in a paradoxical situation in the light of Article 24(2) of that directive.

115. Whilst Article 24(1) of Directive 2004/38 lays down the principle of equal treatment, Article 24(2) derogates from it by expressly authorising the host Member State to refuse jobseekers entitlement to social assistance.

116. Therefore, if the Court were to consider legislation such as that at issue in the main proceedings to be contrary to EU law, we would arrive at a situation where a national of a Member State who has exercised his right to freedom of movement as a Union citizen without intending to integrate himself into the labour market of the host Member State would be in a more favourable situation than a national of a Member State who has left his country of origin in order to seek employment in another Member State. The second person might be refused a social assistance benefit on the basis of legislation adopted in accordance with Article 24(2) of Directive 2004/38, whereas the first person could be refused it only on the basis of a thorough examination of his personal situation. [41]

117. I shall conclude these remarks on the coherence of the system put in place by Directive 2004/38 with the thought that the grant of a social assistance benefit is necessarily a burden on the social assistance system. This follows from the very definition of a social assistance system adopted by the Court, which perceives it as 'covering all assistance introduced by the public authorities, whether at national, regional or local level, that can be claimed by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family and who, *by reason of that fact*, may become a burden on the public finances of the host Member State during his period of residence which could have consequences for the overall level of assistance which may be granted by that State'. [42]

118. In the light of these considerations, legislation of a Member State, such as that at issue in the main proceedings, under which entitlement to a special non-contributory cash benefit within the meaning of Regulation No 883/2004 (a benefit which, moreover, constitutes social assistance within the meaning of Directive 2004/38) is precluded in the case of persons who move to the territory of that Member State solely in order to benefit from that measure or to seek employment does not, in my view, run counter to Article 4 of Regulation No 883/2004 or to the system put in place by Directive 2004/38.

119. On the contrary, it makes it possible, in accordance with Article 7(1)(b) of Directive 2004/38, to prevent a Union citizen from becoming 'a burden on the social assistance system' in so far as he does not have sufficient resources to support himself by his own means.

3. Is it possible to distinguish *Brey* from the case in the main proceedings?

120. In the present case, the argument has centred on the consequences of the judgment in *Brey*. In the light of the foregoing considerations, should a distinction be drawn between the two cases?

40 — Essentially prior to the adoption of Directive 2004/38.

41 — On the relationship between Article 24(2) of Directive 2004/38 and the case-law of the Court (in particular the judgment in *Collins*, C-138/02, EU:C:2004:172), O. Golynker writes that '[t]he above provision is not in tune with the ruling in *Collins* and shows that the generous interpretation by the Court of Justice of the consequences of Union citizenship for social solidarity in general and the rights of jobseekers in particular *does not accord with what the Member States assumed when they signed the Maastricht Treaty*' (Golynker, O., op. cit., p. 119; emphasis added).

42 — Judgment in *Brey* (EU:C:2013:565, paragraph 61). Emphasis added.

121. In *Brey*, Austrian law made the grant of the social assistance benefit conditional on the lawfulness of the residence, which requires that, beyond the first three months, as I have already pointed out, the person concerned is either a worker or a self-employed person in the host Member State or has sufficient resources not to become a burden on the social assistance system of the host Member State during his period of residence and has comprehensive sickness insurance cover in the host Member State. [43]

122. In such a situation, an individual examination was required in the light of the general scheme of Directive 2004/38. It would, in fact, be contrary to the directive to authorise automatic exclusion from entitlement to a social benefit by a general and abstract reference to the lawfulness of the residence when, in order to assess that lawfulness, Article 8 of the directive expressly prohibits Member States from laying down a fixed amount which they regard as sufficient resources and requires them to take into account the *personal* situation of the person concerned, and when Article 14(3) thereof states that an expulsion measure cannot be the *automatic* consequence of a Union citizen's recourse to the social assistance system.

123. Conversely, point 2 of the second sentence of Paragraph 7(1) of SGB II and Paragraph 23(3) of SGB XII do not refer to the lawfulness of the applicant's residence but refuse the grant of social assistance benefits to persons whose right of residence is based on the sole objective of seeking employment or obtaining social assistance.

124. The grant of the social assistance benefit is, with such legislation, independent of the lawfulness of the applicant's residence in the light of Directive 2004/38. In the words of the judgment in *Grzelzcyk*, [44] it is not conditional, *stricto sensu*, on the applicant falling within the 'scope' of Directive 2004/38.

125. However, this distinction seems to me to be, if not artificial, at the very least tenuous. Although, as the representative of the German Government confirmed at the hearing, the German legislation does not formally link lawfulness of residence with entitlement to subsistence benefits, it is, however, likely that the residence of the applicants in the main proceedings will be jeopardised in the event of their being excluded from entitlement to subsistence benefits.

4. The legitimate requirement of a genuine link with the host Member State

126. However, a final analysis must, in my view, be carried out in the light of the principle of proportionality. It is necessary to examine the relationship between the general criterion used by the German legislation and the existence of a 'genuine' link between the persons falling within its scope and the host Member State.

127. I note that, in the matter of the maintenance costs of students, for example, the Court has accepted on a number of occasions that, although the Member States must, in the organisation and application of their social assistance systems, show a certain degree of financial solidarity with nationals of other Member States, it is permissible for a Member State to ensure that the grant of such assistance to 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. In this regard, the Court held that it is legitimate for a Member State to grant such assistance only to students who have demonstrated a certain *degree of integration* into the society of that State. [45]

43 — Article 7(1) of Directive 2004/38.

44 — EU:C:2001:458, paragraph 46.

45 — See, to this effect, judgments in *Bidar* (C-209/03, EU:C:2005:169, paragraphs 56 and 57) and *Förster* (C-158/07, EU:C:2008:630, paragraphs 48 and 49).

128. The Court has adopted a similar attitude to tideover allowances for young persons seeking their first job and to jobseekers' allowances. In such situations, the Court has, in fact, also held that it is legitimate for the national legislature to wish to ensure that there is a *genuine link* between an applicant for an allowance and the geographical employment market in question. [46]

129. It follows from this case-law that the entitlement of economically inactive Union citizens to social assistance benefits is, in general, dependent on a certain degree of integration in the host Member State.

130. These legitimate concerns are reflected in recitals 10 and 21 in the preamble to Directive 2004/38, referred to above, which state, first, that '[p]ersons exercising their right of residence should not … become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence' and, second, that 'it should be left to the host Member State to decide whether it will grant social assistance during the first three months of residence, or for a longer period in the case of jobseekers, to Union citizens other than those who are workers or self-employed persons or who retain that status or their family members'.

131. In the present case, by refusing basic provision benefits to persons who come to Germany solely in order to benefit from the social assistance system of that Member State and who do not seek in any way to integrate themselves into the labour market, the national legislation is consistent, in my view, with the EU legislature's intention. It serves to prevent persons exercising their right to freedom of movement without intending to integrate themselves from becoming a burden on the social assistance system. It also falls within the discretion accorded to the Member States in the matter. In other words, it serves to prevent abuse and a certain form of 'benefit tourism'. [47]

132. I also note that the Court has held, admittedly in a different context, that 'generally speaking, it cannot be insisted that a measure … should involve an individual examination of each particular case …, since the management of the regime concerned must remain technically and economically viable'. [48] It has also accepted that the risk of seriously undermining the financial balance of a social security system may constitute an overriding reason in the public interest capable of justifying barriers to the fundamental freedoms. [49] This is also the idea behind the possibility afforded to the Member States of ensuring 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. [50]

133. Although the referring court provides no precise information about the existence of such a risk, it none the less refers to the limits of basic provision systems financed from taxation in the light of the amounts involved, amounts which might encourage immigration of Union citizens whose average income is considerably lower.

134. It is also likely that, in circumstances such as those in the main proceedings, recourse to the social assistance system will not be temporary but will be prolonged indefinitely in the absence of any attempt at all to seek employment.

46 — See, to this effect, judgments in *Collins* (EU:C:2004:172, paragraph 67) and *Vatsouras and Koupatantze* (EU:C:2009:344, paragraph 38).

47 — 'In essence, this requirement of genuine integration is used by Union institutions to manage tension between the right of migrant citizens to transnational solidarity and the power of Member States to shape their social security system and prevent "abuses of host law" in the form of benefit tourism' (Sayde, A., 'One Law, Two Competitions: An Enquiry into the Contradictions of Free Movement Law', *Cambridge Yearbook of European Legal Studies*, 2010-11, vol. 13, p. 365 et seq., especially p. 395.

48 — Judgment in *Dansk Jurist- og Økonomforbund* (C-546/11, EU:C:2013:603, paragraph 70). That case concerned an availability pay scheme from which civil servants who had reached the age at which a retirement pension became payable were excluded by reason of that fact alone.

49 — See, to this effect, judgment in *Kohll* (C-158/96, EU:C:1998:171, paragraph 41).

50 — See, to this effect, judgments in *Bidar* (EU:C:2005:169, paragraph 59) and *Förster* (EU:C:2008:630, paragraph 48).

135. To sum up, the criterion chosen by the legislation at issue in the main proceedings, namely entering German territory solely in order to seek employment or benefit from social assistance, is such as to demonstrate the absence of a genuine link with the territory of the host Member State and of integration in it. The criterion serves to ensure that the system is economically viable and that its financial balance is not undermined. The legislation therefore pursues a legitimate objective within the meaning of the abovementioned case-law.

136. Moreover, I consider the condition chosen to be proportionate to the objective legitimately pursued by the national law.

137. In order to refuse the grant of basic provision benefits, the authorities of the Member State must, to a certain extent, examine the applicant's personal situation for the purpose of determining whether the applicant is covered by the exception provided for in point 2 of the second sentence of Paragraph 7(1) of SGB II or Paragraph 23(3) of SGB XII.

138. The limited scope of this exception also removes the risk of an automatic expulsion measure based solely on an application for a social assistance benefit, which is prohibited by Article 14(3) of Directive 2004/38.

139. Therefore, in the light of the foregoing, I consider that the answer to the second and third questions should be that Regulation No 883/2004 and Directive 2004/38 do not preclude a national legislature from choosing to exclude nationals of other Member States from entitlement to a special non-contributory cash benefit on the basis of a general criterion, such as the reason for entering the territory of the host Member State, which is capable of demonstrating the absence of a genuine link with that State, in order to prevent an unreasonable burden on its social assistance system.

140. I should state again, for the record, that this finding does not affect the possibility for the Member States of granting, if they so wish, benefits such as those provided for by the basic provision at issue in the main proceedings on more favourable conditions.

D – *The fourth question*

141. By its fourth and final question, the referring court asks, in essence, whether Articles 1, 20 and 51 of the Charter require Member States to grant Union citizens non-contributory cash benefits which enable permanent residence.

142. Article 1 of the Charter proclaims that human dignity is inviolable, and Article 20 that everyone is equal before the law.

143. It should be noted that, in the context of a reference for a preliminary ruling under Article 267 TFEU, the Court can interpret EU law only within the limits of the powers conferred on the European Union. [51]

144. According to Article 51(1) of the Charter, its provisions are addressed 'to Member States only when they are implementing Union law'. Moreover, under Article 6(1) TEU, which confers a binding value on the Charter, the Charter does not establish any new power for the European Union or modify its powers. [52]

51 — See, to this effect, among countless examples, order in *Vino* (C-161/11, EU:C:2011:420, paragraphs 25 and 37).

52 — See, to this effect, judgment in *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraphs 17 and 23).

145. In the present instance, as the Court confirmed in the judgment in *Brey*, Article 70 of Regulation No 883/2004, which defines the concept of special non-contributory cash benefits, 'is not intended to lay down the conditions creating the right [to such benefits]. It is [on the contrary] for the legislation of each Member State to lay down those conditions'.[53] Article 70(4) of Regulation No 883/2004 merely sets out a 'conflict rule'.[54]

146. If the Member States have competence to determine the conditions for granting special non-contributory cash benefits, they also, in my view, have competence to determine the extent of the social cover provided by that type of benefit.

147. Therefore, when the Member States determine the conditions for and extent of special non-contributory cash benefits, they are not implementing EU law.

148. It follows that the Court's jurisdiction to answer the fourth question has not been established.

149. Moreover, the principle of equal treatment referred to in Article 20 of the Charter is also laid down in Articles 20 TFEU and 21 TFEU. As I have stated in point 90 of this Opinion, Regulation No 883/2004 and Directive 2004/38 flesh out the meaning and scope of the principle of equality established by those provisions.

150. Under Article 52(2) of the Charter, rights recognised by the Charter for which provision is made in the Treaties are to be exercised under the conditions and within the limits defined by those Treaties.

151. As the second and third questions concern provisions of secondary law defining the conditions and limits of the rights protected by Articles 20 TFEU and 21 TFEU, it seems to me to be sufficient to examine those questions for the purpose of providing the referring court with a useful answer.[55]

V – **Conclusion**

152. In the light of the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Sozialgericht Leipzig as follows:

(1) Persons claiming a special non-contributory cash benefit within the meaning of Articles 3(3) and 70 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, as amended by Regulation (EC) No 988/2009 of the European Parliament and of the Council of 16 September 2009, fall within the scope *ratione personae* of Article 4 of that regulation.

(2) Regulation No 883/2004, as amended by Regulation No 988/2009, and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC do not preclude the national legislature from choosing to exclude nationals of other Member States from entitlement to a special non-contributory cash benefit on the basis of

53 — Judgment in *Brey* (EU:C:2013:565, paragraph 41).

54 — Ibid., paragraph 39.

55 — See, to this effect, with regard to the effect of the establishment of freedom of movement for workers by Article 15(2) of the Charter and Article 45 TFEU on the answer to be given to a request for a preliminary ruling, judgment in *Gardella* (C-233/12, EU:C:2013:449, paragraphs 39 and 41).

a general criterion, such as the reason for entering the territory of the host Member State, which is capable of demonstrating the absence of a genuine link with that State, in order to prevent an unreasonable burden on its social assistance system.

(3) The Court of Justice of the European Union does not have jurisdiction to answer the fourth question referred for a preliminary ruling.