Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 2 March 2021 [1]

Case C-94/20

Land Oberösterreich
v
KV

(Request for a preliminary ruling from the Landesgericht Linz (Regional Court, Linz, Austria))

(Reference for a preliminary ruling – Directive 2003/109/EC – Third-country nationals who are long-term residents – Article 11(1)(d) – Equal treatment – Derogation – Article 11(4) – Limitation of equal treatment in respect of social assistance and social protection to core benefits – Concept of 'core benefits' – Housing assistance – Requirement of proof of a basic command of the language of the Member State – Condition applicable solely to third-country nationals who are long-term residents – Application of Charter and fundamental principles of EU law in the context of a derogation under Article 11(4) of Directive 2003/109/EC)

I. Introduction

1. The present request for a preliminary ruling, dated 6 February 2020, was lodged by the Landesgericht Linz (Regional Court, Linz, Austria) at the Registry of the Court on 25 February 2020. It arose in the context of proceedings before the Austrian courts challenging the requirement imposed by national law on third-country nationals with long-term resident status to provide a particular type of proof of (German) language proficiency in order to be entitled to a social benefit in the form of housing assistance.

2. KV ('the applicant') [2] brought an action at first instance before the Bezirksgericht Linz (District Court, Linz, Austria) against the Land Oberösterreich ('the respondent') [3] for the sum of EUR 4 096.94 plus interest for damages resulting from the loss of housing assistance from January to November 2018 due to the absence of the requisite formal evidence of language proficiency. [4] The Bezirksgericht Linz (District Court, Linz) upheld the applicant's claim in all respects. The present application for a preliminary ruling was made in the course of appeal proceedings brought by the respondent before the Landesgericht Linz (Regional Court, Linz).

1 Original language: English.

2 KV is the respondent in the appeal before the referring court.

3 The Land Oberösterreich is the appellant in the appeal before the referring court.

4 The applicant's action is based on his right to damages pursuant to Article 8(1) of the Oberösterreichisches Antidiskriminierungsgesetz (Upper Austrian Non-Discrimination Law, 'the oöADG') (LGBl. No 50/2005.). In addition to his claim for loss of housing assistance, the applicant seeks compensation for moral damage resulting from discrimination based on his ethnic origin.

3. In its request, the referring court seeks an interpretation of Article 11 of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents,[5] Article 2 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin[6] and Article 21 of the Charter of Fundamental Rights of the European Union ('the Charter').

4. The request for a preliminary ruling accordingly requires the Court to determine, inter alia, whether housing assistance such as that in question in the main proceedings constitutes a 'core benefit' pursuant to Article 11(4) of Directive 2003/109 and, in the event that it does not, whether the grant of such assistance to third-country nationals with long-term resident status may be made conditional on the production of proof, in a particular form, of proficiency in the language of the Member State in question. Before considering this question, it is first necessary to set out the relevant legal provisions which form the background to this preliminary reference.

II. Legal framework

A. EU law

1. Directive 2000/43

5. Article 1 of Directive 2000/43, entitled 'Purpose', provides:

'The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment.'

6. Article 2 of that directive, entitled 'Concept of discrimination', provides:

'1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

…'

5 OJ 2004 L 16, p. 44.

6 OJ 2000 L 180, p. 22.

7. Article 3 of Directive 2000/43, entitled 'Scope', provides in paragraph 2 thereof:

'This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.'

2. Directive 2003/109

8. Recitals 2, 4, 12 and 13 of Directive 2003/109 provide:

'(2) The European Council, at its special meeting in Tampere on 15 and 16 October 1999, stated that the legal status of third-country nationals should be approximated to that of Member States' nationals and that a person who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by citizens of the European Union.

…

(4) The integration of third-country nationals who are long-term residents in the Member States is a key element in promoting economic and social cohesion, a fundamental objective of the Community stated in the Treaty.

…

(12) In order to constitute a genuine instrument for the integration of long-term residents into society in which they live, long-term residents should enjoy equality of treatment with citizens of the Member State in a wide range of economic and social matters, under the relevant conditions defined by this Directive.

(13) With regard to social assistance, the possibility of limiting the benefits for long-term residents to core benefits is to be understood in the sense that this notion covers at least minimum income support, assistance in case of illness, pregnancy, parental assistance and long-term care. The modalities for granting such benefits should be determined by national law.

…'

9. Article 5 of Directive 2003/109, entitled 'Conditions for acquiring long-term resident status', provides in paragraph 2 thereof:

'Member States may require third-country nationals to comply with integration conditions, in accordance with national law.'

10. Article 11 of Directive 2003/109, entitled 'Equal treatment', provides:

'1. Long-term residents shall enjoy equal treatment with nationals as regards:

…

(d) social security, social assistance and social protection as defined by national law;

…

4. Member States may limit equal treatment in respect of social assistance and social protection to core benefits.

…'

B. National law

11. The respondent, Land Oberösterreich, grants housing assistance. The conditions for the grant thereof were governed, at the material time, by certain provisions of the Oberösterreichisches Wohnbauförderungsgesetz (Upper Austrian Law on Housing Construction Subsidies, 'the oöWFG'[7]).

12. Paragraph 6 of that law provided:

'…

(9) Support under this Law shall be granted to Austrian citizens, nationals of a Member State of the [European Economic Area (EEA)] and Union citizens and their family members within the meaning of 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, (OJ 2004 L 158, p. 78)]. Unless an international convention requires them to be granted support in the same way as to Austrian citizens, support may be granted only to other persons if they:

1. have their principal residence lawfully for a continuous period of more than five years in Austrian territory,

2. receive income subject to income tax in Austria or paid contributions to the compulsory social insurance scheme in Austria for having pursued an occupational activity and now receive benefits from that scheme, and received that income or benefit for 54 months during the previous five years, and

3. provide evidence of their knowledge of the German language in accordance with subparagraph 11.

…

(11) The condition laid down in subparagraph 9(3) shall be considered satisfied where the applicant

1. produces a certificate from the Österreichischer Integrationsfonds (Austrian integration fund) (ÖIF) or an examination institution certified by ÖIF attesting success in an integration examination; or

2. produces a generally recognised language diploma or a certificate of knowledge of A2-Level German issued by an examination centre certified in accordance with the Integrationsvereinbarungs-Verordnung (Integration Convention) (BGBl. II, 242/2017) or

3. produces proof that he pursued compulsory education in Austria for at least five years and obtained a sufficient score in the "German" subject or the subject "German" has been successfully completed at the 9th grade level, or

7 LGBl. No 6/1993.

4. has passed the examination at the end of apprenticeship in accordance with the Berufsausbildungsgesetz (Law on Vocational Training for apprenticeship) (BGBl.142/1969).

…'

13. Paragraph 23 of that law provided:

'(1) Housing assistance may be granted to the main tenant, to the purchaser in the state of future completion and to the owner of a dwelling in respect of which support has been granted, where

1. the cost of accommodation constitutes an unreasonable burden for the applicant;

2. the applicant lives permanently in the dwelling concerned in order to meet his accommodation needs; and

3. the applicant has applied for other aid to reduce expenditure on accommodation (Paragraph 24(1)) which he is entitled to receive, and

4. repayment of the support loan (Paragraph 9) or a subsidised mortgage loan (Paragraph 10) has already commenced.

(2) The housing assistance may be granted to the main tenant of a dwelling in respect of which no support has been granted if the conditions laid down in subparagraph 1(1) to (3) are satisfied and the lease has not been concluded with a related person.

…'

14. In accordance with Paragraph 2(3) of the oberösterreichische Wohnbeihilfen-Verordnung (Upper Austrian Ordinance on Social Housing Assistance), the amount of housing assistance was capped at EUR 300 per month.

15. Under the legislation in force at the material time, persons in a situation of social distress could receive a guarantee of minimum resources to cover their needs under the Oberösterreichisches Mindestsicherungsgesetz (Upper Austrian Law on Guaranteed Minimum Benefits, 'the oöBMSG'[8]).

16. Paragraph 1(1) of the oöBMSG stated that the purpose of the minimum guarantee is to guarantee to those who need support a dignified life and to ensure the lasting integration into society that that entails. Under certain conditions, this benefit could also be received in addition to or partially offset against housing assistance under the oöWFG. The benefit under the oöBMSG was also available to third-country nationals who were long-term residents within the meaning of Directive 2003/109. It was, however, linked to much stricter social indigence requirements than the housing assistance under oöWFG. The basic amount under the oöBMSG in 2018, was EUR 921.30 per month for a person living alone and EUR 649.10 for adults living in a household, with complementary benefits granted for children.

17. Paragraph 4 of that law provided:

'(1) In so far as this Law does not provide otherwise, the minimum resources guarantee to cover needs may be granted only to those who

1. have their habitual residence in Upper Austria … and

8 LGBl. No 74/2011.

2. (a) are Austrian nationals or members of the family of Austrian nationals;

(b) have the right to asylum or subsidiary protection;

(c) are Union citizens, nationals of a Member State of the [EEA], Swiss nationals or their family members, provided that receipt of those benefits does not cause them to lose their right of residence;

(d) they have a long-term resident's EC residence permit or a 'long-term resident – family member' permit, or a certificate of establishment or an indefinite residence permit;

(e) have a different right of permanent residence in Austrian territory, provided that receipt of those benefits does not cause them to lose their right of residence.'

18. Under Paragraph 5 of that law:

'The grant of the minimum resources guarantee to cover needs shall be subject to the condition that a person meeting the conditions laid down in Paragraph 4

(1) is in a situation of social distress (Paragraph 6) and

(2) is prepared to try to avoid, mitigate or overcome social distress (Paragraph 7).'

19. Paragraph 6 of the oöBMSG provided:

'(1) Persons are in a situation of social distress where they are unable to provide

1. for their own subsistence and accommodation; or

2. for the subsistence and accommodation needs of dependent family members living with them within the same household,

or to provide, within that framework, the cover required in the event of illness, pregnancy and giving birth.

(2) The subsistence needs referred to in subparagraph 1 include expenditure relating to the periodic needs related to a dignified life, in particular food, clothing, personal hygiene, household furniture and equipment, heating, electricity, and other personal needs, such as the need to take part in an appropriate manner in social and cultural life.

(3) The accommodation requirements referred to in subparagraph 1 include periodic rent, general charges and taxes necessary to ensure appropriate accommodation.

…'

20. The oöADG transposed Directive 2000/43. Paragraph 1 of that law, entitled 'Prohibition of discrimination', prohibits any direct or indirect discrimination against natural persons on grounds, inter alia, of ethnic origin. That paragraph does not apply, by virtue of Paragraph 3 of that law, to inequalities in treatment on grounds of nationality, provided that they are imposed by law or objectively justified and that rules of the European Union or international conventions forming part of the framework of European integration relating to the equality of persons do not preclude such treatment.

21. Under Paragraph 8 of that law:

‘(1) In the event of a breach of the prohibition of discrimination on the grounds referred to in Paragraph 1, the person at issue has … the right to appropriate compensation …

In addition to compensation for material damage, [he or she] is also entitled to appropriate compensation for the personal injury suffered. The amount of compensation for the personal injury suffered cannot be less than EUR 1 000.

…’

III. The facts of the main proceedings and the request for the preliminary ruling

22. The applicant is a Turkish national who was born in 1981. He has, however, lived in Austria since 1997 and he is a ‘third-country national who is a long-term resident’ within the meaning of Directive 2003/109. He lives with his wife and three children in Land Oberösterreich (the State of Upper Austria) and, until the end of 2017, received housing assistance pursuant to the oöWFG.

23. Since 1 January 2018 – unlike for citizens of the Union, nationals of an EEA State and family members within the meaning of Directive 2004/38/EC – eligibility for housing assistance for third-country nationals is subject to proof of a certain basic command of German in accordance with Paragraph 6(9)(3) and Paragraph 6(11) of the öoWFG.

24. The applicant has a command of German at the required level but does not have any of the requisite formal evidence of his proficiency in that language, which is why his application for housing assistance was rejected. He meets all of the other conditions and, for example, he would receive housing assistance if he were an EEA national.

25. The applicant seeks damages from the Land Oberösterreich amounting to the loss of housing assistance from January to November 2018, namely EUR 281.54 per month plus damages for non-material harm of EUR 1 000. The applicant bases his claim on Paragraph 8 of the oöADG, which transposed Directive 2000/43. The applicant maintained that Paragraph 6(9)(3) and Paragraph 6(11) of the oöWFG placed him at a disadvantage by reason of his ethnicity without any objective justification. In addition, he argued that housing assistance was a core benefit within the meaning of Article 11(4) of Directive 2003/109.

26. The Land Oberösterreich considered that there was no difference in treatment on grounds of ethnicity, that the requirement to speak German was objectively justified and that housing assistance does not constitute a core benefit within the meaning of Directive 2003/109.

27. The Bezirksgericht Linz (District Court, Linz), the court of first instance, upheld the applicant’s action in all respects. It thus held that housing assistance was a core benefit within the meaning of Article 11(4) of Directive 2003/109. In addition, it held that the requirement to prove a certain command of German was inappropriate and discriminated against the applicant on grounds of his ‘ethnicity’. It thus held that the applicant’s claims based on the oöADG were founded.

28. The Land Oberösterreich brought an appeal against that decision before the referring court.

29. The referring court considers that if housing assistance is a core benefit within the meaning of Article 11(4) of Directive 2003/109, it must, from the point of view of EU law, be granted to the applicant on that ground alone, irrespective of whether there is also discrimination. In addition to the loss of housing assistance, the applicant however also claims damages for non-material harm due to

discrimination on grounds of his ethnicity. The referring court also considers that, in applying the exception provided for in Article 11(4) of Directive 2003/109, the Land Oberösterreich is required, when structuring such a provision, to comply with other requirements of EU law such as Directive 2000/43 and the Charter and must not apply any discriminatory criteria in doing so.

30. In the present proceedings, it is conceivable that Directive 2000/43 is not applicable on account, in particular, of Article 3(2) thereof. However, according to the referring court, that would not necessarily mean that there is also no discrimination as prohibited by the Charter. In that regard, the referring court notes that the Charter does not contain any exception similar to Article 3(2) of Directive 2000/43. The referring court considers that Paragraph 6(9) and (11) of the oöWFG might be contrary to EU law for infringement of the Charter.

31. The referring court notes that according to the Ausschuss für Wohnbau, Baurecht und Naturschutz (Committee for Housing, Construction Law and Protection of the Environment, 'the Committee') of the Landtag (State Parliament) of Upper Austria, housing assistance is not a core social benefit within the meaning of Article 11(4) of Directive 2003/109. The requirements laid down by Directive 2003/109 with regard to core benefits are covered by the oöBMSG. According to the referring court, the Committee intended to make use of the exception in Article 11(4) of Directive 2003/109. However, while third-country nationals who are long-term residents were not generally excluded from entitlement to housing assistance, additional conditions were imposed on them. The referring court is not, however, bound by the Committee's interpretation of Article 11(4) of Directive 2003/109.

32. The referring court considers that the application of the principles laid down in the judgment of 24 April 2012, *Kamberaj* (C-571/10, EU:C:2012:233) and Article 34 of the Charter to the Upper Austrian housing assistance provisions is not clear. The objective of the housing assistance is to avoid excessive burdens due to housing costs. In terms of amount and in terms of the conditions for granting it, housing assistance constitutes a subsidy to housing costs which depends, inter alia, on income, number of household members and size of the home, and which is capped at EUR 300. Housing assistance is not intended to fully cover the housing costs of a recipient of the payment, but typically covers part of the housing costs in order to prevent individuals on low incomes from being required to spend too large a proportion of their income on adequate housing.

33. The guaranteed minimum benefits provided by the oöBMSG, however, are intended to generally enable persons suffering social hardship to lead a dignified life, including covering their housing needs. The guaranteed minimum benefits provisions are subject to significantly stricter conditions than housing assistance and may be granted to individuals without any income or on extremely low incomes. In certain cases, it is possible to receive both housing assistance and guaranteed minimum benefits (where applicable, these are partly set off against each other). However, the target groups of those two social benefits are not identical.

34. In the light of that regulatory framework, the referring court asks whether (and, if so, in what additional circumstances) only benefits covered by the oöBMSG may be regarded as core benefits within the meaning of Article 11(4) of Directive 2003/109, or whether housing assistance provided pursuant to the oöWFG may also qualify as a core benefit for this purpose given that it is intended to compensate for excessive burdens in terms of housing costs. This is despite the fact that, unlike the guaranteed minimum benefits, it does not require that the beneficiary suffer social hardship.

35. As regards the question of discrimination based on 'racial or ethnic origin' within the meaning of Directive 2000/43, the referring court states that the oöADG transposes Directive 2000/43. That court considers that a difference in treatment based on the criterion of status as a third-country national does not, in principle, fall within the scope of that directive due to Article 3(2) of Directive

2000/43.[9] The question arises, however, whether the reference to nationality may nevertheless, under certain conditions, constitute a form of indirect discrimination based on ethnic origin.

36. In the present case, the referring court is concerned with Paragraph 6(9) and (11) of the oöWFG. These provisions not only make a distinction based on the nationality of the third-country national but are also linked to a requirement of a certain level of German proficiency, proof of which may only be furnished in certain clearly defined ways.

37. In the event that Paragraph 6(9) and (11) of the oöWFG is held to constitute indirect or 'covert' discrimination, the referring court considers that it would be necessary to examine the objective justification of that provision within the meaning of Article 2(2)(b) of Directive 2000/43.

38. Moreover, in the event that the Court considers that Directive 2000/43 does not apply to the situation at issue in the main proceedings – in particular by reason of Article 3(2) of that directive – the referring court asks whether the rule laid down in Paragraph 6(9) and (11) of the oöWFG must be assessed in the light of the Charter. Article 51(1) of the Charter provides that it must be taken into consideration when the Member States are implementing EU law. The referring court considers that a provision such as Paragraph 6(9) and (11) of the oöWFG may only be applied with the provisions of the Charter in mind. The Charter may, inter alia, be applicable because there are principles under EU law concerning the grant of social benefits to third-country nationals who are long-term residents, and the national legislation at issue in the main proceedings may be regarded as implementing those principles.

39. Article 21 of the Charter provides, inter alia, a prohibition of any discrimination on grounds of ethnic origin. Any limitation on the exercise of the rights and freedoms recognised by the Charter is to be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations are to be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.[10]

40. In those circumstances, the Landesgericht Linz (Regional Court, Linz) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is Article 11 of [Directive 2003/109] to be interpreted as precluding national legislation, such as Paragraph 6(9) and (11) of the [oöWFG], which allows EU citizens, EEA nationals and family members within the meaning of [Directive 2004/38] to receive a social benefit in the form of housing assistance without proof of language proficiency, while requiring third-country nationals with long-term resident status within the meaning of [Directive 2003/109] to provide particular proof of a basic command of German, where that housing assistance is intended to absorb unreasonable burdens in the form of housing costs even though minimum subsistence levels (including the need for housing) should also be ensured by way of another social benefit (needs-based guaranteed minimum benefits in accordance with the [oöBMSG]) for individuals suffering social hardship?

2. Is the prohibition of 'direct or indirect discrimination' based on 'racial or ethnic origin' in accordance with Article 2 of [Directive 2000/43] to be interpreted as precluding national legislation, such as Paragraph 6(9) and (11) of the oöWFG, which allows EU citizens, EEA nationals and family members within the meaning of [Directive 2004/38] to receive a social benefit (housing assistance in accordance with the oöWFG) without proof of language proficiency, while requiring third-country nationals (including those with long-term resident status within the meaning of [Directive 2003/109]) to provide particular proof of a basic command of German?

9 Judgment of 24 April 2012, *Kamberaj* (C-571/10, EU:C:2012:233, paragraphs 48 to 50) and of 6 April 2017, *Jyske Finans* (C-668/15, EU:C:2017:278).

10 See Article 52(1) of the Charter.

If the answer to question 2 is in the negative:

3. Is the principle of non-discrimination on grounds of ethnic origin in accordance with Article 21 of the Charter of Fundamental Rights to be interpreted as precluding national legislation such as Paragraph 6(9) and (11) oöWFG, which allows EU citizens, EEA nationals and family members within the meaning of [Directive 2004/38] to receive a social benefit (housing assistance in accordance with the oöWFG) without proof of language proficiency, while requiring third-country nationals (including those with long-term resident status within the meaning of [Directive 2003/109]) to provide particular proof of a basic command of German?'

IV. Procedure before the Court

41. Written observations were submitted by the applicant (KV), the respondent (Land Oberösterreich) and the Commission.

42. As requested by the Court, this Opinion will focus on the first question raised by the referring court.

V. Analysis

A. Preliminary remarks

43. Article 11(1)(d) of Directive 2003/109 requires Member States to ensure that third-country nationals who are long-term residents enjoy equal treatment with nationals as regards social security, social assistance and social protection defined by national legislation. Article 11(4) of that directive provides, however, that Member States may limit equal treatment in respect of social assistance and social protection to what it terms as 'core benefits'.[11] I cannot help thinking it unfortunate that the EU legislature has not sought to provide further guidance on this question. Virtually all such payments may be regarded as 'core' by those who are dependent on social assistance and various social benefits provided by Member States. Viewed from that perspective it is difficult to differentiate between payments of this kind.

44. It is nonetheless settled case-law that Directive 2003/109 provides for a right to equal treatment, which is the general rule, and lists the derogations from that right which the Member States may establish, which must be interpreted strictly. Moreover, those derogations can be relied on only if the authorities in the Member State concerned, who are responsible for the implementation of that directive, have stated clearly that they intended to rely on them.[12]

45. It is clear from the request for a preliminary ruling that the applicant is a 'third-country national who is a long-term resident' in accordance with the terms laid down in Directive 2003/109. Given his status, the applicant is thus, in principle, entitled to claim, pursuant to Article 11(1)(d) of that directive, equal treatment with, inter alia, nationals of the Member State concerned (Austria) in respect of social security, social assistance and social protection.

11 Article 11(4) of Directive 2003/109 does not permit Member States to derogate from the principle of equal treatment with regard to benefits falling under social security as defined by national law. Judgment of 24 April 2012, *Kamberaj* (C-571/10, EU:C:2012:233, paragraph 83).

12 See judgment of 25 November 2020, *VR (Family benefits for long-term residents)* (C-303/19, EU:C:2020:958, paragraphs 21 to 23 and the case-law cited).

46. In the main proceedings, the applicant claims that he is entitled to a social benefit in the form of housing assistance. While it is certainly implicit, in my view, in the request for a preliminary ruling that the benefit in question in the form of housing assistance [13] falls within the terms of Article 11(1)(d) of Directive 2003/109, [14] this is ultimately a matter for the referring court to determine, given the absence of an autonomous and uniform definition under EU law of the concepts of 'social security', 'social assistance' and 'social protection' [15] which is evidenced in particular by the reference to national law in both Article 11(1)(d) of Directive 2003/109 and Article 34(3) of the Charter. [16]

47. Despite the absence of an autonomous and uniform definition under EU law of such concepts, Member States may nevertheless not undermine the effectiveness of Directive 2003/109 when applying the principle of equal treatment provided for in Article 11(1)(d) of that directive. [17]

48. Moreover, when determining the social security, social assistance and social protection measures defined by their national law and subject to the principle of equal treatment enshrined in Article 11(1)(d) of Directive 2003/109, the Member States are implementing EU law pursuant to Article 51(1) of the Charter and must comply with the rights and observe the principles provided for under the Charter, including those laid down in Article 34 thereof. [18]

49. It is clear from the request for a preliminary ruling that third-country nationals who are long-term residents were not generally excluded from entitlement to housing assistance pursuant to the oöWFG, but were rather made subject to certain additional conditions. Third-country nationals who are long-term residents were accordingly treated differently to Austrian, EU and EEA citizens in respect of that benefit. [19] Such unequal treatment would be contrary to the terms of Article 11 of Directive 2003/109 if the housing assistance granted pursuant to the oöWFG constitutes a core benefit pursuant to Article 11(4) of that directive. I now propose to consider whether housing assistance of this kind is a core benefit for this purpose.

13 In section C. of its request for a preliminary ruling, the referring court states that the housing assistance granted in accordance with the conditions laid down by the oöWFG is a social benefit. It would appear, pursuant to Paragraph 23 of the oöWFG, that housing assistance may be paid inter alia to the principle tenant or the owner of a dwelling.

14 This is particularly evident from the referring court's reference to the exception to Article 11(1)(d) of Directive 2003/109 contained in Article 11(4) thereof. The latter provision would be of no relevance if the benefit granted pursuant to the oöWFG did not constitute social assistance or social protection within the terms of Article 11(1)(d) of Directive 2003/109. Moreover, the respondent does not explicitly contest in its observations to the Court that the benefit granted pursuant to the oöWFG constitutes social assistance or social protection within the terms of Article 11(1)(d) of Directive 2003/109 but rather claims that that benefit is not a core benefit pursuant to that directive. This is ultimately a question for the referring court.

15 It is settled case-law that EU law does not detract from the Member States' power to organise their social security systems. In the absence of harmonisation at Union level, it is for each Member State to lay down the conditions under which social security benefits are granted, as well as the amount of such benefits and the period for which they are granted. However, when exercising that power, Member States must comply with EU law. Judgment of 25 November 2020, *VR (Family benefits for long-term residents)* (C-303/19, EU:C:2020:958, paragraph 20 and the case-law cited). See also judgment of 24 April 2012, *Kamberaj* (C-571/10, EU:C:2012:233, paragraphs 77 and 78), in which the Court stated inter alia that in the absence of an autonomous and uniform definition under European Union law of the concepts of social security, social assistance and social protection, the European Union legislature wished to respect the differences between the Member States concerning the meaning and exact scope of the concepts in question.

16 At paragraph 81 of the judgment of 24 April 2012, *Kamberaj* (C-571/10, EU:C:2012:233), the Court found that given that both Article 11(1)(d) of Directive 2003/109 and Article 34(3) of the Charter refer to national law, it is for the referring court, taking into account the integration objective pursued by that directive, to assess whether a particular benefit falls within one of the categories referred to in Article 11(1)(d). Under Article 34(3) of the Charter, in order to combat social exclusion and poverty, the Union (and thus the Member States when they are implementing EU law) 'recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by European Union law and national laws and practices'.

17 See judgment of 24 April 2012, *Kamberaj* (C-571/10, EU:C:2012:233, paragraph 78).

18 Judgment of 24 April 2012, *Kamberaj* (C-571/10, EU:C:2012:233, paragraphs 79 and 80). Recital 3 of Directive 2003/109 provides that 'this Directive respects the fundamental rights and observes the principles recognised in particular by the European Convention for the Protection of Human Rights and Fundamental Freedoms and by the Charter of Fundamental Rights of the European Union.'

19 The referring court stated in its request for a preliminary ruling that in 2013 a law amending the oöWFG provided, inter alia, that third-country nationals had to satisfy certain minimum income requirements in the previous five years; this requirement did not apply to Austrian nationals or to persons treated as such. The referring court has not explained the objective of that additional condition in respect of third-country nationals. Moreover, that court has not addressed a question to the Court in that regard, perhaps due to the fact that that condition would appear to be satisfied in any event by the applicant. The questions solely relate to the additional requirement imposed on third-country nationals to provide particular proof of a basic command of German.

B. The concept of 'core benefits' – Article 11(4) of Directive 2003/109

50. By its first question, the referring court, in its request for a preliminary ruling, focused on the concept of 'core benefits' within the meaning of Article 11(4) of Directive 2003/109. In that regard, that court stated that according to the Committee,[20] the benefit granted pursuant to the oöWFG is *not* a core social benefit within the meaning of Article 11(4) of Directive 2003/109 and that core benefits are covered by the oöBMSG. In the view of the referring court, that Committee had therefore expressed the view that the State Parliament of Upper Austria intended to make use of the exception provided for in Article 11(4) of Directive 2003/109.

51. It is clear from the reference for a preliminary ruling that the referring court considers that the guaranteed minimum benefits provided by the oöBMSG are a core benefit as they guarantee minimum benefits in order to enable persons suffering social hardship to lead a dignified life, including covering their housing needs. The referring court has doubts, however, as to whether the benefit granted pursuant to the oöWFG may nonetheless constitute a core benefit.

52. At paragraphs 90 to 92 of the judgment of 24 April 2012, *Kamberaj* (C-571/10, EU:C:2012:233), the Court stated that the meaning and scope of the concept of 'core benefits' in Article 11(4) of Directive 2003/109 must be sought taking into account the context of that article and the objective pursued by that directive, namely, the integration of third-country nationals who have resided legally and continuously in the Member States.[21] Pursuant to Article 11(4) of Directive 2003/109, Member States may limit the equal treatment of third-country nationals who are settled lawfully and on a long-term basis, '*with the exception of social assistance or social protection benefits granted by the public authorities, at national, regional or local level, which enable individuals to meet their basic needs such as food, accommodation and health*'.[22] The Court recalled, at paragraph 92 of that judgment, that, according to Article 34 of the Charter, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources. Where a benefit fulfils the purpose set out in Article 34 of the Charter, it cannot be considered, under European Union law, as not being part of core benefits within the meaning of Article 11(4) of Directive 2003/109. The Court accordingly held that it was for the referring court to reach the necessary findings, taking into consideration the objective of that benefit, its amount, the conditions subject to which it is awarded and the place of that benefit in the national or regional system of social assistance.

53. In the light of the above passages from the judgment of 24 April 2012, *Kamberaj* (C-571/10, EU:C:2012:233), it is clear that benefits which enable individuals who lack sufficient resources to meet their housing needs so as to ensure a decent existence constitute core benefits within the meaning of Article 11(4) of Directive 2003/109.

54. In my view, it is important to underscore at the outset that Member States or regions may grant a variety of such core benefits which are tailored to meet the specific needs of individuals or households depending on their economic and family circumstances. This is particularly the case in the complex field of housing and accommodation benefits where a diverse range of measures may be deemed necessary by the legislature.[23]

20 See point 31 of this Opinion.

21 See also, judgment of 14 March 2019, *Y.Z. and Others (Fraud in family reunification)* (C-557/17, EU:C:2019:203, paragraph 63), in which the Court stated that it is clear from recitals 2, 4, 6 and 12 of Directive 2003/109 that the objective of the directive is the integration of third-country nationals who are settled lawfully and on a long-term basis in the Member States and, for that purpose, bringing the rights of those nationals closer to those enjoyed by EU citizens, inter alia by establishing equal treatment with the latter in a wide range of economic and social fields. Thus, long-term resident status enables the person benefiting from it to enjoy equal treatment in the fields covered by Article 11 of Directive 2003/109, under the conditions laid down in that article.

22 Judgment of 24 April 2012, *Kamberaj* (C-571/10, EU:C:2012:233, paragraph 91). Emphasis added.

23 As the Commission stated in its observations, different housing benefits with similar objectives may exist in parallel in a Member State.

55. While a comparative study of the different social benefits granted by a Member State in the housing and accommodation sphere is of interest and assistance in revealing the nature and scope of those benefits and their place within the regional/national system of social assistance, I consider that the focus in the present proceedings should be on the nature of the benefit granted pursuant to the oöWFG and, inter alia, the objectives pursued by that benefit and the applicable conditions in order to avail thereof. [24]

56. The mere fact that the oöBMSG, which grants housing assistance to individuals without any income or on extremely low income, constitutes a core benefit and is aimed at protecting the most needy, does not in itself mean that housing benefits granted pursuant to the oöWFG should not also constitute a core benefit aimed at ensuring the decent existence of its beneficiaries pursuant to Article 11(4) of Directive 2003/109 and, indeed, Article 34(3) of the Charter.

57. The referring court has stated that the objective of the housing assistance granted pursuant to the oöWFG is to avoid excessive burdens on individuals on low incomes due to housing costs. Accordingly, the benefit typically covers part [25] of the housing costs in order to prevent such individuals from being required to spend too large a proportion of their income on adequate housing. It would thus appear from the explanation provided by the referring court, the applicant and the respondent, that, subject to verification by that court, the housing assistance granted pursuant to the oöWFG (which is, inter alia, means tested) depends on the number of household members and the size of the home and is capped at EUR 300. It is accordingly not, as such, aimed at providing individuals with a minimum level of subsistence (including their housing needs) but rather at ensuring that low income households have access to adequate housing by making that access (more) affordable. Indeed, it would appear that the benefit granted pursuant to the oöWFG may, in certain specific circumstances, be granted, at least in part, in addition to the benefit granted pursuant to the oöBMSG.

58. The benefit granted pursuant to the oöWFG, which is tailored to ensure that low income individuals and households do not spend too large a proportion of their income on adequate housing, would thus appear, subject to verification by the referring court, to be aimed at guaranteeing that its beneficiaries have a decent existence as it ensures greater access by them, not only to adequate housing, which they could not otherwise afford, but also in turn to other basic necessities such as food and clothing which might otherwise be compromised if they had to spend a larger proportion of their income on housing. Subject again, to verification by the referring court, it would appear that the benefit granted pursuant to the oöWFG falls within the terms of Article 34(3) of the Charter as a benefit designed to 'combat social exclusion and poverty' so as to ensure a decent existence for those who lack sufficient resources.

59. In these circumstances, I consider that the entitlement of third-country nationals who are long-term residents of a Member State to access, on an equal footing with, inter alia, nationals of that Member State, to adequate housing which they could not otherwise afford without sacrificing other basic needs is key to ensuring the continued economic and social integration of such third-country nationals. As the oöWFG benefit is designed with this objective in mind, it must thus be considered to be a core benefit, pursuant to Article 11(4) of Directive 2003/109. [26]

24 The respondent stated in its observations that the housing assistance granted pursuant to the oöWFG depends, in principle, on the existence of resources above the threshold characterising minor employment. As a support measure, housing assistance is intended primarily for people who have difficulty covering their needs, but who, in principle, live on their income. In that regard, I would note that the applicant stated in his observations that he is not entitled to the benefit granted pursuant to the oöBMSG as his income is too high. These are questions of fact that it is for the referring court to verify.

25 The housing benefit granted pursuant to the oöWFG is capped at EUR 300 per month. By contrast, the referring court has stated that the benefit granted pursuant to the oöBMSG may be EUR 921.30 per month for a single person.

26 At paragraph 32 of the judgment of 4 June 2015, *P and S* (C-579/13, EU:C:2015:369), the Court emphasised the importance that the EU legislature attaches to integration measures, as can be seen inter alia from recital 4 in the preamble to Directive 2003/109, which states that the integration of third-country nationals who are long-term residents in the Member States is a key element in promoting economic and social cohesion, a fundamental objective of the European Union stated in the Treaty.

C. Requirement of a particular form of proof of a basic command of the German language

60. In the event, however, that the benefit granted under the oöWFG is deemed by the Court not to be a core benefit pursuant to Article 11(4) of Directive 2003/109, the question would then arise as to whether a Member State, rather than excluding access to that benefit by third-country nationals with long-term resident status, may condition their access to that benefit to the provision of a particular type of proof of a basic command of the language of that Member State, in this case, German.

61. In examining that question, it is first necessary to determine whether a Member State, when applying the derogation pursuant to Article 11(4) of Directive 2003/109, is implementing EU law and must thus respect, in particular, the Charter and the general principles of EU law such as the principle of proportionality.

62. Or, to put matters differently, when a Member State exercises the option specifically granted by Article 11(4) of Directive 2003/109 to derogate from the principle of equal treatment in respect of certain non-core benefits provided in accordance with Article 11(1)(d) of that directive, is it implementing EU law and, if so, to what extent is that Member State free to set the criteria in order to have access to such benefits?

63. It is settled case-law that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law,[27] but not outside such situations.[28] Thus, the applicability of EU law entails the applicability of the fundamental rights guaranteed, inter alia, by the Charter.[29]

1. Applicability of the Charter and General Principles of EU law to national legislation implementing the derogation under Article 11(4) of Directive 2003/109

64. Where the provisions of EU law in the area concerned do not govern an aspect of a given situation and do not impose any specific obligation on the Member States with regard thereto, the national rule enacted by a Member State as regards that aspect falls outside the scope of the Charter and the situation concerned cannot be assessed in the light of the provisions of the Charter. Thus, where EU law specifically enables Member States to adopt measures granting more favourable conditions than those provided by EU law, those measures fall within the exercise of the powers retained by the Member States, without being governed by EU law or falling within its scope.[30]

27 For an early statement of this principle, see judgment of 13 July 1989, *Wachauf* (5/88, EU:C:1989:321, paragraph 17 and the case-law cited). See more recently, judgment of 19 November 2019, *TSN and AKT* (C-609/17 and C-610/17, EU:C:2019:981, paragraph 43).

28 See judgment of 6 March 2014, *Siragusa* (C-206/13, EU:C:2014:126, paragraphs 26 to 28). The provisions of the Charter are, according to Article 51(1) thereof, addressed to the Member States only when they are implementing European Union law. Under Article 51(2) thereof, the Charter does not extend the field of application of European Union law beyond the powers of the Union, and it does not establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties. Judgment of 15 November 2011, *Dereci and Others* (C-256/11, EU:C:2011:734, paragraph 71).

29 Judgment of 30 April 2014, *Pfleger and Others* (C-390/12, EU:C:2014:281, paragraph 34).

30 See judgment of 19 November 2019, *TSN and AKT* (C-609/17 and C-610/17, EU:C:2019:981, paragraphs 52 to 54 and the case-law cited).

65. An example of this situation is Article 13 of Directive 2003/109 entitled 'more favourable national provisions' which permits the Member States to issue residence permits of permanent or unlimited validity to third-country nationals on terms more favourable than those laid down by that directive.[31] In its judgment of 17 July 2014, *Tahir* (C-469/13, EU:C:2014:2094, paragraph 43), the Court stated that residence permits issued by a Member State on terms more favourable than those laid down by EU law cannot in any circumstances be long-term residents' EU residence permits within the meaning of Directive 2003/109.[32]

66. By contrast, where a legislative act of the Union gives the Member States the freedom to choose between various methods of implementation or grants them a margin of discretion which is an integral part of the regime established by that act or authorises the adoption, by the Member States, of specific measures intended to contribute to the achievement of the objective of that act,[33] the Court has stated that in such circumstances, where Member States adopt national legislation implementing the option conferred on them by EU law they are implementing EU law, thereby rendering the Charter and the principle of proportionality applicable.[34]

67. Article 11(4) of Directive 2003/109 authorises Member States to opt-out of, or to derogate from, an obligation which would otherwise be applicable pursuant to Article 11(1)(d) of that directive. Such a derogation, which is specifically envisaged or contemplated by EU law, is thus itself governed by EU law. Accordingly, when a Member State relies on the derogation in Article 11(4) of Directive 2003/109, it is implementing EU law. It must thus comply with the Charter and the general principles recognised in the Union's legal order.[35]

31 Judgment of 17 July 2014, *Tahir* (C-469/13, EU:C:2014:2094, paragraph 39).

32 See also Article 3(5) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12) which provides that Member States may provide or maintain more favourable conditions in respect of family reunification than that contained in Directive 2003/86, and judgment of 12 December 2019, *Bevándorlási és Menekültügyi Hivatal (Family reunification – sister of a refugee)* (C-519/18, EU:C:2019:1070, paragraph 43).

33 See judgment of 19 November 2019, *TSN and AKT* (C-609/17 and C-610/17, EU:C:2019:981, paragraph 50 and the case-law cited). See also, judgment of 12 December 2019, *Bevándorlási és Menekültügyi Hivatal (Family reunification – sister of a refugee)* (C-519/18, EU:C:2019:1070, paragraphs 39 to 41 and 58 to 61).

34 Judgment of 12 December 2019, *Bevándorlási és Menekültügyi Hivatal (Family reunification – sister of a refugee)* (C-519/18, EU:C:2019:1070, paragraphs 61 and 67). See, in particular, judgment of 4 March 2010, *Chakroun* (C-578/08, EU:C:2010:117, paragraphs 41 to 44). In the latter case, the Court found that the possibility for a Member State, pursuant to Article 7(1)(c) of Directive 2003/86, to impose more onerous conditions on a person submitting an application for family reunification by requiring them to provide evidence that the sponsor has certain means must be interpreted in the light of the fundamental rights and, more particularly, in the light of the right to respect for family life enshrined, inter alia, in the Charter.

35 See, by analogy, judgment of 12 December 2019, *Bevándorlási és Menekültügyi Hivatal (Family reunification – sister of a refugee)* (C-519/18, EU:C:2019:1070, paragraphs 61 and 65 to 67).

68. In that regard, the Court has stated on a number of occasions that where a Member State relies on a derogation provided in the Treaty to a fundamental freedom or on overriding requirements in the public interest in order to justify rules which are liable to obstruct the exercise of a fundamental freedom,[36] such justification, provided for by EU law, must be interpreted in the light of the general principles of EU law, in particular the fundamental rights guaranteed by the Charter.[37] Thus, the national rules in question can fall within the scope of the exceptions provided for only if they are compatible with the fundamental rights the observance of which is ensured by the Court.[38]

69. As regards derogations contained in EU legislation, in its judgment of 27 June 2006, *Parliament* v *Council* (C-540/03, EU:C:2006:429), the Court examined whether a number of specific derogations in Directive 2003/86 respect fundamental rights. The Court, after analysing their content and scope, found that the derogations in the directive in question did not authorise the Member States, expressly or impliedly, to adopt implementing provisions that would be contrary to fundamental rights. At paragraphs 104 and 105 of that judgment, the Court held, in essence, that while Directive 2003/86 leaves the Member States a margin of appreciation, it is sufficiently wide to enable them to apply the directive's rules in a manner consistent with the requirements flowing from the protection of fundamental rights.[39]

70. In my view, it is clear from the above case-law that where a Member State adopts legislation on the basis of a derogation or option in the Treaty or EU legislation such as that provided by Article 11(4) of Directive 2003/109,[40] that Member State is implementing EU law and must therefore comply with the Charter and the general principles of EU law.

71. The provisions of the Charter cannot be interpreted so as to deprive the Member States of the discretion available to them when they decide to implement Article 11(4) of Directive 2003/109.[41] It is thus clear that Member States may, in accordance with the terms of Article 11(4) of Directive 2003/109, limit equal treatment in respect of social assistance and social protection to core benefits. In the event, however, that a Member State adopts less restrictive measures, it must nonetheless comply with the Charter.

36 Such as the freedom to provide services.

37 Judgment of 30 April 2014, *Pfleger and Others* (C-390/12, EU:C:2014:281, paragraphs 34 to 36).

38 The judgment of 30 April 2014, *Pfleger and Others* (C-390/12, EU:C:2014:281, paragraphs 34 to 36) is important as it clarifies, in substance, that the ruling of the Court in the judgment of 18 June 1991, *ERT* (C-260/89, EU:C:1991:254, paragraph 43) applies in respect of the Charter following its entry into force from 1 December 2009 with the entry into force of the Treaty of Lisbon. See Article 6(1) TEU. The use by a Member State of exceptions provided for by EU law in order to justify an obstruction of a fundamental freedom guaranteed by the Treaty constitutes an implementation of EU law within the meaning of Article 51(1) of the Charter, and national legislation which restricts fundamental freedoms guaranteed by the Treaty may benefit from the exceptions provided for by EU law only in so far as that complies with the fundamental rights. At point 32 of his Opinion in *Ispas* (C-298/16, EU:C:2017:650), Advocate General Bobek stated that 'from a functional point of view, a national authority is likely to be acting within the scope of EU law *at least* in three typical scenarios. First, the national authority directly applies a source of EU law to a case before it, most frequently a regulation (the *direct application* scenario). Second, the national authority applies national law that transposes or implements an EU law measure or obligation … (the *indirect application* scenario). Third, the national authority finds itself in a situation in which a national rule makes use of the derogations or justifications to restrictions allowed by EU law (the *derogation* scenario).'

39 See also judgment of 1 March 2011, *Association belge des Consommateurs Test-Achats and Others* (C-236/09, EU:C:2011:100, paragraphs 31 and 32) where the Court held that Article 5(2) of Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ 2004 L 373, p. 37), which enables certain Member States to maintain without temporal limitation an exemption or derogation from the rule of unisex premiums and benefits, works against the achievement of the objective of equal treatment between men and women, which is the purpose of Directive 2004/113, and is incompatible with Articles 21 and 23 of the Charter. In the field of copyright, see judgment of 29 July 2019, *Spiegel Online* (C-516/17, EU:C:2019:625, paragraph 59). At paragraph 119 of Opinion 3/15 (Marrakesh Treaty on access to published works) of 14 February 2017 (EU:C:2017:114), the Court stated in essence that where the Member States have a discretion under Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10), as regards the implementation of an option to provide for an exception or limitation for the benefit of certain users, that discretion derives from the decision of the EU legislature to grant the Member States that option, within the harmonised legal framework which Directive 2001/29 establishes and which ensures a high and even level of protection for the rights of reproduction, making available to the public and distribution.

40 Irrespective of whether that option or derogation is advantageous or disadvantageous to individuals. Contrast the judgment of 21 December 2011, *N.S. and Others* (C-411/10 and C-493/10, EU:C:2011:865) with the judgment of 4 March 2010, *Chakroun* (C-578/08, EU:C:2010:117).

41 See by analogy, judgment of 12 December 2019, *Bevándorlási és Menekültügyi Hivatal (Family reunification – sister of a refugee)* (C-519/18, EU:C:2019:1070, paragraph 65).

72. In addition, when relying on the derogation in Article 11(4) of Directive 2003/109, Member States may not apply national rules which are liable to jeopardise the achievement of the objectives pursued by that directive and, therefore, deprive it of its effectiveness. [42]

2. Application to the circumstances in the main proceedings

73. The referring court has expressed concern in respect of Paragraph 6(9) and (11) of the oöWFG. That court stated that according to the *travaux préparatoires* of the 2017 law modifying the oöWFG, the purpose of Paragraph 6(9) and (11) of the oöWFG was to provide for more restricted access to housing assistance for third-country nationals, with the main argument specifically in favour of the required proficiency in German being that it was an important element for social integration. The referring court questions the necessity of the language requirement in addition to the other conditions laid down by the oöWFG, given that third-country nationals may, in any event, receive housing assistance only if they have lived in Austria for more than five years and, as a general rule, have already worked for a number of years. Moreover, third-country nationals who are long-term residents within the meaning of Directive 2003/109 already had to satisfy various integration-related conditions stipulated by the österreichisches Niederlassungs- und Aufenthaltsgesetz (Austrian Law on Settlement and Residence) in order to obtain that status. [43] In addition, the referring court expresses doubts as to why the relatively basic German proficiency level required can be demonstrated solely through the specific, formal evidence required by the statute.

74. In accordance with the principle of proportionality, which is one of the general principles of European Union law, the lawfulness of such language proficiency requirements is subject to the condition that they are appropriate and necessary in order to attain the objectives legitimately pursued; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued. [44]

75. The principal purpose of Directive 2003/109 is the integration of third-country nationals who are settled on a long-term basis in the Member State. The acquisition of knowledge of the language of the host Member State greatly facilitates communication between third-country nationals and nationals of the Member State concerned, encourages interaction and the development of social relations between them and makes it less difficult for third-country nationals to access the labour market and vocational training. [45]

76. It would therefore appear from the request for a preliminary ruling that one of the stated objectives of the 2017 reform to the oöWFG is the fostering of social integration. In such circumstances, the imposition of a language proficiency requirement is not contrary to, and does not, by itself, jeopardise the achievement of the objectives pursued by Directive 2003/109, but may, on the contrary, contribute to their achievement. [46] Indeed, in its judgment of 4 June 2015, *P and S* (C-579/13, EU:C:2015:369), the

42 See, to that effect, judgment of 4 June 2015, *P and S* (C-579/13, EU:C:2015:369, paragraph 45).

43 See also Article 5(2) of Directive 2003/109.

44 See by analogy, judgment of 25 February 2010, *Müller Fleisch* (C-562/08, EU:C:2010:93, paragraph 43).

45 See, to that effect, judgment of 4 June 2015, *P and S* (C-579/13, EU:C:2015:369, paragraphs 46 and 47). See, concerning the interpretation of Directive 2003/86, judgments of 9 July 2015, *K and A* (C-153/14, EU:C:2015:453, paragraph 53) and of 7 November 2018, *C and A* (C-257/17, EU:C:2018:876, paragraph 55).

46 See, to that effect, judgment of 4 June 2015, *P and S* (C-579/13, EU:C:2015:369), paragraph 48). It must be noted that the applicant does not dispute that improving the social integration of non-Austrian citizens is a legitimate aim and that language proficiency can contribute to the achievement of that aim. The applicant considers, however, that the method chosen by the respondent to achieve this aim, which would result in the withdrawal or refusal to grant the housing assistance in question, is neither appropriate nor necessary, particularly in the applicant's case,, given that he has resided in Austria without interruption for over five years and has a long-term residence permit.

Court held that a Member State can, in principle, impose on a third-country national who already possesses long-term residence status the obligation to pass a civic integration examination, provided that the means of implementing that obligation are not liable to jeopardise the achievement of the objectives pursued by that directive.[47]

77. Against this background, it is accordingly necessary to examine the manner in which the language proficiency requirement is implemented.

78. It would appear, subject to verification by the referring court, that failure to prove the requisite level of language proficiency results in the immediate loss of the total amount of the benefit in question. The amount in question could be as much as EUR 300 per month. Given that the housing benefit in question is only available to individuals on low incomes, the amount lost could be considerable depending on the time it may take to comply with the requirement. As observed by the applicant, the loss of income involved may lead to the opposite of the desired objective and hinder the integration of third-country nationals, thereby jeopardising the objectives of Directive 2003/109. The integration objective could in any event be achieved by less onerous means, such as, for example, by suspending the benefit or reducing its amount in a phased manner until the language proficiency requirement is met. It would appear therefore that the measure in question does not comply with the principle of proportionality.

79. As regards the language proficiency requirement itself, the referring court stated that the level required – level A2 of the Common European Framework of Reference for Languages – is 'relatively basic'.[48] It would thus not appear, subject to verification by the referring court, that the requirement is so onerous as to constitute a difficult obstacle to overcome, preventing, in practice,[49] third-country nationals who are long-term residents from being eligible for the housing benefit in question.[50]

80. I would nonetheless query the necessity in all cases of such a language proficiency requirement given that, according to the referring court, third-country nationals who are long-term residents within the meaning of Directive 2003/109 already had to satisfy various integration-related conditions stipulated by Austrian law in order to obtain that status. It is not clear, however, whether those conditions required a level of language proficiency. Indeed, the respondent indicated in its observations that not all the persons concerned by the measure in question have already had to provide proof of adequate language proficiency under other legal provisions; this is due in particular to the limited duration of the periods during which these other provisions are applicable, as is the case with the Austrian Law on Settlement and Residence.

81. It follows, in my view, that the language proficiency requirement in question may in principle be regarded by Member States as necessary to achieve the desired integration objective thereby pursued. For such a requirement to be valid, however, it would also be necessary to establish that a third-country national who is a long-term resident and who would otherwise be eligible for the housing assistance granted pursuant to the oöWFG has *not* previously satisfied that language proficiency requirement in accordance with national law in order to acquire that status.

82. As regards the concrete implementation of the language proficiency requirement, aside from indicating the basic level required under the oöWFG, the referring court has focused on the exclusive nature of the proof accepted thereunder in order to establish that level.[51]

47 Whether the long-term resident status was acquired before or after the obligation to pass a civic integration examination was imposed was deemed by the Court to be irrelevant in that respect.

48 The respondent stated that the language proficiency level in question is so low that it can be reached in a few weeks, even with no previous knowledge of the German language and no particular aptitude for language learning.

49 The respondent also indicated, subject to verification by the referring court, that there are certain exceptions to the language proficiency requirement, for example, for health reasons.

50 See, by analogy, judgment of 7 November 2018, *C and A* (C-257/17, EU:C:2018:876, paragraph 52 and the case-law cited).

51 In that regard, the referring court has not indicated the cost or the accessibility of the eligible proof.

83. In my view, the requirement under the oöWFG that a third-country national who is a long-term resident applying for housing assistance provide evidence of his or her language proficiency exclusively by means of certain identified certificates or diplomas would be inappropriate,[52] if that level can be reasonably established[53] by other equivalent methods which are reputable and which are subject to objective proof.[54] This, however, is a matter for the referring court to ascertain.

84. Article 11 of Directive 2003/109 should therefore be interpreted as precluding national legislation, such as Paragraph 6(9) and (11) of the oöWFG, which allows EU citizens, EEA nationals and family members within the meaning of Directive 2004/38 to receive a social benefit in the form of housing assistance without proof of language proficiency, while at the same time requiring third-country nationals with long-term resident status within the meaning of Directive 2003/109 to provide specific formal proof of a basic command of German.

VI. Conclusion

85. In the light of the foregoing considerations, I propose that the Court answer the first question asked by the Landesgericht Linz (Regional Court, Linz, Austria) as follows:

The entitlement of third-country nationals who are long-term residents of a Member State to access, on an equal footing with, inter alia, nationals of that Member State to adequate housing which they could not otherwise afford without sacrificing other basic needs is key to ensuring the continued economic and social integration of such third-country nationals.

A benefit which seeks to ensure the access of third country nationals who are long-term residents of a Member State to adequate housing must thus be considered a 'core benefit' pursuant to Article 11(4) of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

Article 11 of Directive 2003/109 should therefore be interpreted as precluding national legislation, such as Paragraph 6(9) and (11) of the Oberösterreichisches Wohnbauförderungsgesetz (Upper Austrian Law on Housing Construction Subsidies), which allows EU citizens, EEA nationals and family members within the meaning of 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 to receive a social benefit in the form of housing assistance without proof of language proficiency, while at the same time requiring third-country nationals with long-term resident status within the meaning of Directive 2003/109 to provide specific formal proof of a basic command of German.

52 See, by analogy, judgment of 6 June 2000, *Angonese* (C-281/98, EU:C:2000:296, paragraph 44) and of 5 February 2015, *Commission* v *Belgium* (C-317/14, EU:C:2015:63, paragraph 29).

53 In the sense of being accessible to the relevant national authorities.

54 The respondent has rightly pointed out, in my view, that the proof required must ensure the objective and uniform application of the language proficiency requirement.