Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 13 December 2011 [1]

Case C-571/10

Servet Kamberaj
v
Istituto per l'Edilizia Sociale della Provincia autonoma di Bolzano (IPES),
Giunta della Provincia autonoma di Bolzano,
Provincia Autonoma di Bolzano

(Reference for a preliminary ruling from the Tribunale di Bolzano (Italy))

(Directive 2000/43/EC — Implementation of the principle of equal treatment between persons irrespective of racial or ethnic origin — Directive 2003/109/EC — Status of third-country nationals who are long-term residents — Right to equal treatment with respect to social security, social assistance and social protection as defined by national law — Option for Member States to limit equal treatment in respect of social assistance and social protection to core benefits — Refusal of an application for housing benefit — Ground for refusal — Exhaustion of funds for third-country nationals)

1. This reference for a preliminary ruling concerns the interpretation of Article 2 TEU, Article 6 TEU, Article 18 TFEU, Article 45 TFEU and Article 49 TFEU, and Articles 1, 21 and 34 of the Charter of Fundamental Rights of the European Union [2], and the provisions of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [3] and Council Directive 2003/109 of 25 November 2003 concerning the status of third-country nationals who are long-term residents. [4] The Tribunale di Bolzano (Italy) also raises questions concerning Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, [5] and Article 1 of Additional Protocol No 12.

2. The reference has been made in proceedings brought by Mr Kamberaj, the applicant in the main proceedings, against the Instituto per l'Edilizia Sociale della Provincia autonoma di Bolzano (IPES) (Institute for Social Housing of the Autonomous Province of Bolzano), the Giunta della Provincia autonoma di Bolzano (Government of the Autonomous Province of Bolzano, 'the Giunta provinciale') and the Provincia Autonoma di Bolzano (Autonomous Province of Bolzano) regarding the refusal by the IPES to grant him, in respect of the year 2009, the housing benefit provided for in Article 2(1)(k) of Provincial Law No 13 (legge provinciale n. 13) of 17 December 1998 in the version in force at the material time ('the provincial law'). That monthly benefit, which is designed to make up the rent, is for tenants on low incomes.

1 — Original language: French.
2 — 'the Charter'.
3 — OJ 2000 L 180, p. 22.
4 — OJ 2004 L 16, p. 44.
5 — 'the ECHR'.

I – Legal background

A – *European Union legislation*

3. Here I will merely set out the relevant provisions of the directive which will be central to the subsequent discussions, Directive 2003/109.

4. Recitals 2 to 4 and 12 and 13 in the preamble to that directive are worded as follows:

'(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.

(3) The Directive respects the fundamental rights and observes the principles recognised in particular in [the ECHR] and in the [Charter].

(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.'

5. In accordance with Article 4(1) of Directive 2003/109, Member States are to grant long-term resident status to third-country nationals who have resided legally and continuously within their territory for five years immediately prior to the submission of the relevant application.

6. Article 5 of that directive lays down the conditions relating to the acquisition of the status of long-term resident. Member States may, in accordance with Article 5(1), require the third-country national to provide evidence that he has, for himself and for dependent family members, stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned, and sickness insurance in respect of all risks normally covered for his/her own nationals in the Member State concerned.

7. Pursuant to Article 5(2) of that directive, Member States may require third-country nationals to comply with integration conditions, in accordance with national law.

8. Article 11(1) of Directive 2003/109 is worded as follows:

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

…

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

…

(f) access to goods and services and the supply of goods and services made available to the public and to procedures for obtaining housing;

…'

9. Article 11(4) of the directive provides that Member States may limit equal treatment in respect of social assistance and social protection to core benefits.

B – *National legislation*

10. Pursuant to Article 117 of the Italian Constitution, the State has exclusive power to legislate in the field of social assistance only in order to determine the minimum level of benefits concerning the civil and social rights which must be guaranteed throughout the national territory. Competence is reserved to the regions in relation to matters extending beyond that objective.

11. Legislative decree No 3 (decreto legislativo n.3) of 8 January 2007[6] transposes Directive 2003/109 and incorporates the provisions of that directive into the provisions of Legislative Decree No 286 (decreto legislativo n. 286) of 25 July 1998.[7]

12. Article 9(1) of Legislative Decree No 286/1998 provides that a foreign national who, for at least five years, has held a valid residence permit, who shows that he has an income of not less than the annual amount of the social benefits and, regarding an application concerning members of his family, a sufficient income … and appropriate accommodation satisfying the minimum conditions laid down by the relevant provisions of national law, may request the prefect of police to issue him with a long-term EC residence permit for himself and his family members.

13. Article 9(12)(c) of Legislative Decree No 286/1998, as amended by Legislative Decree No 3 of 8 January 2007, provides that, in addition to the provisions laid down with respect to foreign nationals lawfully residing in Italy in national territory, the holder of a long-term residence permit may be entitled to social assistance and social security benefits and to those relating to subsidies for health, education and social matters, and those relating to access to goods and services made available to the public, including accessing to the procedure for obtaining accommodation managed by the public authorities, unless otherwise provided and on condition that it is shown that the foreign national actually resides in national territory.

14. Pursuant to the third subparagraph of Article 3 of Decree of the President of the Republic (decreto del Presidente della Repubblicca n. 670) of 31 August 1972,[8] which has constitutional status, the Provincia Autonoma di Bolzano, on account of the specific composition of its population which is divided into three linguistic groups (Italian, German and Ladin) enjoys specific conditions of autonomy.

15. Under Article 8(25) of Decree No 670/1972 of Decree No 670/1972, that autonomy includes the power to adopt legislative provisions concerning public assistance and allowances.

16. The second paragraph of Article 15 of Decree No 670/1972 provides that the Provincia Autonoma di Bolzano, is to use its funds, apart from exceptional cases, for welfare, social and cultural aims, in direct proportion to the size of each linguistic group and in accordance with the extent of the needs of each group.

6 — GURI No 24 of 30 January 2007, p. 4 ('Legislative Decree No 3/2007').

7 — Ordinary Supplement to the GURI No 191 of 18 August 1998, ('Legislative Decree No 286/1998').

8 — GURI No 301 of 20 November 1972 ('Decree No 670/1972').

17. The housing benefit provided for in Article 2(1)(k) of the provincial law, which is designed to enable tenants on low incomes to make up the full amount of their rent, is allocated, in the Provincia Autonoma di Bolzano, between the three linguistic groups on the basis of the criteria set out in the second paragraph of Article 15 of Decree No 670/1972.

18. Article 5(1) of the provincial law provides that the funds for the actions referred to in Article 2(1)(k) thereof must be divided between the applicants of the three linguistic groups in proportion to the weighted average of their numbers – based on the latest general population census – and the needs of each group. According to Article 5(2) of the provincial law, the needs of each linguistic group are determined annually on the basis of the applications submitted in the last ten years. Applications for housing benefit must obtain at least 25 points.

19. It is apparent from the order for reference that the calculation of the numerical size of each linguistic group is made on the basis of the latest general population census and declarations of belonging to one of the three linguistic groups that all Italian nationals over the age of 14 and residing in the territory of the Provincia Autonoma di Bolzano are required to make.

20. Citizens of the European Union who reside in provincial territory, are in employment and satisfy the other conditions to which the grant of housing benefit is subject must, in accordance with Article 5(6) of the provincial law, produce a declaration that they belong to or elect to join one of the three linguistic groups.

21. Pursuant to Article 5(7) of the provincial law, the Giunta Provinciale determines each year the amount of funds reserved for third-country nationals and stateless persons who, on the date of submission of their application, have resided permanently and lawfully in the provincial territory for at least five years and who have worked there for at least three years. The number of rented dwellings which may be allocated to those nationals and stateless persons is determined in proportion to the weighted average between, first, the number of third-country nationals and stateless persons who satisfy the abovementioned criteria and second, their needs. The amount of funds for subsidised housing for the purchase, construction and renovation of dwellings for primary housing need and housing benefit is determined in accordance with the same criteria.

22. It is apparent from Decision No 1885 (deliberazione n. 1885) of the Giunta Provinciale, of 20 July 2009, relating to the amount of funds for third-country nationals and stateless persons for 2009 that, with respect to the weighted average, their numerical importance was accorded a multiplier of 5, whereas their needs were given a multiplier of 1.

23. In accordance with those criteria, the amount of funds for the financing of housing benefit, and aid for the purchase, construction and renovation of dwellings for third-country nationals and stateless persons was set at 7.9% of the total amount of the funds provided for by the 2009 action programme.

II – The facts of the dispute in the main proceedings and the questions referred for a preliminary ruling

24. Mr Kamberaj is an Albanian national of Muslim faith. He has been a resident of and in stable employment in the Provincia Autonoma di Bolzano since 1994. He is the holder of a residence permit for an indefinite period.

25. Until 2008 he received the housing benefit provided for in Article 2(1)(k) of the provincial law.[9]

9 — It is apparent from the order for reference and the written submissions lodged by Mr Kamberaj that he received lastly EUR 550 in benefit for a rent of EUR 1 200. The amounts mentioned at the hearing by Mr Kamberaj do not correspond exactly. It is clear, however, that the housing benefit covered approximately half of his rent.

26. By letter of 22 March 2010, the IPES informed the applicant in the main proceedings that his application for benefit for 2009 had been refused on the ground that the budget for third-country nationals fixed by Decision No 1885 of the Giunta Provinciale of 20 July 2009 was exhausted.

27. By action brought on 8 October 2010, the applicant in the main proceedings sought a declaration from the Tribunale di Bolzano that the defendants had discriminated against him. The applicant submitted that a law such as the provincial law was incompatible, in particular, with Directives 2003/43 and 2003/19, in so far as it treats third-country nationals who are long-term residents less favourably than citizens of the Union with respect to housing benefit.

28. Before the referring court, the Provincia Autonoma di Bolzano submitted that to provide for a proportionate allocation of benefit to the linguistic groups residing on its territory was the only way to preserve social peace between the persons seeking social assistance.

29. According to the referring court, since the adoption of the provincial law, the resident population of the Provincia Autonoma di Bolzano has been divided into two groups, namely citizens of the European Union (whether Italians or not), for whom access to housing benefit is subject without distinction to the production of the declaration that they belong to or elect to join of one of the three linguistic groups, and third-country nationals who do not have to make that declaration.

30. The referring court states that, in 2009, in order to satisfy the overall requirements for access to rented or owner-occupied accommodation, grants in the total sum of EUR 90 812 321.57 (EUR 21 546 197.57 of which was for housing benefit and EUR 69 266 124 was for the purchase, construction or renovation of dwellings for primary housing need) were approved for the first group and grants of EUR 11 604 595 (EUR 10 200 000 of which was for housing benefit and EUR 1 404 595 was for the purchase, construction or renovation of dwellings for primary housing need) were approved for the second group.

31. In the light of the foregoing, the Tribunale di Bolzano decided to stay the proceedings and to refer the following questions for a preliminary ruling:

‘(1) Does the principle of the primacy of European Union law oblige a national court to give full and immediate effect to provisions of European Union law having direct effect, by disapplying provisions of domestic law in conflict with European Union law even if they were adopted in accordance with fundamental principles of the Member State’s constitutional system?

(2) When there is a conflict between the provision of domestic law and the ECHR, does the reference to the ECHR in Article 6 TEU oblige the national court to apply Articles 14 ECHR and 1 of Protocol No 12 directly, disapplying the incompatible source of domestic law, without having first to raise the issue of constitutionality before the national constitutional court?

(3) Does European Union law, in particular, Articles 2 [TEU] and 6 [TEU], Articles 21 and 34 of the Charter and Directives 2000/43… and 2003/109… preclude a provision of national [more correctly: regional] law, such as that contained in Article 15[2)] of Presidential Decree No 670/1972 in conjunction with Articles 1 and 5 of the Provincial Law … and in [Decision No 1885], inasmuch as that provision, with regard to the allowances concerned, in particular, so-called “housing benefit”, attaches importance to nationality by treating long-term resident workers not belonging to the European Union or stateless persons worse than resident Community nationals (whether or not Italian)?

If the foregoing questions should be answered in the affirmative:

(4) In the case of an infringement of general principles of the Union, such as the prohibition of discrimination and the requirement of legal certainty, when there exists national implementing legislation permitting the court to “order the cessation of the damaging conduct and adopt any

other suitable measure, according to the circumstances, [to put an end to] the effects of the discrimination", requiring the court to "order the discriminatory conduct, behaviour or action, if still subsisting, to cease and its effects to be eliminated" and permitting the court to order "a plan for the suppression of the discrimination found to exist, in order to prevent its repetition, within the period fixed in the measure", must Article 15 of Directive 2000/43…, in so far as it provides that sanctions must be effective, proportionate and dissuasive, be interpreted as including, in discrimination found to exist and effects to be eliminated, and in order to avoid unjustified reverse discrimination, all infringements affecting the persons discriminated against, even if they do not form part of the dispute?

If the previous question (4) is answered in the affirmative:

(5) Is it contrary to European Union law, in particular, to Articles 2 [TEU] and 6 [TEU], Articles 21 and 34 of the Charter and Directives 2000/43… and 2003/109…, for a provision of national [more correctly: provincial] law to require non-Community nationals only and not Community nationals also (whether or not Italian) – who receive equal treatment merely in respect of the obligation to have resided for more than 5 years in the territory of the province – to satisfy the further condition that they should have completed three years of work in order to be eligible for housing benefit?

(6) Is it contrary to European Union law, in particular, to Articles 2 [TEU] and 6 [TEU] and Articles 18 [TFEU], 45 [TFEU] and 49 [TFEU], read in conjunction with Articles 1, 21 and 34 of the Charter, for a provision of national [more correctly: provincial] law to require Community nationals (whether or not Italian) to make a declaration that they ethnically belong to or elect to join one of the three linguistic groups of Alto Adige/South Tyrol in order to be eligible for housing benefit?

(7) Is it contrary to European Union law, in particular, to Articles 2[TEU] and 6 [TEU], and to Articles 18 [TFEU], 45 [TFEU] and 49 [TFEU], read in conjunction with Articles 21 and 34 of the Charter, for a provision of national [more correctly: provincial] law to impose on Community nationals (whether or not Italian) the obligation to have resided or worked in the territory of the province for at least five years in order to be eligible for housing benefit?'

III – Analysis

32. By formulating the seven questions set out above, the referring court clearly seeks a decision from the Court of Justice on the compatibility with European Union law of the system put in place by the provincial law with respect to housing benefit. Having regard to the nature of the preliminary ruling procedure and the consequent limits with respect to the jurisdiction of the Court, it is not the role of the Court to give a ruling on aspects of the system which fall outside the scope of the dispute in the main proceedings.

A – *The admissibility of the questions referred for a preliminary ruling*

33. At the outset, I consider it pertinent to reiterate the principles relating to the Court's jurisdiction under Article 267 TFEU.

34. According to settled case-law, the procedure instituted by Article 267 TFEU is an instrument of cooperation between the Court and the national courts, by means of which the Court provides the national courts with the points of interpretation of European Union law which they need in order to decide the disputes before them. [10]

10 — See, inter alia, Case C-445/06 *Danske Slagterier* [2009] ECR I-2119, paragraph 65 and the case-law cited.

35. In the context of that cooperation, questions relating to European Union law enjoy a presumption of relevance. However, the Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. [11]

36. The questions referred by the Tribunale di Bolzano must be examined in the light of those principles.

37. In my opinion, the present proceedings are admissible only in so far as concerns the third question.

38. The second question, as is clear from the order for reference, concerns the solution to be adopted by the national court when faced with a domestic law which is incompatible with directly effective provisions of the ECHR. According to the referring court, the Corte costituzionale has held that such incompatibility does not allow the national provision to be disapplied, but requires the court to raise a question of constitutionality, if it is impossible for it to observe the ECHR in accordance with the principle of consistent interpretation. [12]

39. It must be stated that, pursuant to Article 267 TFEU, the Court has jurisdiction to give preliminary rulings concerning the interpretation of the treaties and on the validity and interpretation of acts of the institutions of the European Union. The jurisdiction of the Court is confined to considering provisions of European Union law only. [13] Therefore, it does not have jurisdiction to give a ruling in a preliminary reference procedure on the consequences that the national court must draw from any incompatibility between a rule of national law and the provisions of the ECHR.

40. By its fourth question, the referring court asks essentially whether Article 15 of Directive 2000/43, where it provides that the sanctions for infringements of the principle of non-discrimination based on racial or ethnic origin must be effective, proportionate and dissuasive, requires the national court which finds such an infringement to put an end to all the infringements affecting the persons discriminated against even if they are not parties to the dispute.

41. According to Article 2(1) of that directive, it applies to direct and indirect discrimination based on racial or ethnic origin. Furthermore, Article 3(2) thereof provides that it 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.

42. It is apparent from the order for reference that Mr Kamberaj has not suffered any direct or indirect discrimination based on his racial or ethnic origin. The difference in treatment allegedly suffered compared with citizens of the Union, under the provincial law, is based on his status as a third-country national, and therefore on his nationality.

43. Therefore, the dispute in the main proceedings does not fall within the scope of Directive 2000/43 and there is thus no need to give a ruling on its interpretation.

44. Furthermore, I take the view that the first, sixth and seventh questions are inadmissible as they concern the situation of citizens of the European Union and Italian citizens belonging to one of the three linguistic groups present on the territory of the Provincia Autonoma di Bolzano.

11 — See, inter alia, Joined Cases C-570/07 and C-571/07 *Blanco Pérez and Chao Gómez* [2010] ECR I-4629, paragraph 36 and the case-law cited.

12 — Paragraph 62 of the order for reference.

13 — See Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraph 31, and Case C-453/04 *innoventif* [2006] ECR I-4929, paragraph 29, and order in Case C-457/09 *Chartry* [2011] ECR I-819, paragraph 21 and the case-law cited.

45. By its first question, the referring court asks essentially whether the principle of the primacy of European Union law requires the national court to give full and immediate effect to European Union law, disapplying provisions of national law in conflict with it even if those national provisions were adopted in accordance with fundamental principles of the Member State's constitutional system.

46. That question relates, from the point of view of constitutional law, to the scope of the principle of protection of linguistic minorities and the implementation of linguistic proportionality. Those aspects are relevant only as regards German-, Italian- and Ladin-speaking Italian nationals and citizens of the Union.

47. By its sixth and seventh questions, the referring court asks essentially whether European Union law precludes national legislation which requires citizens of the European Union, first, to declare that they belong to or elect to join one of the three linguistic groups present in the Provincia Autonoma di Bolzano and, second, to reside or work there for at least five years in order to be entitled to housing benefit.

48. I take the view those questions are without relevance with respect to the resolution of the dispute in the main proceedings. The latter does not concern a citizen of the European Union, whether he is an Italian national or a national of another Member State, but a third-country national who is a long-term resident of the Provincia Autonoma di Bolzano.

49. I also take the view that there is no need to answer the fifth question, which concerns the compatibility with European Union law of the condition that third-country nationals must have been working for three years in order to be entitled to housing benefit. It is common ground that Mr Kamberaj has resided and been in stable employment since 1994 in the territory of the Provincia Autonoma di Bolzano and that the rejection of his application for housing benefit was not based on the failure to comply with the abovementioned condition. That question is therefore irrelevant for the purposes of the resolution of the dispute in the main proceedings.

50. It follows from the above that only an answer to the third question is useful in order to resolve the dispute in the main proceedings. Therefore, I propose that the Court should concentrate solely on that question.

51. Before examining that question, I would point out that I assume, for the purpose of the following analysis, that Mr Kamberaj has the status of long-term resident, as laid down in Articles 4 to 7 of Directive 2003/109. It is for the referring court to verify the accuracy of that finding.

B – *The third question*

52. By that question, the referring court asks the Court, essentially, to rule whether Directive 2003/109 must be interpreted as precluding a law of a Member State which, with respect to housing benefit, treats third-country nationals who are long-term residents less favourably than citizens of that country and citizens of the Union who reside in that Member State.

53. I would recall that, pursuant to Article 11(1) of Directive 2003/109, third-country nationals who are long-term residents are to enjoy equal treatment with nationals in various fields which are listed under (a) to (h). In addition to the conditions which already appear in several of those points, and Article 11(2) and (3) thereof, Article 11(4) thereof allows Member States, with regard to social assistance and social protection, to limit equal treatment to core benefits.

54. The way in which Article 11 of Directive 2003/109 is drafted reflects the differences of opinion which may have been expressed during the discussion of the directive as to the scope to be given to the principle of equal treatment between third-country nationals who have the status of long-term resident and home-country nationals.[14] Those differences are also clear when one compares the Commission's proposal[15] and the final text. They led to an affirmation of the principle of equal treatment in a series of areas while placing a certain number of conditions and restrictions on it. The present case offers the Court the opportunity to determine the scope of some of the conditions and restrictions and the way in which to reconcile them with the objectives referred to in Directive 2003/109 and with fundamental rights as guaranteed inter alia by Article 34 of the Charter.

55. First of all, I will examine whether third-country nationals who are long-term residents are in fact subject, under the provincial law at issue, to less favourable treatment than home-country nationals with respect to housing benefit.

56. If that were the case, it would then be necessary to examine whether Directive 2003/109 precludes such a difference in treatment in the field considered.

1. The existence of a difference in treatment between third-country nationals who are long-term residents and home-country nationals

57. The provincial law establishes a mechanism for distributing housing benefit pursuant to which the amount of funds granted to groups which are composed, on one hand, by home-country nationals and nationals of the European Union and, on the other, by third-country nationals, is determined in proportion to the weighted average of the numbers of those nationals and their needs.

58. As regards the first group, made up of home-country nationals and nationals of the European Union, the factors relating to their numerical size and their needs are subject to the same multiplier, that is, 1.

59. However, concerning the second group, made up of third-country nationals, the factor relating to their size was accorded a multiplier of 5, whereas their needs were accorded a multiplier of 1.

60. The determination of the part of the funds granted as housing benefit to each of the two groups has therefore been made subject to a different method of calculation. That difference has the effect of reducing the part of the funds which the group made up of third-country nationals could have claimed if the factors relating to the numbers of that group and its needs had been accorded the same multiplier as that applied to the first group.

61. It is clear from the file that, according to the method of calculation applied to the second group for the benefits for 2009, third-country nationals, representing 4.44% of the population residing in the Provincia Autonoma di Bolzano, and constituting 25.16% of needs, were attributed 7.90% of the subsidies paid by the IPES for housing benefit and for assistance for the purchase, construction and renovation of dwellings for primary residence.

14 — See, in that regard, Hailbronner, K., *EU Immigration and Asylum Law — Commentary*, pp. 642 and 643.

15 — Proposal for Council Directive concerning the status of third-country nationals who are long-term residents (COM(2001) 127 final; 'the Commission proposal').

62. If the factors relating to the numbers of third-country nationals and their needs had been accorded the same multiplier as that applied to home-country and European Union nationals, third-country nationals would have received a more substantial share of the funds, around 14.8%. The application of different multipliers has therefore had the effect of disadvantaging the group made up of third-country nationals by contributing to the reduction of the number of successful applications for housing benefit by them.

63. At the hearing, the Giunta Provinciale denied the existence of discrimination, arguing that the situation of the nationals of each of the two groups was different. Thus, although the numerical size of the first group was calculated on the basis of a census carried out every 10 years, that of the second group was obtained from an annual statistical calculation which is, by nature, approximate. Moreover, the needs of the two groups were quantified differently and it is almost impossible to ascertain the assets and income of third-country nationals.

64. I do not consider those factors sufficient to show that the nationals of the two groups were in situations so different that no discrimination could be found as regards the calculation of the allocation of benefits. In any event, those elements do not justify the extent of the difference, namely from 1 to 5, in the multipliers accorded to the numerical size of the two groups. Furthermore, as the Commission rightly stated at the hearing, the statistical and administrative differences cannot justify such a difference in treatment.

65. It should now be ascertained whether Directive 2003/109 precludes that difference in treatment.

2. Does Directive 2003/109 preclude a difference in treatment between third-country nationals who are long-term residents and home-country nationals with respect to the allocation of housing benefit such as that at issue in the main proceedings?

66. In order to answer that question, I will deal first with the problem relating to the classification of housing benefit in the light of the fields referred to in Article 11(1)(d) and (f) of Directive 2003/109. Next, I will examine the concept of 'core benefits' within the meaning of Article 11(4) thereof.

(a) The classification of housing benefit in the light of the fields referred to in Article 11(1)(d) and (f) of Directive 2003/109

67. The field referred to in Article 11(1)(f) of Directive 2003/109 concerns 'access to goods and services and the supply of goods and services made available to the public and to procedures for obtaining housing'.

68. Since the dispute in the main proceedings concerns the conditions for granting housing benefit and not the conditions for obtaining social housing from the local authorities, the provincial law at issue cannot, in my view, be regarded as relating to 'access to procedures for obtaining housing' within the meaning of that provision.

69. Furthermore, even if the latter expression, like 'access to goods and services' should be understood as referring to access to both social and private housing,[16] the provision relating to housing benefit at issue in the present case is not directly intended to regulate access to housing, even though it is undeniable that the implementation of that mechanism may have a real effect on the opportunity for

16 — That was, in any event, the meaning, in the Commission's proposal, that it gave to that provision, stating that access to goods and services 'includes both public and private-sector housing' (p. 21). The expression 'access to housing' in that proposal had been the subject of a reservation by a Member State (Council of the European Union document 10698/01, p. 17) which may explain why it does not appear in the final text. See, also, as regards a comparable provision in Article 14(1)(g) of Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (OJ 2009 L 155, p. 17), Hailbronner, K., *EU Immigration and Asylum Law — Commentary* (op.cit.), p. 775.

certain persons to obtain housing. Only an especially broad interpretation of Article 11(1)(f) of Directive 2003/109, according to which that article should be understood as covering any rule which may have an effect on access to housing, could bring the provincial law at issue within the scope of that provision. I am not in favour of such an extensive interpretation which would have the effect, in reality, of giving that provision the same scope as, for example, Article 9 of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union,[17] which provides, in paragraph 1, in terms very different from those in Article 11(1)(f) of Directive 2003/109, that '[a] worker who is a national of a Member State and who is employed in the territory of another Member State shall enjoy *all the rights and benefits accorded to national workers in matters of housing*'.[18]

70. In my opinion, it is in the light of Article 11(1)(d) of Directive 2003/109 that the housing benefit at issue in the main proceedings must be understood. It should be recalled that, pursuant to that provision, third-country nationals who are long-term residents enjoy equal treatment with home-country nationals as regards 'social security, social assistance and social protection as defined by national law'.

71. The version thus adopted by the legislature of the European Union differs substantially from that initially been proposed by the Commission. The Commission proposal contained an Article 12(1)(d) to (f) which provided for equal treatment between third-country nationals who are long-term residents and home-country nationals in matters of 'social protection, including social security and health care', 'social assistance' and 'social and tax benefits'.

72. The Commission thereby intended to confer a very wide scope on equal treatment between third-country nationals who are long-term residents and home-country nationals in the social sphere.[19]

73. The reticence of certain Member States in affording such wide scope to equal treatment in social matters led, first, to the removal of the reference to social benefits, which I am aware have been the subject of a broad interpretation by the Court in the application of Regulation (EEC) No 1612/68 of the Council[20] and, second, the addition of the statement that the concepts of social security, social assistance and social protection should be understood 'as they are defined by national law'.

74. The presence of such a reference in Article 11(1)(d) of Directive 2003/109 contrasts with other acts of the European Union which are also intended to establish equal treatment in social matters. Thus, the aim of Article 3(1)(e) and (f) of Directive 2000/43 is 'social protection, including social security and healthcare' and 'social advantages' without referring to the laws of the Member States for the definition of those concepts. Furthermore, Article 12(c) of Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research[21] and Article 14(1)(e) of Directive 2009/50 refer, in order to define the branches of social security, to Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community,[22] and the annex to Council Regulation (EC) No 859/2003.[23]

17 — OJ 2011 L 141, p. 1.

18 — My emphasis.

19 — I note that that version is close to that in Article 3(1)(e) and (f) of Directive 2000/43.

20 — Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (Official Journal, English special edition: 1968(II) p. 475). See, in particular, Case 32/75 *Cristini* [1975] ECR 1085, paragraphs 12 and 13.

21 — OJ 2005 L 289, p. 15.

22 — Official Journal, English special edition, 1971(II) p. 416.

23 — Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality (OJ 2003 L 124, p. 1).

75. However regrettable it may appear with respect to the consistency between the different acts of the European Union in social matters, which refer to similar or identical concepts and which, in addition, are sometimes adopted on the same legal basis, it appears to me, however, difficult to ignore the express reference made in Article 11(1)(d) of Directive 2003/109 to the national law of the Member States. It is very likely that, far from being fortuitous, the addition of that clarification was intended to prevent an autonomous European Union law interpretation of each of the concepts of social security, social assistance and social protection in the application of Article 11 thereof.[24] The European Union legislature thus intended to entrust to the Member States the responsibility for determining the scope of those concepts so that they could themselves fix the limits of equal treatment in those matters.

76. It is true that, in the light of the settled case-law of the Court, the phrase 'as they are defined by national law' constitutes, in principle, an obstacle to the adoption of a single independent interpretation of European Union law of the concepts of social security, social assistance and social protection for the application of Article 11 of Directive 2003/109.

77. According to that case-law, 'the need for a uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union'.[25] That means, *a contrario*, that a provision of European Union law which contains an express reference to the law of the Member States cannot, in principle, be the subject of such an independent and uniform interpretation.

78. However, the Court examines attentively the exact wording of the reference made to national laws in order to circumscribe precisely the margin for manoeuvre left to the Member States. Thus, for example, it held, as regards the right to paid annual leave laid down in Article 7(1) of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time,[26] '[t]he expression in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice must …be construed as referring only to the arrangements for paid annual leave adopted in the various Member States … [without the latter being entitled] to make the existence of that right, which derives directly from Directive 93/104, subject to any preconditions whatsoever'.[27]

79. Furthermore, the Court attaches more importance to an autonomous interpretation where the terms of the reference to the laws of the Member States are general and when such an interpretation is necessary in order to safeguard the objective intended by a rule of European Union law. Thus, with regard to Directive 93/104, but this time the concepts of working time and rest periods, the Court held that they are 'concepts of Community law which must be defined in accordance with objective characteristics by reference to the scheme and purpose of that directive', stating that '[o]nly such an autonomous interpretation is capable of securing for that directive full efficacy and uniform application of those concepts in all the Member States'.[28] Article 2(1) of Directive 93/104 defined the concept of working time as 'any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, *in accordance with national laws and/or practice*'.[29] The Court considers that the latter part of the sentence does not preclude an independent interpretation from being adopted in European Union law. It takes the view that 'the fact that the definition of the concept of working time refers to "national law and/or practice" does not mean that the Member States may unilaterally determine the scope of that concept'.[30]

24 — See, to that effect, Hailbronner, K., *EU Immigration and Asylum Law — Commentary* (op cit.), p. 646. See, also, concerning the concept of 'social security' referred to in Article 11(1)(d) of Directive 2003/109, Halleskov L. 'The Long-Term Residents Directive: A Fulfilment of the Tampere Objective of Near-Equality?', *European Journal of Migration and Law*, vol. 7, 2005, No 2, p. 181, esp. p. 198.

25 — See, in particular, Case C-34/10 *Brüstle* [2011] ECR I-9821, paragraph 25 and the case-law cited.

26 — OJ 1993 L 307, p. 18.

27 — Case C-173/99 *BECTU* [2001] ECR I-4881, paragraph 53.

28 — Case C-151/02 *Jaeger* [2003] ECR I-8389, paragraph 58, and order of 4 March 2011 in Case C-258/10 *Grigore*, paragraph 44 and the case-law cited.

29 — My emphasis.

30 — *Jaeger*, paragraph 59.

80. The clarity of the words used by the European Union legislature in Article 11(1)(d) of Directive 2003/109 in order to characterise the scope of the reference to the laws of the Member States, that is the definition of the concepts of social security, social assistance and social protection by the national law of each Member State, precludes the Court, in my view, from deriving an autonomous and uniform interpretation of the concepts referred to in that provision.

81. The situation before me in the present case therefore differs from the situation before the Court in Case C-578/08 in *Chakroun*,[31] in which it held that '[t]he concept of "social assistance" [within the meaning of Article 7(1)(c) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification[32]] 'has its own independent meaning in European Union law and cannot be defined by reference to concepts of national law'.[33] Such an independent interpretation was possible since that provision did not contain any reference to national law as far as concerns the definition of that concept. Furthermore, in that judgment, the Court set out an interpretation of the concept of social assistance closely linked to the general scheme specific to Article 7(1)(c) of Directive 2003/86 by taking account of the concept of stable, regular and sufficient resources. The juxtaposition of the two concepts thus led the Court to hold that '[t]he concept of "social assistance system of the Member State" in [that article] must be interpreted as referring to assistance which compensates for a lack of stable, regular and sufficient resources, and not as referring to assistance which enables exceptional or unforeseen needs to be addressed.[34]

82. Therefore, in its judgment in *Chakroun*, the Court defined the concept of social assistance in the specific context of Article 7(1)(c) of Directive 2003/86, a provision which also appears in Article 5(1)(a) of Directive 2003/109 as a condition relating the acquisition of the status of long-term resident. Article 11(1)(d) thereof is however drafted in such a manner that it does not allow either for an independent interpretation by the Court of the concepts which appear therein or a transposition of the definition set out by the Court in *Chakroun*.

83. That does not however mean that the Member States enjoy an unlimited margin for manoeuvre in order to decide whether the benefits they provide for in social matters fall, for the purposes of the application of Article 11 of Directive 2003/109, within the fields relating to social security, social assistance and social protection as they define them. In my view, two sorts of restrictions limit the margin for manoeuvre that the European Union legislature wished to leave to the Member States, particularly in a situation such as that at issue in the main proceedings in which it is for them to determine whether housing benefit falls within the scope of Article 11(1)(d) of Directive 2003/109.

84. First, as the Court held in *Chakroun*, the margin for manoeuvre which the Member States are recognised as having must not be used by them in a manner which would undermine the objective of the directive concerned and its effectiveness.[35] Recital 4 in the preamble to Directive 2003/109 provides that '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'. From that perspective, recital 12 in the preamble to that directive states that '[i]n order to constitute a genuine instrument for the integration of long-term residents into [the] society in which they live, [they] should enjoy equality of treatment with citizens of the Member State *in a wide range of economic and social matters*,
[36] under the relevant conditions defined by [that] Directive'. In my view that designates an extensive

31 — Case C-578/08 *Chakroun* [2010] ECR I-1839.

32 — OJ 2003 L 251, p. 12.

33 — *Chakroun*, paragraph 45.

34 — Ibid. paragraph 49.

35 — Ibid paragraph 43.

36 — Our underlining. The integration objective is also stated, in similar fashion, in recitals 2, 3 and 6 in the preamble to Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection (OJ 2011 L 132, p. 1).

conception of the social fields in which third-country nationals who are long-term residents must be treated in the same way as home-country nationals. The statement of such an objective prevents Member States from excessively restricting the social benefits which third-country nationals who are long-term residents may receive pursuant to Article 11(1)(d) of Directive 2003/109.

85. Second, Member States are required, when they transpose a directive, to take account of the Charter, pursuant to Article 51(1) thereof. They cannot, in that regard, ignore the fact that Article 34 of the Charter, entitled 'Social security and social assistance' expressly mentions 'housing assistance' in paragraph 3 thereof. Therefore, it seems to me, extremely difficult for a Member State, when it transposes Article 11(1)(d) of Directive 2003/109 to be able to exclude housing benefit such as that in the main proceedings from the scope of that provision.

86. The reference made by that provision to the national law of the Member States thus, in reality, leaves them with a very limited margin for manoeuvre if they consider restricting, in social matters, the areas covered by the principle of equal treatment laid down by Article 11(1) of that directive.

87. Ultimately, it is for the referring court to determine, taking into account the objective of the integration of third-country nationals who are long-term residents referred to by that directive and Article 34(3) of the Charter, whether housing benefit such as that at issue in the main proceedings corresponds to one of the categories referred to in Article 11(1)(d) of Directive 2003/109, as defined in its national legislation.

88. It now remains for me to examine the impact of Article 11(4) of that directive in the present case.

(b) The concept of 'core benefits' within the meaning of Article 11(4) of Directive 2003/109

89. I would point out that, under Article 11(4) of Directive 2003/109 'Member States may limit equal treatment in respect of social assistance and social protection to core benefits'.

90. Recital 13 in the preamble to that directive provides a preliminary insight into the scope of that provision, stating that '[w]ith 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.'

91. The use of the expression 'at least' means that the list of benefits which are referred to in that recital is not exhaustive. I would also point out that Article 11(4) of Directive 2003/109 does not contain any reference to national law with respect to the definition of what constitutes core benefits within the meaning of that provision. It is true that recital 13 in the preamble to that directive does contain a reference to national law, but it is limited to 'modalities for granting such benefits', that is to say to the determination of the conditions for the grant of and the level of such benefits together with the related procedures and, therefore, does not extend to the definition of the concept of core benefits. In those circumstances, I take the view that that is a concept of European Union law which is for the Court to define according to objective characteristics, referring to the scheme and purpose of Directive 2003/109. [37]

92. Having regard to the fact that Article 11(4) of Directive 2003/109 allows the Member States the option to limit the scope of the principle of equal treatment laid down by Article 11(1) thereof, and therefore to derogate from the full application of that principle, recourse to that option must be strictly construed.

37 — It should be observed that this is not the only occasion on which the concept of core benefits has been used by the European Union legislature. By way of example, that concept appears in Articles 28(2) and 29(2) of and in recital 34 in the preamble to Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12).

93. As the Commission rightly stated in its observations, where a Member State intends to exercise the option offered by Article 11(4) of Directive 2003/109, it must do so with complete transparency and in accordance with the principle of legal certainty. According to settled case-law, 'the principle of legal certainty – which is one of the general principles of Community law – requires, particularly, that rules of law be clear, precise and predictable in their effects, in particular where they may have negative consequences on individuals and undertakings'.[38] In the present case there is nothing to suggest that the national and/or provincial legislature exercised that option respecting the abovementioned conditions.[39] That information evidently remains to be verified by the national court.

94. Furthermore, the definition of 'core benefits' within the meaning of Article 11(4) of Directive 2003/109 must be established by taking account of the objective of the integration of third-country nationals who are long-term residents who, as we have previously seen, is central to the concerns expressed by the European Union legislature in several recitals in the preamble to that directive. Therefore, I take the view that core benefits are those which, by helping to satisfy basic needs such as food, housing and health, combat social exclusion.

95. In accordance with recital 3 in the preamble to Directive 2003/109, the directive 'respects the fundamental rights and observes the principles recognised in particular by the [ECHR] and by the Charter'. I have already set out the reasons for which the wording of Article 34(3) of the Charter makes it, in my view, extremely difficult for a Member State — so as to exclude the application of Article 11(1)(d) of Directive 2003/109 — to decide that housing benefit such as that at issue in the main proceedings does not fall within any of the categories relating to social security, social assistance and social protection as they are defined by national law. In my view, Article 34(3) of the Charter, in so far as it expressly refers to 'housing assistance' as intended to 'ensure a decent existence for all those who lack sufficient resources', '[i]n order to combat social exclusion and poverty', is to be interpreted as favouring the inclusion of housing assistance such as that at issue in the main proceedings in the concept of 'core benefits' as I have previously defined it.

96. Assistance, without which a tenant can no longer honour his rental contract and which, if withdrawn from him, would make it very difficult for him to find alternative accommodation or even impossible to find decent lodging for himself and his family, satisfies, in particular, that definition. It is for the referring court, in the context of a comprehensive examination of the benefits which make up the social assistance system in force in the Member State of residence of the third-country national who is a long-term resident, to ascertain whether the loss of housing assistance such as that at issue in the main proceedings would cause the person who formerly received that benefit to lose his accommodation and make it very difficult or even impossible to obtain alternative accommodation.

38 — See, in particular, Case C-158/07 *Förster* [2008] ECR I-8507, paragraph 67 and the case-law cited.

39 — It is clear from the Report from the Commission to the European Parliament and the Council of 28 September 2011 on the application of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents (COM(2011) 585 final) that the Hellenic Republic is the only Member State in which, in accordance with Article 11(4) thereof, the national legislature has limited equal treatment to core benefits in respect of social assistance and social protection (p. 7).

IV – Conclusion

97. In the light of the above statements, I propose that the Court answer the Tribunale di Bolzano as follows:

Article 11(1)(d) and (4) of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents should be interpreted as meaning that it precludes a law of a Member State, such as that at issue in the main proceedings, which, with respect to housing benefit, treats third-country nationals who are long-term residents less favourably than home-country nationals and Union citizens who reside in that State, provided that the referring court:

— first, establishes that such assistance is covered, pursuant to Article 11(1)(d) of Directive 2003/109, by the concepts of 'social security', 'social assistance' or 'social protection' as they are defined by the law of that State; and

— second, verifies whether the Member State has exercised, in compliance with the principle of legal certainty, the option provided for in Article 11(4) of that directive. If that is the case, the concept of 'core benefits' within the meaning of that provision must be understood as referring to those which, by helping to satisfy basic needs such as food, accommodation and health, combat social exclusion. It is for the referring court, in the course of a comprehensive examination of the benefits which make up the social assistance system in force in the Member State of residence of a third-country national who is a long-term resident, to ascertain whether the loss of housing assistance, such as that at issue in the main proceedings, would cause the person who formerly received that benefit to lose his accommodation and make it very difficult or even impossible to obtain alternative accommodation.